Court File No.: CV-12-9667-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF SINO-FOREST CORPORATION

Court File No.: CV-11-431153-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, THE TRUSTEES OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 793 PENSION PLAN FOR OPERATING ENGINEERS IN ONTARIO, SJUNDE AP-FONDEN, DAVID GRANT and ROBERT WONG

Plaintiffs

- and -

SINO-FOREST CORPORATION, ERNST & YOUNG LLP, BDO LIMITED (formerly known as BDO MCCABE LO LIMITED), ALLEN T.Y. CHAN, W. JUDSON MARTIN, KAI KIT POON, DAVID J. HORSLEY, WILLIAM E. ARDELL, JAMES P. BOWLAND, JAMES M.E. HYDE, EDMUND MAK, SIMON MURRAY, PETER WANG, GARRY J. WEST, PÖYRY (BEIJING) CONSULTING COMPANY LIMITED, CREDIT SUISSE SECURITIES (CANADA), INC., TD SECURITIES INC., DUNDEE SECURITIES CORPORATION, RBC DOMINION SECURITIES INC., SCOTIA CAPITAL INC., CIBC WORLD MARKETS INC., MERRILL LYNCH CANADA INC., CANACCORD FINANCIAL LTD., MAISON PLACEMENTS CANADA INC., CREDIT SUISSE SECURITIES (USA) LLC and MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED (successor by merger to Banc of America Securities LLC)

Defendants

Proceeding under the *Class Proceedings Act, 1992*

BOOK OF AUTHORITIES OF THE AD HOC COMMITTEE OF PURCHASERS OF THE APPLICANT'S SECURITIES, INCLUDING THE CLASS ACTION PLAINTIFFS
Settlement Approval - Horsley Settlement
(Motion Returnable July 24, 2014)

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TO: ATTACHED SERVICE LIST

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ONTARIO
SUPERIOR COURT OF JUSTICE
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IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. c-36, AS AMENDED

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Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of Sino-Forest Corporation, Applicant
Between
The Trustees of the Labourers' Pension Fund of Central and Eastern Canada, The Trustees of the International Union of Operating Engineers Local 793 Pension Plan for Operating Engineers in Ontario, Sjunde Ap-Fonden, David Grant and Robert Wong, Plaintiffs, and
Sino-Forest Corporation, Ernst & Young LLP, BDO Limited (formerly known as BDO McCabe Lo Limited), Allen T.Y. Chan, W. Judson Martin, Kai Kit Poon, David J. Horsley, William E. Ardell, James P. Bowland, James M.E. Hyde, Edmund Mak, Simon Murray, Peter Wang, Garry J. West, P'Yry (Beijing) Consulting Company Limited, Credit Suisse Securities (Canada) In., TD Securities Inc., Dundee Securities Corporation, RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd., Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated (successor by Merger to Banc of America Securities LLC), Defendants

[2013] O.J. No. 1339

2013 ONSC 1078

227 A.C.W.S. (3d) 930

37 C.P.C. (7th) 135

100 C.B.R. (5th) 30

2013 CarswellOnt 3361

Court File Nos. CV-12-9667-00CL and CV-11-431153-00CP

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: February 4, 2013.
Judgment: March 20, 2013.

(82 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Sanction by court -- Motion by Securities Purchasers' Committee for approval of Ernst & Young Settlement and Release allowed -- Ernst & Young were former auditors of SFC and named as defendant in class proceeding commenced on behalf of SFC debt and equity investors alleging complex financial fraud -- Stay issued pursuant to CCAA -- Settlement and Release included in Plan of Compromise and Reorganization contemplated payment of $117 million and was approved by majority of creditors -- Settlement and Release was fair and reasonable -- Objectors' opposition based on lack of opt-out rights was not sustainable in CCAA or class proceeding context.

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Settlements -- Approval -- Motion by Securities Purchasers' Committee for approval of Ernst & Young Settlement and Release allowed -- Ernst & Young were former auditors of SFC and named as defendant in class proceeding commenced on behalf of SFC debt and equity investors alleging complex financial fraud -- Stay issued pursuant to CCAA -- Settlement and Release included in Plan of Compromise and Reorganization contemplated payment of $117 million and was approved by majority of creditors -- Settlement and Release was fair and reasonable -- Objectors' opposition based on lack of opt-out rights was not sustainable in CCAA or class proceeding context.

Motion by the Ad Hoc Securities Purchasers' Committee for approval of the Ernst & Young Settlement and Release. SFC was a publicly-traded forestry company with a registered office in Toronto and the majority of its operations located in China. SFC issued various debt and equity offerings to investors between 2007 and 2011. After the SFC share price collapsed, it was subsequently alleged that it had engaged in a complex fraudulent scheme misrepresenting its timber rights, misstating financial results, overstating the value of its assets, and concealing material information. The underwriters of the SFC debt and equity offerings were named as defendants in class action proceedings commenced on behalf of investors in both types of offerings. Ernst & Young and BDO acted as auditors for SFC during the relevant times and were named as defendants. Certification and leave motions had yet to be heard due to a stay granted to SFC under the

Companies' Creditors Arrangement Act. The Committee filed a proof of claim on behalf of the putative class of debt and equity investors exceeding $9 billion. Ernst & Young filed a proof of claim for damages and indemnification. The ensuing $117 million settlement was approved by a majority of creditors and included in the Plan of Compromise and Reorganization in respect of SFC. The Committee moved for approval of the settlement. The Objectors were SFC shareholders who opposed the no opt-out and full-third party release features of the Settlement. They moved for appointment of the Objectors to represent the interests of all those opposed to the Settlement.

HELD: Approval motion allowed and Objection motion dismissed. The Ernst & Young Release was justifiable as part of the Ernst & Young Settlement in order to effect any distribution of settlement proceeds. The claims to be released were necessarily and rationally related to the purpose of the Plan given the inextricability and circularity of Ernst & Young's claims against SFC, and those of the Objectors as against Ernst & Young. The Plan benefited claimants in the form of a significant and tangible distribution. The Release was fair and reasonable and not overly broad or offensive to public policy. It provided substantial benefits to relevant stakeholders and was consistent with the purpose and spirit of the CCAA. The Objectors' claim against Ernst & Young was not capable of consideration in isolation from the CCAA proceedings. Their opt-out argument could not be sustained, as the jurisprudence did not permit a dissenting stakeholder to opt out of a restructuring. By virtue of deciding, on their own volition, not to participate in the CCAA process, the Objectors relinquished their right to file a claim and take steps, in a timely way, to assert their rights to vote in the CCAA proceeding. No right to conditionally opt out of a settlement existed under the Class Proceedings Act or the CCAA.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 9

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36,

Counsel:

Kenneth Rosenberg, Max Starnino, A. Dimitri Lascaris, Daniel Bach, Charles M. Wright, and Jonathan Ptak, for the Ad Hoc Committee of Purchasers including the Class Action Plaintiffs.

Peter Griffin, Peter Osborne, and Shara Roy, for Ernst & Young LLP.

John Pirie and David Gadsden, for Pöyry (Beijing) Consulting Company Ltd.

Robert W. Staley, for Sino-Forest Corporation.

Won J. Kim, Michael C. Spencer, and Megan B. McPhee, for the Objectors, Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndical National de Retraite Bâtirente Inc.

John Fabello and Rebecca Wise for the Underwriters.

Ken Dekker and Peter Greene, for BDO Limited.

Emily Cole and Joseph Marin, for Allen Chan.

James Doris, for the U.S. Class Action.

Brandon Barnes, for Kai Kit Poon.

Robert Chadwick and Brendan O'Neill, for the Ad Hoc Committee of Noteholders.

Derrick Tay and Cliff Prophet for the Monitor, FTI Consulting Canada Inc.

Simon Bieber, for David Horsley.

James Grout, for the Ontario Securities Commission.

Miles D. O'Reilly, Q.C., for the Junior Objectors, Daniel Lam and Senthilvel Kanagaratnam.

ENDORSEMENT

G.B. MORAWETZ J.:--

INTRODUCTION

1 The Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Ad Hoc Securities Purchasers' Committee" or the "Applicant"), including the representative plaintiffs in the Ontario class action (collectively, the "Ontario Plaintiffs"), bring this motion for approval of a settlement and release of claims against Ernst & Young LLP [the "Ernst & Young Settlement", the "Ernst & Young Release", the "Ernst & Young Claims" and "Ernst & Young", as further defined in the Plan of Compromise and Reorganization of Sino-Forest Corporation ("SFC") dated December 3, 2012 (the "Plan")].

2 Approval of the Ernst & Young Settlement is opposed by Invesco Canada Limited ("Invesco"), Northwest and Ethical Investments L.P. ("Northwest"), Comité Syndical National de Retraite Bâtirente Inc. ("Bâtirente"), Matrix Asset Management Inc. ("Matrix"), Gestion Férique and Montrusco Bolton Investments Inc. ("Montrusco") (collectively, the "Objectors"). The Objectors particularly oppose the no-opt-out and full third-party release features of the Ernst & Young Settlement. The Objectors also oppose the motion for a representation order sought by the Ontario Plaintiffs, and move instead for appointment of the Objectors to represent the interests of all objectors to the Ernst & Young Settlement.

3 For the following reasons, I have determined that the Ernst & Young Settlement, together with the Ernst & Young Release, should be approved.

FACTS

Class Action Proceedings

4 SFC is an integrated forest plantation operator and forest productions company, with most of its assets and the majority of its business operations located in the southern and eastern regions of the People's Republic of China. SFC's registered office is in Toronto, and its principal business office is in Hong Kong.

5 SFC's shares were publicly traded over the Toronto Stock Exchange. During the period from March 19, 2007 through June 2, 2011, SFC made three prospectus offerings of common shares. SFC also issued and had various notes (debt instruments) outstanding, which were offered to investors, by way of offering memoranda, between March 19, 2007 and June 2, 2011.

6 All of SFC's debt or equity public offerings have been underwritten. A total of 11 firms (the "Underwriters") acted as SFC's underwriters, and are named as defendants in the Ontario class action.

7 Since 2000, SFC has had two auditors: Ernst & Young, who acted as auditor from 2000 to 2004 and 2007 to 2012, and BDO Limited ("BDO"), who acted as auditor from 2005 to 2006. Ernst & Young and BDO are named as defendants in the Ontario class action.

8 Following a June 2, 2011 report issued by short-seller Muddy Waters LLC ("Muddy Waters"), SFC, and others, became embroiled in investigations and regulatory proceedings (with the Ontario Securities Commission (the "OSC"), the Hong Kong Securities and Futures Commission and the Royal Canadian Mounted Police) for allegedly engaging in a "complex fraudulent scheme". SFC concurrently became embroiled in multiple class action proceedings across Canada, including Ontario, Quebec and Saskatchewan (collectively, the "Canadian Actions"), and in New York (collectively with the Canadian Actions, the "Class Action Proceedings"), facing allegations that SFC, and others, misstated its financial results, misrepresented its timber rights, overstated the value of its assets and concealed material information about its business operations from investors, causing the collapse of an artificially inflated share price.

9 The Canadian Actions are comprised of two components: first, there is a shareholder claim, brought on behalf of SFC's current and former shareholders, seeking damages in the amount of $6.5 billion for general damages, $174.8 million in connection with a prospectus issued in June 2007, $330 million in relation to a prospectus issued in June 2009, and $319.2 million in relation to a prospectus issued in December 2009; and second, there is a noteholder claim, brought on behalf of former holders of SFC's notes (the "Noteholders"), in the amount of approximately $1.8 billion. The noteholder claim asserts, among other things, damages for loss of value in the notes.

10 Two other class proceedings relating to SFC were subsequently commenced in Ontario: *Smith et al. v. Sino-Forest Corporation et al.*, which commenced on June 8, 2011; and *Northwest and Ethical Investments L.P. et al. v. Sino-Forest Corporation et al.*, which commenced on September 26, 2011.

11 In December 2011, there was a motion to determine which of the three actions in Ontario should be permitted to proceed and which should be stayed (the "Carriage Motion"). On January 6, 2012, Perell J. granted carriage to the Ontario Plaintiffs, appointed Siskinds LLP and Koskie Minsky LLP to prosecute the Ontario class action, and stayed the other class proceedings.

CCAA Proceedings

12 SFC obtained an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") on March 30, 2012 (the "Initial Order"), pursuant to which a stay of proceedings was granted in respect of SFC and certain of its subsidiaries. Pursuant to an order on May 8, 2012, the stay was extended to all defendants in the class actions, including Ernst & Young. Due to the stay, the certification and leave motions have yet to be heard.

13 Throughout the CCAA proceedings, SFC asserted that there could be no effective restructuring of SFC's business, and separation from the Canadian parent, if the claims asserted against SFC's subsidiaries arising out of, or connected to, claims against SFC remained outstanding.

14 In addition, SFC and FTI Consulting Canada Inc. (the "Monitor") continually advised that timing and delay were critical elements that would impact on maximization of the value of SFC's assets and stakeholder recovery.

15 On May 14, 2012, an order (the "Claims Procedure Order") was issued that approved a claims process developed by SFC, in consultation with the Monitor. In order to identify the nature and extent of the claims asserted against SFC's subsidiaries, the Claims Procedure Order required any claimant that had or intended to assert a right or claim against one or more of the subsidiaries, relating to a purported claim made against SFC, to so indicate on their proof of claim.

16 The Ad Hoc Securities Purchasers' Committee filed a proof of claim (encapsulating the approximately $7.3 billion shareholder claim and $1.8 billion noteholder claim) in the CCAA proceedings on behalf of all putative class members in the Ontario class action. The plaintiffs in the New York class action filed a proof of claim, but did not specify quantum of damages. Ernst & Young filed a proof of claim for damages and indemnification. The plaintiffs in the Saskatchewan class action did not file a proof of claim. A few shareholders filed proofs of claim separately. No proof of claim was filed by Kim Orr Barristers P.C. ("Kim Orr"), who represent the Objectors.

17 Prior to the commencement of the CCAA proceedings, the plaintiffs in the Canadian Actions settled with Pöyry (Beijing) Consulting Company Limited ("Pöyry") (the "Pöyry Settlement"), a forestry valuator that provided services to SFC. The class was defined as all persons and entities

who acquired SFC's securities in Canada between March 19, 2007 to June 2, 2011, and all Canadian residents who acquired SFC securities outside of Canada during that same period (the "Pöyry Settlement Class").

18 The notice of hearing to approve the Pöyry Settlement advised the Pöyry Settlement Class that they may object to the proposed settlement. No objections were filed.

19 Perell J. and Émond J. approved the settlement and certified the Pöyry Settlement Class for settlement purposes. January 15, 2013 was fixed as the date by which members of the Pöyry Settlement Class, who wished to opt-out of either of the Canadian Actions, would have to file an opt-out form for the claims administrator, and they approved the form by which the right to opt-out was required to be exercised.

20 Notice of the certification and settlement was given in accordance with the certification orders of Perell J. and Émond J. The notice of certification states, in part, that:

> IF YOU CHOOSE TO OPT OUT OF THE CLASS, YOU WILL BE OPTING OUT OF THE **ENTIRE** PROCEEDING. THIS MEANS THAT YOU WILL BE UNABLE TO PARTICIPATE IN ANY FUTURE SETTLEMENT OR JUDGMENT REACHED WITH OR AGAINST THE REMAINING DEFENDANTS.

21 The opt-out made no provision for an opt-out on a conditional basis.

22 On June 26, 2012, SFC brought a motion for an order directing that claims against SFC that arose in connection with the ownership, purchase or sale of an equity interest in SFC, and related indemnity claims, were "equity claims" as defined in section 2 of the CCAA, including the claims by or on behalf of shareholders asserted in the Class Action Proceedings. The equity claims motion did not purport to deal with the component of the Class Action Proceedings relating to SFC's notes.

23 In reasons released July 27, 2012 [*Re Sino-Forest Corp.*, 2012 ONSC 4377], I granted the relief sought by SFC (the "Equity Claims Decision"), finding that "the claims advanced in the shareholder claims are clearly equity claims". The Ad Hoc Securities Purchasers' Committee did not oppose the motion, and no issue was taken by any party with the court's determination that the shareholder claims against SFC were "equity claims". The Equity Claims Decision was subsequently affirmed by the Court of Appeal for Ontario on November 23, 2012 [*Re Sino-Forest Corp.*, 2012 ONCA 816].

Ernst & Young Settlement

24 The Ernst & Young Settlement, and third party releases, was not mentioned in the early versions of the Plan. The initial creditors' meeting and vote on the Plan was scheduled to occur on November 29, 2012; when the Plan was amended on November 28, 2012, the creditors' meeting

was adjourned to November 30, 2012.

25 On November 29, 2012, Ernst & Young's counsel and class counsel concluded the proposed Ernst & Young Settlement. The creditors' meeting was again adjourned, to December 3, 2012; on that date, a new Plan revision was released and the Ernst & Young Settlement was publicly announced. The Plan revision featured a new Article 11, reflecting the "framework" for the proposed Ernst & Young Settlement and for third-party releases for named third-party defendants as identified at that time as the Underwriters or in the future.

26 On December 3, 2012, a large majority of creditors approved the Plan. The Objectors note, however, that proxy materials were distributed weeks earlier and proxies were required to be submitted three days prior to the meeting and it is evident that creditors submitting proxies only had a pre-Article 11 version of the Plan. Further, no equity claimants, such as the Objectors, were entitled to vote on the Plan. On December 6, 2012, the Plan was further amended, adding Ernst & Young and BDO to Schedule A, thereby defining them as named third-party defendants.

27 Ultimately, the Ernst & Young Settlement provided for the payment by Ernst & Young of $117 million as a settlement fund, being the full monetary contribution by Ernst & Young to settle the Ernst & Young Claims; however, it remains subject to court approval in Ontario, and recognition in Quebec and the United States, and conditional, pursuant to Article 11.1 of the Plan, upon the following steps:

(a) the granting of the sanction order sanctioning the Plan including the terms of the Ernst & Young Settlement and the Ernst & Young Release (which preclude any right to contribution or indemnity against Ernst & Young);
(b) the issuance of the Settlement Trust Order;
(c) the issuance of any other orders necessary to give effect to the Ernst & Young Settlement and the Ernst & Young Release, including the Chapter 15 Recognition Order;
(d) the fulfillment of all conditions precedent in the Ernst & Young Settlement; and
(e) all orders being final orders not subject to further appeal or challenge.

28 On December 6, 2012, Kim Orr filed a notice of appearance in the CCAA proceedings on behalf of three Objectors: Invesco, Northwest and Bâtirente. These Objectors opposed the sanctioning of the Plan, insofar as it included Article 11, during the Plan sanction hearing on December 7, 2012.

29 At the Plan sanction hearing, SFC's counsel made it clear that the Plan itself did not embody the Ernst & Young Settlement, and that the parties' request that the Plan be sanctioned did not also cover approval of the Ernst & Young Settlement. Moreover, according to the Plan and minutes of settlement, the Ernst & Young Settlement would not be consummated (*i.e.* money paid and releases effective) unless and until several conditions had been satisfied in the future.

30 The Plan was sanctioned on December 10, 2012 with Article 11. The Objectors take the position that the Funds' opposition was dismissed as premature and on the basis that nothing in the sanction order affected their rights.

31 On December 13, 2012, the court directed that its hearing on the Ernst & Young Settlement would take place on January 4, 2013, under both the CCAA and the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA"). Subsequently, the hearing was adjourned to February 4, 2013.

32 On January 15, 2013, the last day of the opt-out period established by orders of Perell J. and Émond J., six institutional investors represented by Kim Orr filed opt-out forms. These institutional investors are Northwest and Bâtirente, who were two of the three institutions represented by Kim Orr in the Carriage Motion, as well as Invesco, Matrix, Montrusco and Gestion Ferique (all of which are members of the Pöyry Settlement Class).

33 According to the opt-out forms, the Objectors held approximately 1.6% of SFC shares outstanding on June 30, 2011 (the day the Muddy Waters report was released). By way of contrast, Davis Selected Advisors and Paulson and Co., two of many institutional investors who support the Ernst & Young Settlement, controlled more than 25% of SFC's shares at this time. In addition, the total number of outstanding objectors constitutes approximately 0.24% of the 34,177 SFC beneficial shareholders as of April 29, 2011.

LAW AND ANALYSIS

Court's Jurisdiction to Grant Requested Approval

34 The Claims Procedure Order of May 14, 2012, at paragraph 17, provides that any person that does not file a proof of claim in accordance with the order is barred from making or enforcing such claim as against any other person who could claim contribution or indemnity from the Applicant. This includes claims by the Objectors against Ernst & Young for which Ernst & Young could claim indemnity from SFC.

35 The Claims Procedure Order also provides that the Ontario Plaintiffs are authorized to file one proof of claim in respect of the substance of the matters set out in the Ontario class action, and that the Quebec Plaintiffs are similarly authorized to file one proof of claim in respect of the substance of the matters set out in the Quebec class action. The Objectors did not object to, or oppose, the Claims Procedure Order, either when it was sought or at any time thereafter. The Objectors did not file an independent proof of claim and, accordingly, the Canadian Claimants were authorized to and did file a proof of claim in the representative capacity in respect of the Objectors' claims.

36 The Ernst & Young Settlement is part of a CCAA plan process. Claims, including contingent claims, are regularly compromised and settled within CCAA proceedings. This includes outstanding litigation claims against the debtor and third parties. Such compromises fully and finally dispose of such claims, and it follows that there are no continuing procedural or other rights in such

proceedings. Simply put, there are no "opt-outs" in the CCAA.

37 It is well established that class proceedings can be settled in a CCAA proceeding. See *Robertson v. ProQuest Information and Learning Co.*, 2011 ONSC 1647 [*Robertson*].

38 As noted by Pepall J. (as she then was) in *Robertson*, para. 8:

> When dealing with the consensual resolution of a CCAA claim filed in a claims process that arises out of ongoing litigation, typically no court approval is required. In contrast, class proceedings settlements must be approved by the court. The notice and process for dissemination of the settlement agreement must also be approved by the court.

39 In this case, the notice and process for dissemination have been approved.

40 The Objectors take the position that approval of the Ernst & Young Settlement would render their opt-out rights illusory; the inherent flaw with this argument is that it is not possible to ignore the CCAA proceedings.

41 In this case, claims arising out of the class proceedings are claims in the CCAA process. CCAA claims can be, by definition, subject to compromise. The Claims Procedure Order establishes that claims as against Ernst & Young fall within the CCAA proceedings. Thus, these claims can also be the subject of settlement and, if settled, the claims of all creditors in the class can also be settled.

42 In my view, these proceedings are the appropriate time and place to consider approval of the Ernst & Young Settlement. This court has the jurisdiction in respect of both the CCAA and the CPA.

Should the Court Exercise Its Discretion to Approve the Settlement

43 Having established the jurisdictional basis to consider the motion, the central inquiry is whether the court should exercise its discretion to approve the Ernst & Young Settlement.

CCAA Interpretation

44 The CCAA is a "flexible statute", and the court has "jurisdiction to approve major transactions, including settlement agreements, during the stay period defined in the Initial Order". The CCAA affords courts broad jurisdiction to make orders and "fill in the gaps in legislation so as to give effect to the objects of the CCAA." [*Re Nortel Networks Corp.*, 2010 ONSC 1708, paras. 66-70 ("*Re Nortel*"); *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299, 72 O.T.C. 99, para. 43 (Ont. C.J.)]

45 Further, as the Supreme Court of Canada explained in *Re Ted Leroy Trucking Ltd. [Century*

Services], 2010 SCC 60, para. 58:

> CCAA decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly described as "the hothouse of real time litigation" has been the primary method by which the CCAA has been adapted and has evolved to meet contemporary business and social needs (internal citations omitted). ... When large companies encounter difficulty, reorganizations become increasingly complex. CCAA courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the Debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the CCAA.

46 It is also established that third-party releases are not an uncommon feature of complex restructurings under the CCAA [*ATB Financial v. Metcalf and Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 ("*ATB Financial*"); *Re Nortel, supra*; *Robertson, supra*; *Re Muscle Tech Research and Development Inc.* (2007), 30 C.B.R. (5th) 59, 156 A.C.W.S. (3d) 22 (Ontario S.C.J.) ("*Muscle Tech*"); *Re Grace Canada Inc.* (2008), 50 C.B.R. (5th) 25 (Ont. S.C.J.); *Re Allen-Vanguard Corporation*, 2011 ONSC 5017].

47 The Court of Appeal for Ontario has specifically confirmed that a third-party release is justified where the release forms part of a comprehensive compromise. As Blair J. A. stated in *ATB Financial, supra*:

> 69. In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).
>
> 70. The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan ...
>
> 71. In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:
>
> a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) The claims to be released are rationally related to the purpose of the Plan and

necessary for it;

c) The Plan cannot succeed without the releases;

d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and

e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

72. Here, then - as was the case in T&N - there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed ...

73. I am satisfied that the wording of the CCAA - construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation - supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

...

78. ... I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

...

113. At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here - with two additional findings - because they provide an important foundation for his analysis concerning the fairness and reasonableness of the

Plan. The application judge found that:

a) The parties to be released are necessary and essential to the restructuring of the debtor;
b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
c) The Plan cannot succeed without the releases;
d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
g) The releases are fair and reasonable and not overly broad or offensive to public policy.

48 Furthermore, in *ATB Financial*, *supra*, para. 111, the Court of Appeal confirmed that parties are entitled to settle allegations of fraud and to include releases of such claims as part of the settlement. It was noted that "there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given".

Relevant CCAA Factors

49 In assessing a settlement within the CCAA context, the court looks at the following three factors, as articulated in *Robertson*, *supra*:

(a) whether the settlement is fair and reasonable;
(b) whether it provides substantial benefits to other stakeholders; and
(c) whether it is consistent with the purpose and spirit of the CCAA.

50 Where a settlement also provides for a release, such as here, courts assess whether there is "a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan". Applying this "nexus test" requires consideration of the following factors: [*ATB Financial*, *supra*, para. 70]

(a) Are the claims to be released rationally related to the purpose of the plan?
(b) Are the claims to be released necessary for the plan of arrangement?
(c) Are the parties who have claims released against them contributing in a tangible and realistic way? and
(d) Will the plan benefit the debtor and the creditors generally?

Counsel Submissions

51 The Objectors argue that the proposed Ernst & Young Release is not integral or necessary to the success of Sino-Forest's restructuring plan, and, therefore, the standards for granting third-party releases in the CCAA are not satisfied. No one has asserted that the parties require the Ernst & Young Settlement or Ernst & Young Release to allow the Plan to go forward; in fact, the Plan has been implemented prior to consideration of this issue. Further, the Objectors contend that the $117 million settlement payment is not essential, or even related, to the restructuring, and that it is concerning, and telling, that varying the end of the Ernst & Young Settlement and Ernst & Young Release to accommodate opt-outs would extinguish the settlement.

52 The Objectors also argue that the Ernst & Young Settlement should not be approved because it would vitiate opt-out rights of class members, as conferred as follows in section 9 of the CPA: "Any member of a class involved in a class proceeding may opt-out of the proceeding in the manner and within the time specified in the certification order." This right is a fundamental element of procedural fairness in the Ontario class action regime [*Fischer v. IG Investment Management Ltd.*, 2012 ONCA 47, para. 69], and is not a mere technicality or illusory. It has been described as absolute [*Durling v. Sunrise Propane Energy Group Inc.*, 2011 ONSC 266]. The opt-out period allows persons to pursue their self-interest and to preserve their rights to pursue individual actions [*Mangan v. Inco Ltd.*, (1998), 16 C.P.C. (4th) 165, 38 O.R. (3d) 703 (Ont. C.J.)].

53 Based on the foregoing, the Objectors submit that a proposed class action settlement with Ernst & Young should be approved solely under the CPA, as the Pöyry Settlement was, and not through misuse of a third-party release procedure under the CCAA. Further, since the minutes of settlement make it clear that Ernst & Young retains discretion not to accept or recognize normal opt-outs if the CPA procedures are invoked, the Ernst & Young Settlement should not be approved in this respect either.

54 Multiple parties made submissions favouring the Ernst & Young Settlement (with the accompanying Ernst & Young Release), arguing that it is fair and reasonable in the circumstances, benefits the CCAA stakeholders (as evidenced by the broad-based support for the Plan and this motion) and rationally connected to the Plan.

55 Ontario Plaintiffs' counsel submits that the form of the bar order is fair and properly balances the competing interests of class members, Ernst & Young and the non-settling defendants as:

(a) class members are not releasing their claims to a greater extent than necessary;
(b) Ernst & Young is ensured that its obligations in connection to the Settlement will conclude its liability in the class proceedings;
(c) the non-settling defendants will not have to pay more following a judgment than they would be required to pay if Ernst & Young remained as a defendant in the action; and
(d) the non-settling defendants are granted broad rights of discovery and an

appropriate credit in the ongoing litigation, if it is ultimately determined by the court that there is a right of contribution and indemnity between the co-defendants.

56 SFC argues that Ernst & Young's support has simplified and accelerated the Plan process, including reducing the expense and management time otherwise to be incurred in litigating claims, and was a catalyst to encouraging many parties, including the Underwriters and BDO, to withdraw their objections to the Plan. Further, the result is precisely the type of compromise that the CCAA is designed to promote; namely, Ernst & Young has provided a tangible and significant contribution to the Plan (notwithstanding any pitfalls in the litigation claims against Ernst & Young) that has enabled SFC to emerge as Newco/NewcoII in a timely way and with potential viability.

57 Ernst & Young's counsel submits that the Ernst & Young Settlement, as a whole, including the Ernst & Young Release, must be approved or rejected; the court cannot modify the terms of a proposed settlement. Further, in deciding whether to reject a settlement, the court should consider whether doing so would put the settlement in "jeopardy of being unravelled". In this case, counsel submits there is no obligation on the parties to resume discussions and it could be that the parties have reached their limits in negotiations and will backtrack from their positions or abandon the effort.

Analysis and Conclusions

58 The Ernst & Young Release forms part of the Ernst & Young Settlement. In considering whether the Ernst & Young Settlement is fair and reasonable and ought to be approved, it is necessary to consider whether the Ernst & Young Release can be justified as part of the Ernst & Young Settlement. See *ATB Financial, supra*, para. 70, as quoted above.

59 In considering the appropriateness of including the Ernst & Young Release, I have taken into account the following.

60 Firstly, although the Plan has been sanctioned and implemented, a significant aspect of the Plan is a distribution to SFC's creditors. The significant and, in fact, only monetary contribution that can be directly identified, at this time, is the $117 million from the Ernst & Young Settlement. Simply put, until such time as the Ernst & Young Settlement has been concluded and the settlement proceeds paid, there can be no distribution of the settlement proceeds to parties entitled to receive them. It seems to me that in order to effect any distribution, the Ernst & Young Release has to be approved as part of the Ernst & Young Settlement.

61 Secondly, it is apparent that the claims to be released against Ernst & Young are rationally related to the purpose of the Plan and necessary for it. SFC put forward the Plan. As I outlined in the Equity Claims Decision, the claims of Ernst & Young as against SFC are intertwined to the extent that they cannot be separated. Similarly, the claims of the Objectors as against Ernst & Young are, in my view, intertwined and related to the claims against SFC and to the purpose of the

Plan.

62 Thirdly, although the Plan can, on its face, succeed, as evidenced by its implementation, the reality is that without the approval of the Ernst & Young Settlement, the objectives of the Plan remain unfulfilled due to the practical inability to distribute the settlement proceeds. Further, in the event that the Ernst & Young Release is not approved and the litigation continues, it becomes circular in nature as the position of Ernst & Young, as detailed in the Equity Claims Decision, involves Ernst & Young bringing an equity claim for contribution and indemnity as against SFC.

63 Fourthly, it is clear that Ernst & Young is contributing in a tangible way to the Plan, by its significant contribution of $117 million.

64 Fifthly, the Plan benefits the claimants in the form of a tangible distribution. Blair J.A., at paragraph 113 of *ATB Financial*, *supra*, referenced two further facts as found by the application judge in that case; namely, the voting creditors who approved the Plan did so with the knowledge of the nature and effect of the releases. That situation is also present in this case.

65 Finally, the application judge in *ATB Financial*, *supra*, held that the releases were fair and reasonable and not overly broad or offensive to public policy. In this case, having considered the alternatives of lengthy and uncertain litigation, and the full knowledge of the Canadian plaintiffs, I conclude that the Ernst & Young Release is fair and reasonable and not overly broad or offensive to public policy.

66 In my view, the Ernst & Young Settlement is fair and reasonable, provides substantial benefits to relevant stakeholders, and is consistent with the purpose and spirit of the CCAA. In addition, in my view, the factors associated with the *ATB Financial* nexus test favour approving the Ernst & Young Release.

67 In *Re Nortel*, *supra*, para. 81, I noted that the releases benefited creditors generally because they "reduced the risk of litigation, protected Nortel against potential contribution claims and indemnity claims and reduced the risk of delay caused by potentially complex litigation and associated depletion of assets to fund potentially significant litigation costs". In this case, there is a connection between the release of claims against Ernst & Young and a distribution to creditors. The plaintiffs in the litigation are shareholders and Noteholders of SFC. These plaintiffs have claims to assert against SFC that are being directly satisfied, in part, with the payment of $117 million by Ernst & Young.

68 In my view, it is clear that the claims Ernst & Young asserted against SFC, and SFC's subsidiaries, had to be addressed as part of the restructuring. The interrelationship between the various entities is further demonstrated by Ernst & Young's submission that the release of claims by Ernst & Young has allowed SFC and the SFC subsidiaries to contribute their assets to the restructuring, unencumbered by claims totalling billions of dollars. As SFC is a holding company with no material assets of its own, the unencumbered participation of the SFC subsidiaries is crucial

to the restructuring.

69 At the outset and during the CCAA proceedings, the Applicant and Monitor specifically and consistently identified timing and delay as critical elements that would impact on maximization of the value and preservation of SFC's assets.

70 Counsel submits that the claims against Ernst & Young and the indemnity claims asserted by Ernst & Young would, absent the Ernst & Young Settlement, have to be finally determined before the CCAA claims could be quantified. As such, these steps had the potential to significantly delay the CCAA proceedings. Where the claims being released may take years to resolve, are risky, expensive or otherwise uncertain of success, the benefit that accrues to creditors in having them settled must be considered. See *Re Nortel, supra*, paras. 73 and 81; and *Muscle Tech, supra*, paras. 19-21.

71 Implicit in my findings is rejection of the Objectors' arguments questioning the validity of the Ernst & Young Settlement and Ernst & Young Release. The relevant consideration is whether a proposed settlement and third-party release sufficiently benefits all stakeholders to justify court approval. I reject the position that the $117 million settlement payment is not essential, or even related, to the restructuring; it represents, at this point in time, the only real monetary consideration available to stakeholders. The potential to vary the Ernst & Young Settlement and Ernst & Young Release to accommodate opt-outs is futile, as the court is being asked to approve the Ernst & Young Settlement and Ernst & Young Release as proposed.

72 I do not accept that the class action settlement should be approved solely under the CPA. The reality facing the parties is that SFC is insolvent; it is under CCAA protection, and stakeholder claims are to be considered in the context of the CCAA regime. The Objectors' claim against Ernst & Young cannot be considered in isolation from the CCAA proceedings. The claims against Ernst & Young are interrelated with claims as against SFC, as is made clear in the Equity Claims Decision and Claims Procedure Order.

73 Even if one assumes that the opt-out argument of the Objectors can be sustained, and opt-out rights fully provided, to what does that lead? The Objectors are left with a claim against Ernst & Young, which it then has to put forward in the CCAA proceedings. Without taking into account any argument that the claim against Ernst & Young may be affected by the claims bar date, the claim is still capable of being addressed under the Claims Procedure Order. In this way, it is again subject to the CCAA fairness and reasonable test as set out in *ATB Financial, supra*.

74 Moreover, CCAA proceedings take into account a class of creditors or stakeholders who possess the same legal interests. In this respect, the Objectors have the same legal interests as the Ontario Plaintiffs. Ultimately, this requires consideration of the totality of the class. In this case, it is clear that the parties supporting the Ernst & Young Settlement are vastly superior to the Objectors, both in number and dollar value.

75 Although the right to opt-out of a class action is a fundamental element of procedural fairness in the Ontario class action regime, this argument cannot be taken in isolation. It must be considered in the context of the CCAA.

76 The Objectors are, in fact, part of the group that will benefit from the Ernst & Young Settlement as they specifically seek to reserve their rights to "opt-in" and share in the spoils.

77 It is also clear that the jurisprudence does not permit a dissenting stakeholder to opt-out of a restructuring. [*Re Sammi Atlas Inc.*, (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. (Commercial List)).] If that were possible, no creditor would take part in any CCAA compromise where they were to receive less than the debt owed to them. There is no right to opt-out of any CCAA process, and the statute contemplates that a minority of creditors are bound by the plan which a majority have approved and the court has determined to be fair and reasonable.

78 SFC is insolvent and all stakeholders, including the Objectors, will receive less than what they are owed. By virtue of deciding, on their own volition, not to participate in the CCAA process, the Objectors relinquished their right to file a claim and take steps, in a timely way, to assert their rights to vote in the CCAA proceeding.

79 Further, even if the Objectors had filed a claim and voted, their minimal 1.6% stake in SFC's outstanding shares when the Muddy Waters report was released makes it highly unlikely that they could have altered the outcome.

80 Finally, although the Objectors demand a right to conditionally opt-out of a settlement, that right does not exist under the CPA or CCAA. By virtue of the certification order, class members had the ability to opt-out of the class action. The Objectors did not opt-out in the true sense; they purported to create a conditional opt-out. Under the CPA, the right to opt-out is "in the manner and within the time specified in the certification order". There is no provision for a conditional opt-out in the CPA, and Ontario's single opt-out regime causes "no prejudice ... to putative class members". [CPA, section 9; *Osmun v. Cadbury Adams Canada Inc.* (2009), 85 C.P.C. (6th) 148, paras. 43-46 (Ont. S.C.J.); and *Eidoo v. Infineon Technologies AG*, 2012 ONSC 7299.] *Miscellaneous*

81 For greater certainty, it is my understanding that the issues raised by Mr. O'Reilly have been clarified such that the effect of this endorsement is that the Junior Objectors will be included with the same status as the Ontario Plaintiffs.

DISPOSITION

82 In the result, for the foregoing reasons, the motion is granted. A declaration shall issue to the effect that the Ernst & Young Settlement is fair and reasonable in all the circumstances. The Ernst & Young Settlement, together with the Ernst & Young Release, is approved and an order shall issue substantially in the form requested. The motion of the Objectors is dismissed.

G.B. MORAWETZ J.

1998 CarswellOnt 5823
Ontario Court of Justice (General Division)

Dabbs v. Sun Life Assurance Co. of Canada

1998 CarswellOnt 5823, [1998] O.J. No. 1598

Paul Dabbs, Plaintiff and Sun Life Assurance Company of Canada, Defendant

Sharpe J.

Judgment: February 24, 1998
Heard: February 5, 1998
Docket: Toronto 96-CT-022862

Counsel: *Michael A. Eizenga* and *Charles M. Wright*, for Plaintiff.
H. Lorne Morphy and *Patricia D.S. Jackson*, for Defendant.
Michael Deverett, for 3 Objectors.
Gary R. Will and *J. Douglas Barnett*, for 11 Objectors.

Subject: Civil Practice and Procedure

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s. 242(2) — referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — pursuant to

s. 12 — considered

s. 14 — considered

s. 14(2) — considered

s. 29 — considered

s. 32(1) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — referred to

R. 7.08(1) — referred to

RULING on hearingto determine procedure for court approval of settlement and class action certification.

***Sharpe J.*:**

1. Nature of Proceedings

1 In this action, commenced pursuant to the *Class Proceedings Act 1992*, the plaintiff asserts claims for alleged breach of contract and negligent misrepresentation arising out of the manner in which whole life participating insurance policies with a premium offset option were sold. Similar actions were commenced in Quebec and in British Columbia. Before the defendant filed a statement of defence and before certification as a class proceeding, this action, together with the Quebec and British Columbia actions, was settled by written agreement, dated June 16, 1997, setting out detailed and complex terms. The settlement is subject to and conditional upon court approval in all three provinces.

2 Winkler J. approved a form of notice of motion for a certification/authorization and agreement approval to be sent to members of the proposed Ontario class. Similar orders were made in Quebec and British Columbia. The notice stated that members of the class who wished to participate in the hearing for approval of the settlement were required to file a written statement of objection and notice of appearance by a specified date. Fourteen members of the proposed Ontario class filed objections. Three are represented by Mr. Deverett and eleven by Messrs. Will and Barnett. At the opening of this hearing, Mr. Deverett indicated that one of the objectors he represents wished to withdraw from further participation.

3 On August 28, 1997 Winkler J. directed that there be a hearing to determine certain procedural issues, namely:

(a) Standing to object;

(b) Procedures for and scope of objection;

(c) The role of the court in approval of the agreement;

(d) Onus for approval of the agreement;

(e) Factors to be considered by the court for approval of the agreement;

(f) Cost consequences.

4 The issue of standing was determined by Winkler J. and it was contemplated that the motion to determine the remaining procedural issues would be heard on September 4, 1997. It did not proceed on that date as the Deverett objectors requested an adjournment. The Deverett objectors then brought a motion to set aside Winkler J.'s earlier order regarding the notice of motion

for certification/authorization, to declare the plaintiff's counsel to be in a conflict of interest, and for other relief, including an order that those objectors be given immunity from costs and be awarded interim costs. While the costs issue remains outstanding, other aspects of the motion were dismissed by Winkler J. An application for leave to appeal from that order was dismissed by O'Driscoll J. on January 22, 1998.

5 I have now heard full argument on the outstanding procedural issues specified by Winkler J.'s August 29, 1997 direction. For convenience of analysis, I propose to deal with them in the following order:

(a) Onus for approval of the agreement

(b) The role of the court in approval of the agreement

(c) Factors to be considered by the court for approval of the agreement

(d) Procedures for and scope of objection

(e) Cost consequences.

6 I wish to emphasize at the outset that what follows is intended only to provide a procedural framework for the hearing of this motion. It would be entirely inappropriate to attempt to determine in the context of one case a process appropriate for all cases. My ruling has been determined on the basis of the submissions I have heard and is intended to do no more than provide guidance to the parties and objectors in the present case.

2. Analysis

(a) Onus for approval of the agreement

7 It is common ground that the parties proposing the settlement bear the onus of satisfying the court that it ought to be approved.

(b) The role of the court in approval of the agreement

8 There are two matters to be determined by the court: (1) should the action be certified as a class proceeding and, if the answer is yes, (2) should the settlement be approved. While the role of the court with respect to certification is well defined by the *Class Proceedings Act, 1992*, the same cannot be said of the approval of settlements. Section 29 provides that "[a] settlement of a class proceeding is not binding unless approved by the court" but the *Act* provides no statutory guidelines that are to be followed.

9 Experience from other situations in which the court is required to approve settlements does, however, provide guidance. Court approval is required in situations where there are parties under disability (see Rule 7.08(1)). Court approval is also required in other circumstances where there are affected parties not before the court (see *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 242(2) dealing with derivative actions). The standard in these situations is essentially the same and is equally applicable here: *the court must find that in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it.*

10 It has often been observed that the court is asked to approve or reject a settlement and that it is not open to the court to rewrite or modify its terms: *Poulin v. Nadon*, [1950] O.R. 219 (Ont. C.A.), at 222-3. As a practical matter, it is within the power of the court to indicate areas of concern and afford the parties the opportunity to answer and address those concerns with changes to the settlement: see eg *Bowling v. Pfizer*, 143 F.R.D. 141 (U.S. Ohio 1992). I would observe, however, that the fact that the settlement has already been approved in Quebec and British Columbia would have to be considered as a factor making changes unlikely in this case.

11 With respect to specific objections raised by the objectors, there is an additional factor to be kept in mind. The role of the court is to determine whether the settlement is fair, reasonable and in the best interests of the class as a whole, not whether it

meets the demands of a particular class member. As approval is sought at the same time as certification, even if the settlement is approved, class members will be afforded the right to opt out. There is, accordingly an element control that may be exercised to alleviate matters of particular concern to individual class members.

12 Various definitions of "reasonableness" were offered in argument. The word suggests that there is a range within which the settlement must fall that makes some allowance for differences of view, as an American court put it "a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion". (*Newman v. Stein*, 464 F.2d 689, (U.S. 2nd Cir. N.Y. 1972) at 693).

(c) Factors to be considered by the court for approval of the agreement

13 A leading American text, *Newberg on Class Actions*, (3rd ed), para 11.43 offers the following useful list of criteria:

1. Likelihood of recovery, or likelihood of success

2. Amount and nature of discovery evidence

3. Settlement terms and conditions

4. Recommendation and experience of counsel

5. Future expense and likely duration of litigation

6. Recommendation of neutral parties if any

7. Number of objectors and nature of objections

8. The presence of good faith and the absence of collusion

14 I also find the following passage from the judgment of Callaghan A.C.J.H.C. in *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (Ont. H.C.), at 230-1 to be most helpful. Callaghan A.C.J.H.C.was considering approval of a settlement in a derivative action, but his comments are equally applicable to the approval of settlements of class actions:

> In approaching this matter, I believe it should be observed at the outset that the courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system.
>
> In deciding whether or not to approve a proposed settlement under s. 235(2) of the Act, the court must be satisfied that the proposal is fair and reasonable to all shareholders. In considering these matters, the court must recognize that settlements are by their very nature compromises, which need not and usually do not satisfy every single concern of all parties affected. Acceptable settlements may fall within a broad range of upper and lower limits.
>
> In cases such as this, it is not the court's function to substitute its judgment for that of the parties who negotiate the settlement. Nor is it the court's function to litigate the merits of the action. I would also state that it is not the function of the court to simply rubber-stamp the proposal.
>
> The court must consider the nature of the claims that were advanced in the action, the nature of the defences to those claims that were advanced in the pleadings, and the benefits accruing and lost to the parties as a result of the settlement.
>
> . . . . .
>
> The matter was aptly put in two American cases that were cited to me in the course of argument. In a decision of the Federal Third Circuit Court in *Yonge v. Katz*, 447 F.2d 431 (1971), it is stated:

> It is not necessary in order to determine whether an agreement of settlement and compromise shall be approved that the court try the case which is before it for settlement. Such procedure would emasculate the very purpose for which settlements are made. The court is only called upon to consider and weigh the nature of the claim, the possible defences, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable.

In another case cited by all parties in these proceedings, *Greenspun v. Bogan*, 492 F.2d 375 at p. 381 (1974), it is stated:

> ... any settlement is the result of a compromise — each party surrendering something in order to prevent unprofitable litigation, and the risks and costs inherent in taking litigation to completion. A district court, in reviewing a settlement proposal, need not engage in a trial of the merits, for the purpose of settlement is precisely to avoid such a trial. See *United Founders Life Ins. Co. v. Consumer's National Lifel Ins. Co.*, 447 F. 2d 647 (7th Cir. 1971); *Florida Trailer & Equipment co. v. Deal*, 284 F. 2d 567, 571 (5th Cir. 1960). *It is only when one side is so obviously correct in its assertions of law and fact that it would be clearly unreasonable to require it to compromise to the extent of the settlement, that to approve the settlement would be an abuse of discretion.* (Emphasis added)

15 It is apparent that the court cannot exercise its function without evidence. The court is entitled to insist on sufficient evidence to permit the judge to exercise an objective, impartial and independent assessment of the fairness of the settlement in all the circumstances.

16 In the arguments presented by the proponents of the settlement, considerable emphasis is placed on the opinion of senior counsel that the settlement is fair and reasonable as an important factor. While I agree that the opinion of counsel is evidence worthy of consideration, it is only one factor to be considered. It does not relieve the parties proposing the settlement of the obligation to provide sufficient information to permit the court to exercise its function of independent approval. On the other hand, the court must be mindful of the fact that as the consequence of not approving the settlement is that the litigation may well continue, there are inherent constraints on the extent to which the parties can be expected to make complete disclosure of the strengths and weaknesses of their case.

(d) Procedures for and scope of objection

17 The *Class Proceedings Act, 1992*, s. 12 confers a general discretion on the court with respect to the conduct of class proceedings:

> 12. The court, on the motion or a party or class member, may make an order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

Section 14 provides for the participation of class members in the following terms:

> 14(1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding.
>
> (2) Participation under subsection (1) shall be in whatever manner and on whatever terms, including terms as to costs, the court considers appropriate.

18 As already noted, the order of Winkler J. required class members who wished to object to the settlement to file written objections. It remains to determine the procedural and other rights objectors have in relation to the approval process.

19 In general, the procedural rights of all participants in the approval process must reflect the nature of the process itself and the special role of the court. The matter cannot be viewed in strictly adversarial terms. The plaintiff and the defendant find

themselves in common cause, seeking approval of the settlement. The objectors have their own specific concerns which, upon examination, may or may not be reflective of the interests of the class as a whole.

20 In view of the fact that the purpose of the exercise is to ensure that the interests of the unrepresented class members are protected, the court is called upon to play a more active role than is called for in strictly adversarial proceedings. It is important that the court itself remain firmly in control of the process and that the matter not be treated as if it were a dispute to be resolved between the proponents of the settlement on the one side and the objectors on the other.

(i) Objectors' right to adduce evidence

21 I can see no reason why the objectors should not have the right to adduce evidence. However, given the interests of the objectors and the nature of the process, the right to adduce evidence is not at large. Any evidence adduced by the objectors must be relevant to the points they have raised by way of objection. It must also be adduced in a timely fashion. I direct that any evidence be adduced by way of affidavit filed at least 30 days prior to the date set for the hearing of this motion.

(ii) Objectors' right to discovery

22 Under the Rules of Court, the right to oral discovery and production of documents is restricted to parties to an action. The objectors are not parties to the action, and accordingly have no right to oral discovery or production of documents.

23 On the other hand, s. 14(2) of the Act does provide that participation "shall be in whatever manner and on whatever terms ... the court considers appropriate". On behalf of the objectors he represents, Mr. Deverett sought the right to conduct essentially a "no holds barred" discovery of the parties to the action. He submitted that as no discovery had been conducted, it was impossible to assess the merits of the case and the settlement without one. In my view, this submission misses the whole point of the settlement approval exercise. The very purpose of the settlement at an early stage of the proceedings is to avoid the cost and delay involved in discovery and other pre-trial procedures. If Mr. Deverett is right, then a class action could almost never be settled without discovery, for if the parties did not conduct one, an objector could insist upon doing so as a precondition of settlement. This would create a powerful disincentive to early settlements by the parties and would run counter to the general policy of the law which strongly favours early resolution of disputes. On the other hand, the lack of discovery is a factor the court may take into account in assessing the fairness of the settlement. However, the remedy in a case where the court concludes that the settlement cannot be approved without a discovery is to refuse to approve the settlement and not to have one conducted by an objector. Given the very different in approach to discovery in the United States, I do not find the American authorities cited by the objectors on this point to be persuasive.

24 The objectors represented by Mr. Will seek production of certain specific documents relevant to their claims. This request has to be assessed in the light of the settlement agreement itself. An important element of the settlement agreement is a process to resolve individual claims. One aspect of that process will entitled these objectors to production of documents. The process will also permit them to opt out of the settlement after they receive production. In my view, in light of the process contemplated by the settlement agreement, these objectors are not entitled to insist upon production of documents at this stage. The point of the approval process is to determine whether the settlement is fair, reasonable and in the best interests of those affected by it. The issue for the court, then, is to assess whether the process contemplated by the settlement agreement is a fair one. I fail to see what relevance documents pertaining to the claims of these objectors have at this stage or how they would assist the court in determining whether the settlement and the process it specifies is a fair one.

25 Accordingly, in the circumstances of this case, I find that it is not appropriate to grant the objectors the right to oral or documentary discovery.

(iii) Right to cross-examine

26 The objectors also seek a general right to cross-examine on the affidavits filed in support of approval of the settlement. There is not inherent right to cross-examine: see eg. *Kevork v. R.*, [1984] 2 F.C. 753 (Fed. T.D.) On the other hand, it is important that there be some way for the court to ensure that evidence on contentious points can be probed and tested. As I have already

stated, I view the approval process as one which the court must control and in which the court must take an active role. In keeping with that principle, and in view of the extremely open-ended request made by the Deverett objectors, I direct as follows:

(1) that any cross-examination of deponents shall take place *viva voce* before the court on the dates set for the hearing of the certification/approval motion;

(2) that any party or objector who wishes to cross-examine a deponent serve and file at least 10 days prior to the motion a written outline of the matters upon which cross-examination is requested;

(3) that the nature and extent of cross-examination shall, subject to the discretion of the court, only be in an area indicated by the written outline and shall be subject to the discretion of the court to exclude such cross-examination which may be exercised either before or during the hearing of the motion;

(4) that any deponent for which cross-examination is requested shall be available to attend court on the days the motion is to be heard as if under summons;

(5) that in any event, Mr Ritchie be in attendance for the motion;

(6) that the right of the court to question witnesses shall remain within the sole discretion of the court and shall not be in any way affected by para (2).

(e) Costs consequences

27 The Deverett objectors seek an order that they not be subject to any order as to costs and that they be awarded interim costs. It was suggested, in the alternative, by Mr. Will that I specify in advance the circumstances which would or would not lead to an adverse costs order.

28 In my view, no such orders or directives should be made. Nothing has been shown that would bring this case within the category of "very exceptional cases" contemplated by *Organ v. Barnett* (1992), 11 O.R. (3d) 210 (Ont. Gen. Div.) as justifying an award of interim costs to ensure that the objectors are able to continue their participation. Section 32(1) of the Act, which provides that class members are not liable for costs except with respect to the determination of their own claims, does not apply. That provision contemplates the usual situation where a class member takes no active step in the proceedings. The objectors are subject to the discretion conferred by s. 14(2), which expressly preserves the right of the court to impose appropriate terms as to costs.

29 It is important that, as one means of controlling the process, the court retain its discretion with respect to the costs of this process. I hardly need add that my discretion is to be exercised in accordance with an established body of law dealing with cost orders. That body of law recognizes the right of the court to award costs to compensate for or sanction inappropriate behaviour by a litigant. It also recognizes that in certain cases, departure from the ordinary rule that an unsuccessful pay the costs of the winner may be appropriate: see eg. *Mahar v. Rogers Cablesystems Ltd.* (1995), 25 O.R. (3d) 690 (Ont. Gen. Div.).

Conclusion

30 If there are further procedural issues which arise prior to the hearing of the motion, I may be spoken to.

Order accordingly.

2005 CarswellOnt 2503
Ontario Superior Court of Justice

Nunes v. Air Transat A.T. Inc.

2005 CarswellOnt 2503, [2005] O.J. No. 2527, 20 C.P.C. (6th) 93

Josephine Nunes and Jorge Nunes (Plaintiffs) and Air Transat A.T. Inc., Airbus S.A.S., Airbus of North America Inc., Rolls-Royce PLC and Rolls-Royce Canada Limited and Airbus GIE (Defendants)

Cullity J.

Heard: May 30, 2005
Judgment: June 20, 2005
Docket: 01-CV-217295 CP

Counsel: J.J. Camp Q.C., Glenn Grenier, Allan Dick for Plaintiffs
B. Timothy Trembley for Defendant, Air Transat A.T. Inc.
D. Bruce Garrow for Defendants, Rolls -Royce PLC, Rolls -Royce Canada Limited
John Callaghan for Defendants, Airbus of North America Inc., Airbus GIE

Subject: Civil Practice and Procedure

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Statutes considered:

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Generally — referred to

s. 29(2) — pursuant to

Family Law Act, R.S.O. 1990, c. F.3

Generally — referred to

Negligence Act, R.S.O. 1990, c. N.1
s. 1 — referred to

Treaties considered:

Warsaw Convention on International Carriage by Air, 1929, C.T.S. 1941/15; 137 L.N.T.S. 11
Article 17 — considered

MOTION by plaintiffs for approval of proposed settlement of class proceeding and of fees and disbursements of class counsel.

***Cullity J.*:**

1 The plaintiffs moved for the court's approval of a settlement of this action pursuant to section 29 (2) of the *Class Proceedings Act 1992* S.O. 1992, c.6 ("CPA"). There was also a motion for approval of the fees and disbursements of class counsel.

2 The proceedings involve claims against the defendants for damages suffered by passengers on Air Transat Flight 236 (" Flight 236") when, in August 2001, the aircraft, an Airbus A330, ran out of fuel, lost power in each of its engines and made an emergency landing in the Azores Islands. The defendant, Air Transat A.T. Inc., ("Air Transat") was the operator of the aircraft. Airbus S.A.S. and Airbus North America Inc., (together "Airbus") and Rolls-Royce plc and Rolls-Royce Canada Limited (together "Rolls-Royce") were sued as responsible for the manufacture of the aircraft, and that of its engines, respectively. Claims were also made on behalf of family members of the passengers.

The Settlement

3 The proceedings were certified by order of this court on July 4, 2003. The time for opting out has expired and it has now been determined that, of the 291 passengers on board Flight 236, 115 have either opted out or entered into individual settlements with Air Transat — leaving 176 class members who would share in the benefits to be provided under the terms of the proposed settlement. These benefits can be summarised as follows:

> 1. A fund of $7,650,000, plus accrued interest, is to be paid to an administrator in exchange for a release of all claims of class members arising from the events of Flight 236.
>
> 2. The administrator is to invest the fund in income-earning accounts and, after payment of class counsel fees and disbursements and expenses of administration, the fund is to be distributed among class members subject to monetary limits for particular kinds of damages and, otherwise, in accordance with a claims procedure contained in the settlement agreement.
>
> 3. The monetary limits on different heads of damages claimed by any member are:
>
> > (a) damages for non-pecuniary loss arising from post-traumatic stress disorder or similar psychological injury would not exceed $80,000 unless accompanied by evidence of other significant permanent personal injury — in which case the maximum amount of non-pecuniary damages would not exceed $100,000;
> >
> > (b) damages for past and future loss of income would not exceed $50,000;
> >
> > (c) damages for out-of-pocket expenses would not exceed $5000; and
> >
> > (d) damages in respect of future-care expenses would not exceed $5000.

4. Family member claimants would be limited to their rights of recovery under the *Family Law Act* (Ontario) and the claims asserted by all such members that are derivative of the claims of a particular passenger would not exceed $5000.

4 The settlement provides for class members to make claims, initially, to class counsel who are to provide the claimants with what counsel consider to be a fair and reasonable assessment of the value. Members then would have the option of accepting the assessment or of requesting a review by an arbitrator to be appointed by the court. In the latter event, the arbitrator would determine the value of the claim. Distributions would be made accordingly.

5 The claims process and the powers and procedures to be followed by class counsel, the administrator, a management committee of counsel — that is to work with the administrator and to make the initial assessment of claims for loss of income — and the arbitrator are set out in some detail in the settlement agreement and in a schedule to it. Caps would be placed on the fees payable to the administrator and to members of the management committee, and on an hourly rate to be charged by the arbitrator. Class counsel would not charge fees for their services in assessing the value of claims in addition to the lump-sum amount that the court is asked to approve in connection with their services to date, and the capped amounts that may be charged by members of the management committee.

The Law

6 The role of the court, and the standards to be applied, in determining whether a settlement should be approved has been discussed in several decisions of this court including *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.), at page 444, affirmed (1998), 41 O.R. (3d) 97 (Ont. C.A.); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (Ont. S.C.J.), at paras 77 - 80; *Fraser v. Falconbridge Ltd.*, [2002] O.J. No. 2383 (Ont. S.C.J.), at paras 13 - 14; and *Ford v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1118 (Ont. S.C.J.), at paras 110 - 118.

7 In *Ford*, Cumming J. distilled the following principles from the earlier authorities:

(a) to approve a settlement, the court must find that it is fair, reasonable, and in the best interests of the class;

(b) the resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy;

(c) there is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arm's-length by counsel for the class, is presented for court approval;

(d) to reject the terms of the settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a zone of reasonableness;

(e) a court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the court must balance the need to scrutinise the settlement against the recognition that there may be a number of possible outcomes within a zone or range of reasonableness. All settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs obligation.

(f) it is not the court's function to substitute its judgment for that of the parties or to 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 simply rubber-stamp a proposal;

(g) the burden of satisfying the court that a settlement should be approved is on the party seeking approval;

(h) in determining whether to approve a settlement, the court takes into account factors such as:

(i) the likelihood of recovery or likelihood of success;

(ii) the amount and nature of discovery, evidence or investigation;

(iii) the proposed settlement terms and conditions;

(iv) the recommendations and experience of counsel;

(v) the future expense and likely duration of litigation;

(vi) the recommendation of neutral parties, if any;

(vii) the number of objectors and nature of objections;

(viii) the presence of arm's-length bargaining and the absence of collusion;

(ix) information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiations; and

(x) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation.

8 I believe the following statements of Winkler J. in *Parsons* and in *Fraser* are particularly apposite to the settlement under consideration in this case:

> 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. (*Parsons*, at paragraph 79)

> Lengthy litigation would not be in the interests of the plaintiffs with its inherent risk and delay. The court must approve or reject the settlement in its entirety. It cannot substitute or alter it.... The court does not, and cannot, seek perfection in every aspect, nor can it insist that every person be treated equally." (*Fraser*, at para 13)

9 I note, however, that, unlike the position in the above cases, other than *Fraser*, class members who do not approve of the settlement have no right to opt out of the proceedings as the time in which this could be done has expired and, unlike what I think I was the position in *Parsons*, such a right is not conferred, or contemplated, by the settlement agreement. As notice of the terms of the settlement and of the approval hearing, and the right to object, that I considered to be reasonable and adequate was given to class members, and only two of them have informed the court that they have objections to the settlement, the potential significance of the inability to opt out at this stage might be considered to be limited to these objectors.

Discussion

10 Subject to the specific points made by, or on behalf of, the two objectors, I am satisfied that the factors set out above militate heavily in favour of the settlement. The proceedings were contentiously adversarial from the outset and the litigation risks for the plaintiffs were significant. Article 17 of the Warsaw Convention limits the liability of Air Transat to damages for bodily injury. Class counsel conducted a meticulous investigation and review of the likely claims of class members and concluded that virtually all of them will claim to have suffered post-traumatic stress disorder or other forms of mental or emotional harm. Although I found that, for the purposes of certification, the question whether such harm is to be considered to be bodily injury should be included in the common issues to be tried, counsel's research into the interpretation of Article 17 in this jurisdiction, and internationally, convinced them that there was a highly significant risk that the plaintiffs would not be successful on this issue at trial. After a lengthy examination of the evidence relating to the causes of the events on Flight 236, they concluded also that the case against Rolls-Royce was very weak and that Airbus had tenable defences that not only cast doubts on the prospects

for establishing liability against it but made it inevitable that the litigation would be protracted and expensive. I see no reason to question the competence, diligence or judgment of class counsel on the assessment of litigation risks or, indeed, in the manner in which the proceedings were conducted and the settlement negotiated at arm's-length between the parties.

11 When negotiating the terms of the settlement, class counsel had obtained completed questionnaires from all but a few class members to enable their claims to be reviewed with the assistance of a clinical psychologist in Vancouver and a physician in Portugal. This information, and medical reports that were provided by class members, were independently reviewed by each of the firms acting as co-counsel for the purpose of arriving at an estimate of the total value of the claims of class members. All the information was then provided to counsel for Air Transat to enable them to make their own assessment and, after the negotiations that ensued, the settlement amount of $7,650,000 was arrived at. In class counsel's submission, this amount, less counsels' fees, expenses and administration costs should be considered to be fair and reasonable — as well as substantial — compensation for the claims of class members. In their estimate — made on the basis of their assessment of the claims of class members that have already been completed — it should provide each class member with a recovery of at least 70 per cent of the amount likely to be assessed as the value of such member's claim. This is, of course, only an estimate and, to some extent, it is based on assumptions — about, for example, the amounts that will be claimed for loss of income and the number of claims that will be referred to the arbitrator — that might, or might not, turn out to be unduly optimistic.

12 I am satisfied that the caps proposed to be placed on the recovery of particular heads of damages have been carefully considered and determined principally for the purpose of achieving fairness for the class as a whole. It appears likely that the claims for mental and emotional harm will be made by virtually all of the class members and will be far more common than claims for significant physical injuries or loss of income. The cap of $80,000 for psychological harm ($100,000 if accompanied by significant permanent other injury) was chosen after a review of recent awards in this jurisdiction and elsewhere for post-traumatic stress disorder and similar illnesses.

13 I should note at this point that, although the terms of the proposed settlement might be construed as limiting claims for physical injuries to those that are accompanied by claims for psychological harm, I understand the intention to be that claims for physical injuries alone — if there are any — are to be compensated subject to a cap of $100,000.

14 The most problematic of the monetary limits placed on the recovery of particular types of damages is that relating to loss of income. In conducting their preliminary assessment of the value of the claims of class members, class counsel had less information about the potential loss of income than they had relating to the other heads of damages. However, to the extent that they were able to judge, there would be few claims for loss of income relative to those for psychological harm and only one passenger had provided documentation in support of an income loss in excess of the cap of $50,000. That member, I presume was Mr Manuel Ribeiro, one of the two members of the class who objected to the settlement. At the hearing, counsel indicated that their attention had been drawn to one other such potential claim that, on the basis of the information available to them, they considered to be of doubtful weight.

15 Through his counsel, Mr Ribeiro successfully requested an adjournment of the original hearing date appointed for the motion for approval. At the continuation of the hearing, he was represented by Mr Brian Brock Q.C. who, while disclaiming an intention to object to the settlement agreement in principle, requested that class counsel should be required to revisit it to address a number of issues that he raised in his written and oral submissions. In general terms, these issues relate to (a) whether class counsel gave sufficient significance to the fact that neither Airbus nor Rolls-Royce could claim the protection of Article 17 of the Warsaw Convention and the possibility that, as joint tortfeasors with Air Transat, damages that could not be recovered from it might be recoverable in full from either of them under section 1 of the *Negligence Act* R.S.O. 1990, c. 1 (as amended) even if only a very small degree of relative fault was apportioned to them; (b) whether the caps placed on non-pecuniary and pecuniary damages are fair and reasonable; and (c) whether the amount of legal fees requested by class counsel, and the manner in which they would be borne by class members, are fair and reasonable.

16 In an affidavit sworn for the purpose of the motion by Mr Joe Fiorante — a partner of one of the firms acting as class counsel — he indicated that the arguments mentioned by Mr Brock in connection with the first of the above issues had been considered by them and advanced in the negotiations for the settlement. I see no reason to reject this evidence or to conclude

that the considerations to which Mr Brock referred are sufficient to remove the terms of the settlement from the "zone of reasonableness".

17 Mr Brock's submission that the caps were unfair was made in the context of his opinion that the value of Mr Ribeiro's claims for non-pecuniary damages for post-traumatic stress disorder and loss of income will exceed the limits of $80,000 and $50,000 that would be imposed under the settlement.

18 Class counsel's response to the submission with respect to non-pecuniary damages was that already mentioned — namely, that, from their review of damages awarded in recent cases, other than those involving sexual assaults, the $80,000 cap was at the high end of the range and, notwithstanding the evidence that, since the events of Flight 236, Mr Ribeiro has suffered, and will continue to suffer, psychological difficulties that will require psychiatric support and, probably, adjunct medication, they are not convinced that his claim would fall outside the likely range of damages. Based on their review of damages awards, I do not believe this conclusion is unreasonable although, as an experienced counsel in personal injury cases, Mr Brock's opinion that a higher award could be obtained merits respect. The fairness and reasonableness of the settlement — including the cap of $80,000 for non-pecuniary damages — must, however, be judged in relation to the class as a whole and is not to be determined in respect of the claims of each member considered separately. The comments of Winkler J. that I have quoted from *Parsons* and *Fraser* are in point. On the basis of the record before me, I believe I am justified in deferring to the opinion of class counsel that the cap of $80,000 on non-pecuniary damages would not operate unfairly in respect of Mr Ribeiro, let alone in respect of the class as a whole.

19 Mr Brock's criticism of the existence of the cap on the recovery for different heads of damages was not based exclusively on his opinion that his client's non-pecuniary damages would exceed $80,000. He made a similar objection with respect to the application of a $50,000 limit to Mr Ribeiro's claim for loss of income. In his submission, such a limit would operate with obvious unfairness to Mr Ribeiro in that his potential claim — calculated on the basis of a reduction in his income of $54,000 a year — would be approximately $670,000. Mr Brock informed me that his client was prepared to testify that, since Flight 236, he has lost his motivation to conduct his landscaping business of 25 years, the number of his employees and his customers has diminished and the business is now confined to grass cutting. In support of his estimate of Mr Ribeiro's loss of income, Mr Brock provided unaudited income statements of the corporation that operates the business for 1998, 2000, 2002 and 2004. These show that, between April 2001 and April 2004, the gross income of the corporation declined by approximately $48,600. During that period, operating expenses fell by approximately $49,156. Of this amount, approximately $32,000 represented a reduction in wages paid to employees. Two employees were laid off in the period after Flight 236. No personal income tax returns, or other information, were provided that would indicate the wages, or other amounts, received by Mr Ribeiro from the business in those years.

20 The income statements hardly support Mr Brock's estimate that his client had suffered an income loss of approximately $54,000 a year and, on the basis of the limited information provided, class counsel concluded that they were unable to determine whether Mr Ribeiro's total past and future income loss would exceed $50,000. I am in no better position. At the most, I can infer that Mr Ribeiro claims to have suffered a loss of income that will exceed the cap by a significant amount. The question is whether the existence of this claim is, in itself, sufficient to justify a decision to withhold approval of the settlement. In Mr Brock's submission it is, because it illustrates not merely that the cap is too low but, as well, the unfairness of placing any caps on heads of damages. As he stated in his brief or memorandum filed in the motion:

> If an individual plaintiff's claim falls within the cap it would appear that such person would make a full recovery. Those whose claims exceed the cap would recover only a proportionate share. No explanation is provided as to why those with serious claims should have their claims compromised in this way at the expense of those whose claims are not as serious.
>
> At a minimum one would expect that the recovery for each plaintiff would be on a pro-rata basis so that the percentage of recovery or loss of recovery would be equal.

21 Although I cannot amend the settlement, I do not think there is any doubt that I would have authority to refer this aspect of it back to the parties for their further consideration. After giving this matter careful thought, I am not disposed to do this.

22 As I have indicated, I do not intend to find that the total amount to be paid by Air Transat is less than that which would fall within a zone, or range, of reasonableness. The question that arises is how the net amount is to be distributed among class members if it is less than the total amount of their claims. The provision of caps is one method. Each of the possibilities suggested by Mr Brock is another. In preferring the first method as being in the best interests of the class as a whole, counsel considered:

(a) the nature of the damages likely be claimed by the great majority of class members;

(b) the likely value of such claims;

(c) the possibility that the existence of one, or a few, very large claims for income losses would substantially deplete the amount available for distribution to the other class members; and

(d) the need to simplify the claims process to avoid delays and to reduce expenses.

23 In my judgment each of these considerations was relevant, and properly considered by class counsel. The last of them underlines the necessity to consider the provisions of the settlement as a whole and not to place the focus on particular aspects of it in isolation. The objective of simplifying the claims process is relected in the caps placed on certain types of administrative expenses, the involvement of class counsel without further remuneration and the attempt to devise a process that members will find satisfactory without having recourse to arbitration. Each of these factors presupposes the existence of — and is designed to assist in effecting — an expeditious and economic method of allocating and distributing the net settlement funds among class members.

24 In my judgment, I would not be justified in finding that the existence, or the amounts, of the caps is so evidently unfair and unreasonable that approval of the settlement should be withheld. Nor do I believe that anything of value is likely to be gained by referring the matter back for further consideration by the parties. I am satisfied that the questions have been carefully considered by them. The qualifications and experience of class counsel were reviewed at some length in the carriage motion early in the proceedings. Nothing has occurred since then to dilute my confidence in the competence and diligence with which they would perform their responsibilities under the CPA. Their ability to identify each of the members of the class has enabled them to conduct an unusually thorough investigation and preliminary assessment of the claims of virtually all of them. Their decision that the imposition of the caps would be in the interests of the class as a whole is one which is entitled to be given considerable weight. I do not believe there is sufficient reason for impeding, or delaying, the implementation of the settlement by asking them to reconsider that decision.

25 The third of Mr Brock's objections concerns the amount of the fees of class counsel and the manner in which they would be borne by class members. The appropriate amount of the fees will be considered in an endorsement that will follow the release of these reasons after Mr Brock has had an opportunity to review the time dockets of class counsel. The extent to which approval is given to the payment of class counsel's fees before the final distribution — and any consequential changes to the terms of the claims process — will also be considered in the endorsement to follow.

26 The proposal that the fees, as then approved, should come off the top — rather than to be apportioned among class members in accordance with the value of the amounts ultimately distributed to each of them — is, I believe, appropriate in the circumstances of this case where a gross settlement amount would be paid up front by Air Transat and the further services of class counsel — other than those of the management committee — are to be provided for no further charge. Counsel have acted for the class as a whole and have negotiated a settlement on that basis. I see nothing unfair, or unreasonable, in awarding approved fees out of the settlement proceeds without regard to the proportions in which the proceeds will be shared by class members.

27 The other objection I received was made by Mr Giancarlo Cristiano in an attachment to an email message to class counsel. In the message Mr Cristiano thanked counsel for their diligence in dealing with the file and, subject to certain questions, concerns and objections to the terms of the settlement, he expressed his pleasure that it had been reached. In the attached letter he objected that the settlement contained no finding of liability for negligence on the part of Air Transat and no award of punitive damages. He also complained of the level of fees payable to class counsel and the administrator.

28 The first two of these objections misapprehend both the nature of the settlement as a compromise between the parties and the powers of the court. The settlement contains no admission of liability, negligence, on the part of Air Transat because it has not agreed to make any such admission. This, of course, is very common in a settlement of litigation and I have no jurisdiction to insert such a provision in the settlement. All I could do would be to refuse approval of the settlement unless it contained an admission of liability. Mr Cristiano did not ask me to do this and I would not consider such a decision to be in the best interests of class members. Similarly, and contrary to Mr Cristiano's impression, I have no power to amend the settlement so as to insert a claim for punitive damages.

29 I will consider Mr Cristiano's objection with respect to legal fees and expenses of administration in the endorsement that is to follow.

Disposition

30 Accordingly, pending the decision on the fees of class counsel, I will give provisional approval to the settlement as fair, reasonable and in the best interests of class members. This approval is subject to the terms of the endorsement that is to follow, any necessary adjustments to the times within which claims are to be made, any other acts to be performed and any other amendments counsel may consider to be required as a result of the delay in the release of these reasons. These changes, counsel's submissions with respect to the fees of independent counsel, a few drafting issues and the terms of any formal order can be considered following the release of the endorsement.

Order accordingly.

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2010 ONSC 2643
Ontario Superior Court of Justice

Osmun v. Cadbury Adams Canada Inc.

2010 CarswellOnt 2813, 2010 ONSC 2643, [2010] O.J. No. 1877, 188 A.C.W.S. (3d) 1001, 5 C.P.C. (7th) 341

David Osmun and Metro (Windsor) Enterprises Inc. (Plaintiffs) and Cadbury Adams Canada Inc., The Hershey Company, Hershey Canada Inc., Nestlé Canada, Inc., Mars, Incorporated, Mars Canada Inc. and ITWAL Limited (Defendants)

G.R. Strathy J.

Heard: April 21, 2010
Judgment: May 5, 2010 * **
Docket: 08-CV-347263PD2

Counsel: Harvey T. Strosberg, Q.C., Charles M. Wright for Plaintiffs
Scott Maidment, Adrienne Boudreau for Defendants, The Hershey Company, Hershey Canada Inc.
Christopher P. Naudie, Jean-Marc Leclerc for Defendant, Cadbury Adams Canada Inc.
Catherine Beagan Flood, Iris Antonios for Defendant, Nestle Canada Inc.
Don Houston, Randy Hughes for Defendant, ITWAL Limited
Sandra Forbes, Davit D. Akman for Defendants, Mars Incorporated, Mars Canada Inc.

Subject: Civil Practice and Procedure; Torts

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Main v. Cadbury Scweppes plc (2010), 2010 CarswellBC 1412, 2010 BCSC 816 (B.C. S.C.) — referred to

Manitoba (Securities Commission) v. Crocus Investment Fund (2006), 2006 CarswellMan 456, 210 Man. R. (2d) 171, 28 B.L.R. (4th) 228, 2006 MBQB 276 (Man. Q.B.) — referred to

Nunes v. Air Transat A.T. Inc. (2005), 20 C.P.C. (6th) 93, 2005 CarswellOnt 2503 (Ont. S.C.J.) — referred to

Nutech Brands Inc. v. Air Canada (2009), 71 C.P.C. (6th) 311, 2009 CarswellOnt 888 (Ont. S.C.J.) — considered

Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 37 C.P.C. (4th) 175, 46 O.R. (3d) 130, 1999 CarswellOnt 1851 (Ont. S.C.J.) — referred to

Osmun v. Cadbury Adams Canada Inc. (2009), 2009 CarswellOnt 8132 (Ont. S.C.J.) — referred to

Pierringer v. Hoger (1963), 124 N.W.2d 106, 21 Wis. 2d 182 (U.S. Wis. S.C.) — referred to

Rabideau v. Maddocks (1992), 12 O.R. (3d) 83, 1992 CarswellOnt 727 (Ont. Gen. Div.) — referred to

Roy c. Cadbury Adams Canada inc. (2010), 2010 CarswellQue 579, 2010 QCCS 323 (Que. S.C.) — referred to

Semple v. Canada (Attorney General) (2006), 2006 CarswellMan 482, 2006 MBQB 285, 213 Man. R. (2d) 220, 40 C.P.C. (6th) 314 (Man. Q.B.) — referred to

Standard International Corp. v. Morgan (1967), [1967] 1 O.R. 328, 1967 CarswellOnt 650 (Ont. Master) — referred to

Texas Industries Inc. v. Radcliff Materials Inc. (1981), 451 U.S. 630, 101 S.Ct. 2061, 68 L.Ed.2d 500, 1981-1 Trade Cases P 64,020 (U.S. S.C.) — referred to

Toronto Transit Commission v. Morganite Canada Corp. (2007), 47 C.P.C. (6th) 179, 2007 CarswellOnt 690 (Ont. S.C.J.) — referred to

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — referred to

s. 12 — considered

s. 13 — considered

Competition Act, R.S.C. 1985, c. C-34
Generally — referred to

Negligence Act, R.S.O. 1990, c. N.1

Generally — referred to

s. 1 — considered

MOTION for approval of partial settlement of class proceeding.

G.R. Strathy J.:

1 This is a motion by the plaintiffs for approval of a partial settlement with two of the defendants, Cadbury Adams Canada Inc. ("Cadbury") and ITWAL Limited ("ITWAL"). For the reasons that follow, I approve the settlement.

2 On December 30, 2009, I certified this action against Cadbury and ITWAL, on consent, for the purposes of settlement: *Osmun v. Cadbury Adams Canada Inc.*, [2009] O.J. No. 5566 (Ont. S.C.J.).

3 Notice of the certification and of this approval hearing has been given to the class. The deadline for written objections to the settlement agreement was April 11, 2010. There have been no objections delivered. The deadline to submit written requests to opt out of the action was April 13, 2010. No class members have opted out. The settlement is opposed by the defendants The Hershey Company and Hershey Canada Inc. (together, "Hershey"), primarily on the basis of the terms of the bar order. Other concerns, detailed below, have been expressed by counsel for Mars Incorporated and Mars Canada Inc. (together, "Mars").

Background

4 The plaintiffs allege that the defendants conspired to fix, and did fix, maintain or stabilize prices of chocolate confectionary products in Canada, and that ITWAL engaged in price maintenance. The defendants, other than ITWAL, are manufacturers of chocolate confectionary products. ITWAL operates a retail and wholesale foodservice distribution network, and was a major purchaser and distributor of chocolate confectionary products during the relevant period.

5 Companion proceedings have been commenced across Canada. This action, together with the British Columbia action titled *Main v. Cadbury Scweppes plc* [2010 CarswellBC 1412 (B.C. S.C.)] (Vancouver Registry) (Court File No. S078807) and the Quebec action titled *Roy c. Cadbury Adams Canada inc.* [2010 CarswellQue 579 (Que. S.C.)] (File No. 200-06-000094-071), will be referred to as the "Main Proceedings."

The Settlement Agreements

6 The plaintiffs in the Main Proceedings have entered into separate settlements with Cadbury, dated October 14, 2009 and with ITWAL, dated October 6, 2009 (the "Settlement Agreements"). Cadbury and ITWAL will be referred to as the "Settling Defendants" or "SDs." The Settlement Agreements are subject to court approval in Ontario, British Columbia and Quebec. Cadbury retained the right to terminate its settlement agreement if a pre-defined "opt out threshold" was exceeded. If the settlement is not approved, or is terminated by one of the SDs, the action will proceed as a contested proceeding and the SDs will be entitled to contest certification. If the Settlement Agreements are approved, the Main Proceedings will continue against the remaining defendants (referred to as the "Non-Settling Defendants" or "NSDs").

7 Other proceedings have been commenced in Canada regarding alleged price-fixing in the chocolate confectionary industry (the "Additional Proceedings"). The plaintiffs in the Additional Proceedings have agreed to resolve their claims as part of the Settlement Agreements. The plaintiffs in the Additional Proceedings have agreed that, upon the Settlement Agreements becoming effective, the Additional Proceedings will be dismissed without costs and with prejudice against the SDs and other Releasees.

8 The Settlement Agreements are detailed and complex. Among other things, under the Cadbury settlement agreement:

a. Cadbury agreed to pay CDN $5,700,000 to the class. On November 5, 2009, Cadbury paid $5,795,695.60, being the settlement amount, plus pre-deposit interest at a rate of 2.5% per annum from February 5, 2009. Class counsel deposited

these monies in an interest-bearing trust account. As of April 12, 2010, after payment of the costs of distributing the notice, the balance in the trust account was $5,655,431.33.

b. Cadbury is required to cooperate with the plaintiffs to aid them in pursuing their claims against the non-settling defendants. Cadbury is required to:

i. provide an evidentiary proffer;

ii. produce relevant documents, including transactional data and price announcements; and

iii. make available current and (if reasonably necessary) former directors, officers or employees of Cadbury for interviews with counsel in the Main Proceedings and/or experts retained by them, to provide testimony at trial, and/or affidavit evidence.

c. Cadbury will pay for the cost of the notice program in excess of $250,000. Counsel estimate that Cadbury will be required to pay at least $16,000 towards the cost of notice.

d. Cadbury has the right to terminate the Cadbury Settlement Agreement should opt outs exceed a certain threshold. As noted, there have been no opt outs.

9 The ITWAL settlement agreement provides:

a. ITWAL will assign to or for the benefit of the settlement class any claim it has against the NSDs in relation to the purchase, sale, pricing, discounting, marketing, or distribution of chocolate products (as defined). On the basis of this assignment, the plaintiffs will claim damages against the NSDs based on the sale of all chocolate products in Canada including those sold to and through ITWAL.

b. ITWAL will cooperate with the plaintiffs in pursuing the claims against the NSDs; and,

i. ITWAL will produce copies of relevant "Take Action Now" notices, transactional data, and other relevant documents that are reasonably necessary for the prosecution of the Main Proceedings;

ii. Glenn Stevens, the President and Chief Executive Officer of ITWAL will make himself available for an interview with counsel in the Main Proceedings and/or experts retained by them; and

iii. If reasonably necessary, ITWAL will make current directors, officers or employees of ITWAL available for testimony at trial and/or to provide affidavit evidence.

c. ITWAL will pay the costs of notice up to $25,000.

10 Upon the Settlement Agreements becoming effective, the Main Proceedings will be dismissed against Cadbury and ITWAL, without costs and with prejudice. Cadbury and ITWAL will receive full and final releases from the settlement class. If approved, these releases will form part of the final settlement approval orders.

The bar order - Pierringer orders

11 The Settlement Agreements also contain a "bar order," an ingredient that is common in partial settlements of tort actions in both class actions and ordinary actions. A settling defendant in such an action would not want to settle with the plaintiff, while leaving itself exposed to claims for contribution and indemnity from its co-defendants. A defendant opposing the partial settlement could effectively act as a spoiler of the settlement by maintaining a claim for contribution and indemnity from the settling defendant. In order to promote the settlement of complex multi-party litigation, a device was necessary to permit the plaintiff to settle with one or more defendants who want to settle, while maintaining the action against one or more defendants who do not want to settle. The device that has been crafted, and approved by the courts, is referred to as a "*Pierringer*

agreement." [1] Under such an agreement, the settling defendants agree to pay the plaintiff to pay a sum that is a compromise of their proportionate share of the plaintiff's claim. The court grants an order barring the non-settling defendants from seeking contribution and indemnity from the settling defendants. In return for this, the plaintiff is permitted to continue the action against the non-settling defendants, but only for the proportion of the damage for which they are directly responsible.

12 The authority to make an order giving effect to a *Pierringer* agreement, referred to as a "bar order," arises from s. 12 of the *C.P.A.*, which provides that "[T]he court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate." As well, s. 13 provides that "[T]he court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate": see *Ontario New Home Warranty Program v. Chevron Chemical Co.*, 46 O.R. (3d) 130, [1999] O.J. No. 2245 (Ont. S.C.J.) at paras. 40, 41, 75, 76. It is well-settled that the bar order cannot interfere with the substantive rights of the non-settling defendants: *Amoco Canada Petroleum Co. v. Propak Systems Ltd.*, above.

13 *Pierringer* agreements have been frequently approved by Canadian courts in class proceedings and individual actions: *Manitoba (Securities Commission) v. Crocus Investment Fund*, 2006 MBQB 276, 28 B.L.R. (4th) 228 (Man. Q.B.) at paras. 29-30; *Amoco Canada Petroleum Co. v. Propak Systems Ltd.*, 2001 ABCA 110, 200 D.L.R. (4th) 667 (Alta. C.A.), at 673 -675; *M. (J.) v. Bradley*, 71 O.R. (3d) 171, [2004] O.J. No. 2312 (Ont. C.A.) at para. 31; *Hudson Bay Mining & Smelting Co. v. Fluor Daniel Wright* (1997), 12 C.P.C. (4th) 94, 120 Man. R. (2d) 214 (Man. Q.B.) at para. 26.

14 There are a number of cases, including price-fixing cases, in which bar orders have been approved by this court: *Gariepy v. Shell Oil Co.* (2002), 26 C.P.C. (5th) 358, [2002] O.J. No. 4022 (Ont. S.C.J.); *Furlan v. Shell Oil Co.*, 2002 BCSC 1577, 25 C.P.C. (5th) 363 (B.C. S.C.); *Toronto Transit Commission v. Morganite Canada Corp.*, 47 C.P.C. (6th) 179, [2007] O.J. No. 448 (Ont. S.C.J.) at paras. 26, 36; *Randall Klein Inc. v. Nan Ya Plastics Corp. et al* (14 June 2005), London 41309CP, (Ont. S.C.J.)

15 In the partial settlement of a typical class action involving the negligence of several defendants, the following form of bar order has been used, to limit the plaintiff's claim against the non-settling defendants to their several liability:

> The Plaintiffs shall not make joint and several claims against the Non-Settling Defendants but shall restrict their claims to several claims against each of the Non-Settling Defendants such that the Plaintiffs shall be entitled to receive only those damages proven to have been caused by each of the Non-Settling Defendants.

See: *Gariepy v. Shell Oil Co.*, above, at para. 19; *Ontario New Home Warranty Program v. Chevron Chemical Co.*, above, at para. 36.

16 In this case, the proposed form of bar order in Ontario and British Columbia, as set out in the Cadbury settlement agreement, is in the following terms:

> (1) The Main Plaintiffs in the Ontario Proceeding and the BC Proceeding shall seek a bar order from the Ontario and BC Courts providing for the following:
>
> (a) all claims for contribution, indemnity or other claims over, whether asserted or unasserted or asserted in a representative capacity, inclusive of interest, taxes and costs, relating to the Released Claims (including, without limitation, the ITWAL Claims held and released by the Settlement Class as Released Claims), which were or could have been brought in the Main Proceedings or otherwise, by any Non-Settling Defendant or any other Person or party, against a Releasee, or by a Releasee against a Non-Settling Defendant, are barred, prohibited and enjoined in accordance with the terms of this section (unless such claim is made in respect of a claim by an Opt Out);
>
> (b) a Non-Settling Defendant may, upon motion on at least ten (10) days notice to counsel for the Settling Defendants, and not to be brought unless and until the action against the Non-Settling Defendants has been

certified and all appeals or times to appeal have been exhausted, seek an order from one or more of the Ontario and BC Courts for the following:

(A) documentary discovery and an affidavit of documents in accordance with the relevant rules of civil procedure from Cadbury Adams Canada;

(B) oral discovery of a representative of Cadbury Adams Canada, the transcript of which may be read in at trial;

(C) leave to serve a request to admit on Cadbury Adams Canada in respect of factual matters; and/or

(D) the production of a representative of Cadbury Adams Canada to testify at trial, with such witness to be subject to cross-examination by counsel for the Non-Settling Defendants.

Cadbury Adams Canada retains all rights to oppose such motion(s).

(c) To the extent that that an order is granted pursuant to section 8.1(1)(b) and discovery is provided to a Non-Settling Defendant, a copy of all discovery provided, whether oral or documentary in nature, shall timely be provided by Cadbury Adams Canada to the Main Plaintiffs and Class Counsel; and

(d) a Non-Settling Defendant may effect service of the motion(s) referred to in section 8.1(1)(b) on Cadbury Adams Canada by service on counsel of record for Cadbury Adams Canada in the Main Proceedings.

(2) If the Courts ultimately determine there is a right of contribution and indemnity between co-conspirators, the Main Plaintiffs in the Ontario Proceeding and the BC Proceeding and the Settlement Class Members in the Ontario Proceeding and the BC Proceeding shall restrict their joint and several claims against the Non-Settling Defendants such that the Main Plaintiffs in the Ontario Proceeding and the BC Proceeding and the Settlement Class Members in the Ontario Proceeding and the BC Proceeding shall be entitled to claim and recover from the Non-Settling Defendants on a joint and several basis, only those damages, if any, arising from and allocable to the conduct of and/or sales by the Non-Settling Defendants.

[emphasis added]

17 The terms of the proposed ITWAL bar order are substantially the same.

18 The reason for the underlined language, which is contentious, is that the law in Canada is uncertain about whether there is a right to contribution and indemnity between intentional tortfeasors, particularly where their conduct is alleged to be a criminal conspiracy: see *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R. 3 (S.C.C.) at para. 67.

19 For this reason, the plaintiffs in this case, like plaintiffs in other price-fixing cases, want to preserve their right to pursue the NSDs based on their joint liability for the plaintiffs damages, should it be determined that there is no right to contribution and indemnity between criminal co-conspirators. This is why para. 2 of the proposed bar order provides that "If the Courts ultimately determine there is a right of contribution and indemnity between co-conspirators ..." the plaintiffs will only be able to claim damages "arising from and allocable to the conduct of and/or sales" of the NSDs.

20 I will return to the subject of the proposed bar order later in these reasons.

The Position of the Defendants

Hershey's Position

21 Hershey objects to the settlement because it says that the terms of the bar order permit the plaintiffs to sue the NSDs for the profits wrongfully earned by the SDs while at the same time depriving the NSDs of their substantive right to seek apportionment, contribution and indemnity from those parties. It says that, unlike the typical "symmetrical" bar order in a *Pierringer* settlement,

which releases the SDs but limits the plaintiff's claim against the NSDs to their own proportionate share of liability, the proposed settlement in this case is "asymmetrical". Hershey says that the settlement should not be approved because it deprives the NSDs of their substantive rights, allows Cadbury to retain unlawful profits while transferring liability for them to the NSDs, and it is generally unfair to them because it treats them differently from the SDs. I will discuss this objection in more detail below.

Mars' Position

22 Mars raises several issues with respect to the settlement. I will identify them here and will also set out the disposition of these issues, which is largely the result of agreement between counsel.

(1) The ITWAL Assignment

23 Mars raises questions about the validity of the assignment of ITWAL's claims to the plaintiffs. These questions include whether the assignment is champertous and whether there is any right to assign a claim that is associated with the assignor's own illegal behaviour: *Fredrikson v. Insurance Corp. of British Columbia* (1986), 3 B.C.L.R. (2d) 145, 1986 CarswellBC 131 (B.C. C.A.), at paras. 26 and 36-37, aff'd [1988] 1 S.C.R. 1089, 1988 CarswellBC 697 (S.C.C.); *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, [1983] S.C.J. No. 33 (S.C.C.), at pp. 473, 475-479. Plaintiffs' counsel acknowledges that there may be some defences to the assignment and to ITWAL's underlying claims. The parties agree that these issues do not have to be resolved at this time. The NSDs are at liberty to raise these and other issues relating to the ITWAL assignment at any time in the future. I leave it to counsel to agree on and propose the terms of the order to give effect to this acknowledgment.

(2) The fate of the Additional Proceedings and other actions

24 Ms. Forbes on behalf of Mars expressed the concern that the proposed settlement approval orders contemplate that the Additional Proceedings will be dismissed against the SDs but will continue against the NSDs, without the benefit of a bar order, causing potential unfairness to the NSDs. She also notes that the Settlement Agreements provide that any person who falls within the settlement class, and has commenced another action, but has not opted out of the Main Proceedings, is deemed to have agreed to the dismissal of that other action as against the SDs. Mars submits that by not opting out, the class members are required to pursue any claims they have against the NSDs in the Main Proceedings and not through other actions and there should be an order to this effect.

25 I was advised that counsel are continuing to discuss the resolution of these issues. I will therefore defer consideration pending counsel either proposing a solution or reaching an impasse.

(3) Cadbury Holdings Limited

26 Cadbury Holdings Limited ("Cadbury Holdings") is not a defendant in this action or in the Quebec action, but it is a defendant in the British Columbia action. For this reason, it is a signatory to the Cadbury settlement agreement. Mars submits that both Cadbury and Cadbury Holdings should be identified as an SD in the settlement approval order and the NSDs should have the right to bring a motion for discovery of both Cadbury entities. Counsel for Cadbury acknowledges that such an order is appropriate. I agree.

(4) The Bar Order

27 Ms. Forbes made other submissions with respect to the bar order, the details of which I will discuss below.

The Plaintiffs' Response

28 Mr. Strosberg on behalf of the plaintiffs points to the enormous value of obtaining the cooperation of a "whistleblower" in conspiracy class actions. Leniency is part of the Competition Bureau's official policy (see Canadian Competition Bureau's Immunity Program under the *Competition Act* found online at http://competitionbureau.gc.ca/eic/site/cb-bc.nsf /eng/ 02480. html). There is nothing wrong in the civil context, he submits, with giving the party who breaks the "icejam" a better deal on

settlement than the other defendants who want to defend the case to the hilt. This is particularly the case when the "icebreaker" cooperates with the plaintiff as Cadbury and ITWAL have promised to do here. I accept this general proposition.

29 Mr. Strosberg also submits that the simple answer to Hershey's objections concerning the bar order is that its claim for contribution and indemnity is statute barred because it has not been asserted and the limitation period has expired. I do not accept this submission. First, in order to come to this determination it would be necessary to make factual inquiries and there is no record before me that would permit me to do so. Second, there are limitation periods in other jurisdictions that appear to be unexpired.

30 The balance of Mr. Strosberg's submissions have to do with the approval of the settlement and the bar order.

The Test for settlement approval

31 The plaintiffs refer to *Nunes v. Air Transat A.T. Inc.*, [2005] O.J. No. 2527, 20 C.P.C. (6th) 93 (Ont. S.C.J.) at para. 7, in which Cullity J. set out a useful summary of the principles to be applied on a motion for settlement approval:

> (a) to approve a settlement, the court must find that it is fair, reasonable, and in the best interests of the class;
>
> (b) the resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy;
>
> (c) there is a strong initial presumption of fairness when a proposed settlement, which was negotiated at arm's-length by counsel for the class, is presented for court approval;
>
> (d) to reject the terms of a settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a zone of reasonableness;
>
> (e) a court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within a zone or range of reasonableness. All settlements are the product of compromise and a process of give and take. Settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when considered in light of the risks and obligations associated with continued litigation;
>
> (f) it is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement. Nor is it the court's function to litigate the merits of the action or simply rubber-stamp a proposed settlement; and
>
> (g) the burden of satisfying the court that a settlement should be approved is on the party seeking approval.

32 In addition, the plaintiffs refer to the often-cited decisions of Sharpe J., as he then was, in *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Ont. Gen. Div.) at para. 13; and 40 O.R. (3d) 429, [1998] O.J. No. 2811 (Ont. Gen. Div.), at pp. 439-444; aff'd (1998), 41 O.R. (3d) 97, 165 D.L.R. (4th) 482 (Ont. C.A.); leave to appeal to denied [1998] S.C.C.A. No. 372 (S.C.C.). In the first of the above judgments, Sharpe J. set out a list of factors that are useful in assessing the reasonableness of a proposed settlement. The factors are as follows:

> (a) the presence of arm's-length bargaining and the absence of collusion;
>
> (b) the proposed settlement terms and conditions;
>
> (c) the number of objectors and nature of objections;
>
> (d) the amount and nature of discovery, evidence or investigation;

(e) the likelihood of recovery or likelihood of success;

(f) the recommendations and experience of counsel;

(g) the future expense and likely duration of litigation;

(h) information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiations;

(i) the recommendation of neutral parties, if any; and

(j) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation.

33 It is worth noting, as Sharpe J. himself did, that these factors must not be applied in a mechanical way. They are no more than a guide to the process. It is not necessary for all factors to be present, nor is it necessary that the factors be given equal weight. Some factors may be given greater significance, while others might be disregarded, depending on the circumstances of the case.

34 The court cannot modify the terms of a proposed settlement. The court can only approve or reject the settlement. In deciding whether to reject a settlement, the court should consider whether doing so could de-rail the settlement negotiations. There is no obligation on parties to resume discussions and it may be that the parties have reached their limits in negotiations and will backtrack from their positions or abandon the effort. This result would be contrary to the widely-held view that the resolution of complex litigation through settlement is encouraged by the courts and favoured by public policy: *Semple v. Canada (Attorney General)*, 2006 MBQB 285, 40 C.P.C. (6th) 314 (Man. Q.B.) at para. 26; *Ontario New Home Warranty Program v. Chevron Chemical Co.*, at paras. 69, 70.

35 I will examine below what I regard as the most important factors supporting approval of the settlement in this case.

The settlement terms and conditions are favourable to the class

36 I have set out above the key terms of the settlement. In this case, the court is dealing with a partial settlement that resolves the plaintiffs' claims against two of the defendants but leaves three remaining defendants in the action. There are direct financial benefits from the settlement, in that there will be a significant monetary recovery for the class. In addition, securing the cooperation of Cadbury and ITWAL is an important and immeasurable non-pecuniary benefit. This would be significant in any case, but in a conspiracy action, where the allegation is that the defendants share a dark secret, obtaining the cooperation of two of the alleged conspirators to assist the plaintiff in pursuing the alleged co-conspirators is of inestimable value. Cooperation of non-settling defendants has been considered to be an important factor in other cases: *Crosslink Technology Inc. v. BASF Canada* (November 30, 2007), Doc. London 50305CP (Ont. S.C.J.) at p. 8, paras. 22, 23 (unreported); *Nutech Brands Inc. v. Air Canada* [2009 CarswellOnt 888 (Ont. S.C.J.)], (19 February 2009), London, 50389CP at paras. 29-30, 36-37.

37 Tactically, the settlement is beneficial to the Class, because it reduces the size of the opposition, simplifies the litigation, and drives a potential wedge between the alleged conspirators.

38 There is a rational and justifiable basis for the *quantum* of the plaintiffs' settlement with Cadbury. It represents approximately 50% of the profits flowing to Cadbury as a result of an average 5.2% increase in its prices on October 31, 2005 and continuing until September, 2007. It represents a reasonable compromise of the plaintiffs' financial claim to reflect litigation risks, other factors contributing to the price increase and the benefit of Cadbury's cooperation in the ongoing action.

39 ITWAL is a corporation, but it is essentially a cooperative. Its members hold shares in the corporation and any profits are paid out annually. Counsel agree that ITWAL does not have significant assets. It is unlikely that a large judgment against it could be satisfied.

40 The assignment of ITWAL's claims represents a significant potential value to the settlement class. It is an integral part of the ITWAL settlement agreement. Moreover, the Cadbury settlement agreement is subject to express conditions that require the completion of this assignment under the ITWAL settlement agreement prior to the effective date of the Cadbury settlement. Since ITWAL was a major purchaser of chocolate products during the relevant period, Cadbury required a release of ITWAL's claims as a part of the settlement.

41 While ITWAL's financial contribution to the settlement is very modest, the benefit of its cooperation is important.

The settlement is the result of a real negotiating process

42 I am satisfied that the settlement in this case was the process of a real and extensive bargaining process between parties represented by experienced counsel and that the settlement achieved is a real one.

The partial settlement reduces risk of loss and increases prospects of success

43 Litigation is all about risks. Every party wants to reduce its downside and increase its upside. This partial settlement gives the plaintiffs the best of both worlds. It compromises a difficult, and by no means certain, claim against the SDs in exchange for real money and increased prospects of success against the NSDs. It may well act as an incentive to some of the NSDs to settle the claim, either individually or as a group.

There has been no objection to the settlement

44 It is significant that there has not been a single objection or opt-out. No class member opposes the settlement. There has been extensive advertising of the settlement and members of the class include large and sophisticated corporations.

The settlement comes with the recommendations of experienced class counsel

45 When class counsel presents a negotiated settlement to the court for approval, it is almost invariable that it will bear counsel's seal of approval. One might ask, therefore, why the recommendation of class counsel should be a factor. The answer is threefold. First, counsel has a duty to the class as a whole and not just to the representative plaintiffs. Counsel has to keep this responsibility in mind in recommending a settlement. Second, having been appointed by the court, counsel owes a duty to the court, including a duty to identify any limitations of the settlement. That duty has been fulfilled in this case. Third, counsel is uniquely situated to assess the risks and benefits of the litigation and the advantages of any settlement. In the case of a partial settlement, counsel is best situated to make the kind of judgment call involved in assessing the benefits obtained in exchange for releasing a party from the litigation. Class counsel in this case have extensive experience in class proceedings, including considerable experience in price-fixing cases. Their recommendation carries considerable weight.

46 I am entirely satisfied that from the perspective of the settlement class, the settlement is fair, reasonable and in their best interests. The remaining question, however, is whether the proposed bar order is fair to the NSDs. It will not be fair if it affects their substantive rights.

Is the Bar Order Unfair to the NSDs?

47 There is precedent for a bar order of the kind proposed here in a price-fixing conspiracy case. A similar order was granted by Rady J. in *Irving Paper Limited et al v. Autofina Chemicals Inc. et al*, (September 24, 2008), London, 47026. The order was the result of a partial settlement. It appears that in that case the NSDs took no position with respect to the form of order.

48 Rady J. also made a similar form of order in *Crosslink Technology Inc. v. BASF Canada* (November 30, 2007), Doc. London 50305CP (Ont. S.C.J.). In that case, the NSDs opposed the proposed order, arguing that it was unfair that the plaintiff did not agree absolutely to limit its claims against the NSDs to their proportionate liability, and instead put the onus on the NSDs to obtain a court ruling that there was a right to contribution and indemnity. The NSDs also objected to the use of the term "allocable to the sales or conduct" of the NSDs, which is similar to the language used in the proposed bar order in this

case. They contended that this language was an attempt to transfer to the NSDs responsibility for profits made from sales by the SDs, because the conduct of the NSDs in the alleged conspiracy contributed to those profits. The plaintiffs argued that there may well be no right of contribution between criminal co-conspirators engaged in anti-competitive behaviour. They said that in view of the uncertain state of Canadian law on the subject, the bar order should not compromise the plaintiff's claims against the NSDs any more than was necessary to fairly protect them. The proposed bar order left open the possibility that a court could ultimately determine that a right to contribution and indemnity existed, in which case the plaintiffs' claim would be limited to the NSDs' proportionate share. On the other hand, if there was no such right, the plaintiffs would be free to pursue the NSDs for the full extent of the damages caused by the conspiracy.

49 Rady J. concluded, at paras. 47 - 50, that the proposed bar order was appropriate:

> I begin by observing that the litigants agree that it is not settled in Canada whether a right to contribution and indemnity exists between co-conspirators in a price fixing case. It is not necessary for the court to make that determination at this junction.
>
> It seems to me that the proposed wording ... is appropriate in the circumstances of this case for several reasons. First, this is a case involving allegations of what may be criminal or quasi-criminal conduct as well as allegations of tortuous behaviour, including conspiracy and intentional interference with economic relations. The law respecting the rights of co-defendants to claim contribution and indemnity in a case such as this is not clear. As a result, it strikes me as inappropriate to craft a bar order based on an assumption that the right exists. The Non Settling Defendants are not prejudiced because their potential rights are not being limited or abrogated. They are simply held in abeyance pending further determination of the court.
>
> With respect to the inclusion of the reference to the conduct of the Non Settling Defendants, it seems to me that the frailty of that argument is that it presumes that the basis of allocating liability is based on share of sales. However, there are other methods for allocating liability, one based on profits, for example. The basis for allocating liability is an open question, and as with the entitlement to contribution and indemnity, remains to be determined by the court.
>
> As a result, I cannot give effect to the objections of the Non Settling Defendants. I am unable to conclude that their ability to fully and fairly defend their position is impaired by the proposed order.

50 I was also referred to an order made by Leitch R.S.J. in a partial settlement in *Nutech Brands Inc. v. Air Canada* (Court File No. 50389CP) February 18, 2009. The order defined "Proportionate Liability" as follows:

> 'Proportionate Liability' means that proportion of any judgment that, had they not settled, a court or other arbiter would have apportioned to the Settling Defendants and Released Parties, whether pursuant to the *pro rata*, proportionate fault, *pro tanto*, or another method.

51 The order then provided, in paragraph 13:

> (a) Subject to paragraph (b) of this paragraph [which deals with claims in other jurisdictions and is not relevant] all claims for contribution and indemnity or other claims over, whether asserted or unasserted or asserted in a representative capacity, inclusive of interest, taxes and costs, relating to the Released Claims, which were or could have been brought in the Action by any Non-Settling Defendant or any other Person or Party against a Released Party, or by a Released Party against a Non-Settling defendant or any other Person or Party, are barred, prohibited and enjoined in accordance with the terms of this paragraph (unless such claim is made in respect of a claim by an Opt Out);

52 Paragraphs 14 and 15 of the order then provided:

> 14. THIS COURT ORDERS that if, in the absence of paragraph 13 hereof, the Non-Settling Defendants would have the right to make claims for contribution and indemnity or other claims over, whether in equity or in law, by statute or otherwise, from or against the Released Parties:

(a) the Plaintiffs and the Settlement Class Members shall not claim or be entitled to recover from the Non-Settling Defendants that portion of any damages, costs or interest awarded in respect of any claim(s) on which judgment is entered that corresponds to the Proportionate Liability of the Released Parties proven at trial or otherwise;

(b) for greater certainty, the Plaintiffs and the Settlement Class Members shall limit their claims against the Non-Settling Defendants to, and shall be entitled to recover from the Non-Settling Defendants, only those claims for damages, costs and interest attributable to the Non-Settling Defendants' several liability to the Plaintiffs and the Settlement Class Members, if any;

(c) this Court shall have full authority to determine the Proportionate Liability at the trial or other disposition of this Action, whether or not the Released Parties remain in this action or appear at the trial or other disposition, and the Proportionate Liability shall be determined as if the Released Parties are parties to this Action for that purpose and any such finding by this Court in respect of the Proportionate Liability shall only apply in this Action and shall not be binding upon the Released Parties in any other proceedings.

15. THIS COURT ORDERS that if, in the absence of paragraph 13 hereof, the Non-Settling Defendants would not have the right to make claims for contribution and indemnity or other claims over, whether in equity or in law, by statute or otherwise, from or against the Released Parties, then nothing in this Order is intended to or shall limit, restrict or affect any arguments which the Non-Settling Defendants may make regarding the reduction of any judgment against them in the Action.

53 I have reproduced the terms of this order in detail because it appears to have been the product of negotiation between sophisticated parties, represented by very experienced counsel in class proceedings, some of whom are involved in this action. There is much to commend these terms and I shall return to them later in these reasons.

54 I have set out above the substance of Hershey's opposition to the bar order in this case. Hershey says that the order is unfair because there is no symmetry between what each party gives up. The NSDs lose the right to claim contribution and indemnity from the SDs, but in return the plaintiffs do not give up the right to claim from the NSDs the profits wrongfully earned by the SDs. Mr. Maidment submits that, under a proper *Pierringer* order, when the SDs are released from the action they take their liability with them and it cannot be transferred to the shoulders of the NSDs.

55 Mr. Maidment submits that, even if this form of order is permitted by the *C.P.A.*, it should not be granted because it does not promote behaviour modification. He argues that it permits the SDs to keep the fruits of their unlawful activity by entering into a speedy settlement with the plaintiffs and passing the burden of their conduct onto the shoulders of their competitors. He submits that, faced with the potential of massive joint and several liability, with no right of recourse against the SDs, there is enormous and unfair pressure on the NSDs to settle. A bit player, who has small market share, made small profits and whose participation in the acts in question was borderline, will be under enormous pressure to settle in the face of a potentially devastating award of 100% of the damages.

56 Mr. Maidment's submission is that the *C.P.A.* does not permit the form of bar order proposed in this case because it interferes with the substantive rights of the NSDs. He relies on *Lau v. Bayview Landmark Inc.*, 34 C.P.C. (6th) 138, [2006] O.J. No. 600 (Ont. S.C.J.). That proposed class action arose from a failed real estate investment scheme. It was alleged that a real estate firm (the settling defendants) was jointly and severally liable with a law firm (the non-settling defendants) for breach of trust, breach of fiduciary duty and negligence for releasing investment funds to some of the co-defendants. The terms of the proposed settlement did not contain a bar order, barring claims against the non-settling defendants for their joint and several liability. The plaintiffs, who were propounding the settlement, took the position that a bar order was not required because the non-settling defendants had not made cross-claims against the settling defendants and, in the absence of such claims, there was no reason to limit the claims of the plaintiffs to the several liability of the non-settling defendants.

57 C.L. Campbell J. refused to approve the settlement in the form sought by the plaintiffs -i.e., without a bar order. He noted that the defendants might be liable as concurrent tortfeasors rather than joint tortfeasors, but in any event he concluded

that the failure to include a bar order would prejudice the non-settling defendants' rights. With the settling defendants out of the action, the non-settling defendants would be deprived of the right to shift responsibility for the plaintiffs' loss to the settling defendants and to distinguish their conduct from the conduct of the settling defendants. They would be deprived of the ability to assert crossclaims in the future, which they might have deferred doing for tactical reasons. He concluded that the absence of a bar order would cause unfairness at paras. 18-21:

> I have concluded that the non-settling Defendants cannot procedurally or substantively be put back in the position that they would have been if there were no settlement, for the purposes of fully advancing their defence without any opportunities to amend pleadings and cross-claim, neither of which are before me or permitted in the agreement between the settling parties.
>
> I accept the general premise of settlement of actions in part where settlement in whole may not be possible. Partial settlement can well result in shortened, less expensive trials and may well be the precursor to a full settlement. In this situation, the settlement sought by the Plaintiffs would deprive the non-settling Defendants of substantive rights.
>
> The Court of Appeal for Ontario has recognized the principle of encouraging settlement in *M. (J.) v. B. (W.)*, [2004] O.J. No. 2312. But in approving what has come to be known as a "Pierringer" agreement, the Court adopted the proposition that such partial settlements must achieve "the goal of the proportionate share agreement [being] to limit the liability of the non-settling party to its several liability."...
>
> The Court of Appeal in *M. (J.)* confirmed that while apportionment of liability may be made at trial even thought there is an absent defendant through settlement, that process must not create an unfairness. In my view, the settlement here as proposed without a bar order would create an unfairness.

58 I respectfully agree with the conclusion of Campbell J. on the issues before him. I do not, however, consider that this case is authority for the proposition that it was lack of "symmetry" that made the settlement objectionable - it was the fact that the settlement prejudiced the NSDs' substantive rights. It left them jointly liable for all the plaintiffs' damages without the corresponding right of contribution from the SDs. In this case, if it is ultimately found that there is a right of contribution from the SDs, the plaintiffs' damages will be confined to the NSDs' proportionate share. If it is found that, because of the nature of their conduct, there is no right of contribution, the NSDs may be exposed to the plaintiffs' entire damages. In the latter instance, there is no prejudice to their substantive rights because it will have been determined that the NSDs have no right to contribution and indemnity and the plaintiffs have the right to sue whomsoever they choose.

59 Mr. Maidment submits that the decision of Rady J. in *Crosslink Technology Inc. v. BASF Canada*, above, is wrong because the uncertainty in the state of the law should not be a reason for depriving the NSDs of their substantive rights. He refers to *Hunt v. T & N plc*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 (S.C.C.) at para. 33 in support of the proposition that a party should not be "driven from the judgment seat" because of the uncertain state of the law or the novelty of the issue before the court. He says that the language of s. 1 of the *Negligence Act*, R.S.O. 1990, c. N.1, permitting apportionment, contribution and indemnity between defendants "in the degree in which they are respectively found to be *at fault* or negligent" means that there is a right to contribution in the case of intentional faults: *Bell Canada v. Cope (Sarnia) Ltd.* (1981), 31 O.R. (2d) 571, [1980] O.J. No. 3882 (Ont. C.A.), affg. 11 C.C.L.T. 170, [1980] O.J. No. 69 (Ont. H.C.); *Bains v. Hofs*, 76 B.C.L.R. (2d) 98, [1992] B.C.J. No. 2709 (B.C. S.C.), at para. 26; *Brown v. Cole* (1995), 43 C.P.C. (3d) 111, 14 B.C.L.R. (3d) 53 (B.C. C.A.) at para. 20; see also, *Rabideau v. Maddocks* (1992), 12 O.R. (3d) 83, [1992] O.J. No. 2850 (Ont. Gen. Div.).

60 It of some interest that the United States Supreme Court has held that there is no right to contribution between co-conspirators under U.S. antitrust legislation: *Texas Industries Inc. v. Radcliff Materials Inc.*, 451 U.S. 630 (U.S. S.C. 1981), 646. I also note a decision of Senior Master Rodgers in *Standard International Corp. v. Morgan*, [1967] 1 O.R. 328, [1967] O.J. No. 932 (Ont. Master) at para. 12, in which it was held, relying on *Hollebone v. Barnard*, [1954] O.R. 236, [1954] 2 D.L.R. 278 (Ont. H.C.), that the words "fault or negligence" in the *Negligence Act* were synonymous and simply mean "negligence" and that there is no right of contribution between co-conspirators.

61 The decision in *Hollebone v. Barnard*, was not followed by Linden J. in *Bell Canada v. Cope (Sarnia)*, a decision that was affirmed by the Court of Appeal. That case was one of both trespass and negligence. The Court of Appeal adopted the conclusion of Linden J. that:

> Fault and negligence, as these words are used in the statute, are not the same thing. Fault certainly includes negligence, but it is much broader than that. Fault incorporates all intentional wrongdoing, as well as other types of substandard conduct. In this case, both intentional and negligent wrongdoing were satisfactorily proved.

62 In *Blackwater v. Plint*, above, the Supreme Court of Canada expressly left the issue open for another day, at para. 67:

> It remains an open question whether the term "fault" in the *Negligence Act* includes vicarious liability. Fault has been held not to include intentional torts and torts other than negligence: e.g., *Chernesky v. Armadale Publishers Ltd.*, [1974] 6 W.W.R. 162 (Sask C.A.); *Funnell v. C.P.R.*, [1964] 2 O.R. 325 (H.C.). Other cases hold the contrary: *Bell Canada v. Cope (Sarnia) Ltd.* (1980), 11 C.C.L.T. 170 (Ont. H.C.);*Gerling Global General Insurance Co. v. Siskind, Cromarty, Ivey & Dowler* (2004), 12 C.C.L.I. (4th) 278 (Ont. Sup. Ct. J.). However, it is not necessary to resolve this dispute. If vicarious liability amounts to "fault" under the *Negligence Act*, the trial judge's conclusion that Canada was 75% at fault would amount to a finding that fault could be apportioned, with the result that s. 1(2) would not apply to impose an equal allocation. On the other hand, if vicarious liability is not "fault" under the Act, then the Act does not apply. In this case, liability may be assigned at common law, with the same result.

63 Mr. Maidment has pointed to some interesting commentaries on the social and economic desirability of the fair apportionment of responsibility for conspiracies in restraint of trade and allowing contribution between co-conspirators: Robert P. Taylor, *"Contribution: Searching for Fairness in a Procedural Thicket"* (1980) 49 Antitrust L. J. 1029 at 1031; Council of the Section of Antitrust Law, *"Report of the Section on Proposed Amendment of the Clayton Act to Permit Contribution in Damage Actions"* (1980) 49 Antitrust L. J. 291 at 293. As fascinating as these issues are, the parties agree that I cannot and need not resolve them at this time.

64 Mr. Maidment submits, however, that the effect of postponing the determination of this issue is to make his clients "immediately and presumptively liable" for the overcharges of ITWAL and Cadbury. As he puts it in his factum:

> As a practical matter, the complete release of the SDs means that the SDs' liability is *immediately* and presumptively transferred to the NSDs. Moreover, the NSDs' substantive right to apportionment and contribution is *immediately* and presumptively abrogated and replaced by a vague proviso that has been specially formulated by the plaintiffs and has never been the subject of any proper judicial interpretation or application in any trial.

65 In my view, this overstates the effect of the proposed order. The order does not transfer liability, presumptively or otherwise. It simply leaves that determination for another day. While it may leave the NSDs in some uncertainty concerning their rights of indemnity, that uncertainty existed from the commencement of this litigation in view of the unsettled state of the law.

66 Finally, as I have noted, Mr. Maidment submits that if there is jurisdiction to make the order, it should not be granted because it does not promote behaviour modification and it is unfair to his clients because it puts them under extreme pressure to settle the case. On the former point, he says that permitting this type of settlement will give an incentive to the most culpable conspirator to settle the case and to shift its share of the responsibility to the less culpable. The court's approval of the settlement would create an environment in which the parties whose behaviour is most in need of modification are rewarded for their wrongdoing. On the latter point, he says that the settlement is not fair and reasonable when viewed from the perspective of the NSDs because it will place pressure on innocent defendants to settle the case to avoid a crushing liability - see Robert P. Taylor, *"Contribution: Searching for Fairness in a Procedural Thicket"*, above at 1033; Joseph Angland, *"Joint and Several Liability, Contribution, and Claim Reduction "* (2008) New Directions in Antitrust Law and Policy at 2372, 2380-2382.

67 Whatever the force that Mr. Maidment's submissions might have in another case, on the facts of this case they are not persuasive. First, I am satisfied that the settlement with Cadbury results in a substantial financial penalty that is rationally

related to the benefits Cadbury received from the price increases at issue. That, coupled with the promise of cooperation and the publicity attached to the settlement, accomplishes the behaviour modification goals of class proceedings. This is not a case in which the defendant has paid a pittance for the release it has obtained. Second, the NSDs are very substantial manufacturers of chocolate products, nationally and internationally, with large shares in a market they obviously dominate. They are not "bit players" who are likely to be intimidated into an oppressive settlement.

68 I do have a concern with respect to the language of the proposed bar order that provides that if the courts determine that there is a right of contribution and indemnity the plaintiffs will be entitled to recover from the NSDs "on a joint and several basis, only those damages, if any, arising from and allocable to the conduct of and/or sales by the Non-Settling Defendants." My concern arises for two reasons. First, I am not sure what "allocable to the conduct" means. Does it mean the same as "the degree in which they are respectively found to be at fault" as used in s. 1 of the *Negligence Act* and, if so, why not simply say so? Second, by referring to "allocable to the ... sales" of the NSDs, it appears to confuse measure of damages with degree of responsibility for damages. I think the problem arises, in part, because there is no clear agreement on the measure of the individual liability of a co-conspirator. It might be more appropriate, for example, to simply use the language of the standard bar order, such as "the damage proven to have been caused by the NSDs."

69 I mentioned earlier the terms of the bar order in *Nutech Brands Inc. v. Air Canada*, proposed by Ms. Forbes. It seems to me that an order in that form would remove some of the concerns I have expressed about the bar order currently proposed. As the issue was not fully canvassed on the hearing, I would suggest that counsel discuss the precise form of the order and attempt to resolve the question. I have set aside dates for a continuation of the hearing, and will hear further submissions on the issue at that time, if necessary. The parties may make written submissions prior to the hearing, if they wish to do so.

Conclusion

70 Subject to the resolution of the issues identified in these reasons, I am prepared to approve the Cadbury settlement and the ITWAL settlement. A case conference should be arranged, as soon as possible, to discuss the procedure for the resolution of any outstanding issues and to settle the terms of the order.

Motion granted.

Footnotes

* Affirmed at *Osmun v. Cadbury Adams Canada Inc.* (2010), 5 C.P.C. (7th) 368, 2010 CarswellOnt 9276, 2010 ONCA 841 (Ont. C.A.).

** Leave to appeal refused at *Osmun v. Cadbury Adams Canada Inc.* (2011), 2011 CarswellOnt 6019, 2011 CarswellOnt 6020 (S.C.C.).

1 After *Pierringer v. Hoger*, 124 N.W.2d 106 (U.S. Wis. S.C. 1963).

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1999 CarswellOnt 2932
Ontario Superior Court of Justice

Parsons v. Canadian Red Cross Society

1999 CarswellOnt 2932, [1999] O.J. No. 3572, 103 O.T.C. 161, 40 C.P.C. (4th) 151

Dianna Lousie Parsons, Michael Herbert Cruickshanks, David Tull, Martin Henry Griffen, Anna Kardish, Elsie Kotyk, Executrix of the Estate of Harry Kotyk, Deceased and Elsie Kotyk, Personally, Plaintiffs and The Canadian Red Cross Society, Her Majesty the Queen in Right of Ontario and the Attorney General of Canada, Defendants

James Kreppner, Barry Issac, Norman Landry, as Executor of the Estate of the Late Serge Landry, Peter Felsing, Donald Milligan, Allan Gruhlke, Jim Love and Pauline Fournier, as Executrix of the Estate of the Late Pierre Fournier, Plaintiffs and The Canadian Red Cross Society, the Attorney General of Canada and Her Majesty the Queen in Right of Ontario, Defendants

Winkler J.

Heard: August 19-21, 1999
Judgment: September 22, 1999
Docket: 98-CV-141369, 98-CV-146405

Counsel: *Harvey Strosberg, Q.C.*, *Heather Rumble Peterson* and *Patricia Speight*, for plaintiffs (98-CV-141369).
Bonnie A. Tough and *David Robins*, for plaintiffs (98-CV-146405).
Wendy Matheson and *Jane Bailey*, for Canadian Red Cross Society.
Michèle Smith and *R.F. Horak*, for Her Majesty the Queen in Right of Ontario.
Ivan G. Whitehall, Q.C., *Catherine Moore* and *J.C. Spencer*, for Attorney General of Canada.
Wilson McTavish, Q.C., *Linda Waxman* and *Marian Jacko*, for office of the children's lawyer.
Laurie Redden, for office of the public guardian and trustee.
Beth Symes, for friend of the court, Thalassemia Foundation of Canada.
William P. Dermody, for intervenors, Hubert Fullarton and Tracey Goegan.
L. Craig Brown, for friend of the court, Hepatitis C Society of Canada.
Pierre R. Lavigne, for friend of the court, Dominique Honhon.
Bruce Lemer, for friend of the court, Anita Endean.
Elizabeth M. Stewart, for Provinces and Territories other than British Columbia and Quebec.
Janice E. Blackburn and *James P. Thomson*, for friend of the court, Canadian Hemophilia Society.

Subject: Public; Civil Practice and Procedure; Torts

Table of Authorities

Cases considered by *Winkler J.*:

Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229, 3 C.C.L.T. 225, 83 D.L.R. (3d) 452, 19 N.R. 50, [1978] 1 W.W.R. 577, 8 A.R. 182 (S.C.C.) — considered

Bisignano v. La Corporation Instrumentarium Inc. (September 1, 1999), Doc. 22404/96 (Ont. S.C.J.) — referred to

Dabbs v. Sun Life Assurance Co. of Canada (February 24, 1998), Doc. Toronto 96-CT-022862 (Ont. Gen. Div.) — applied

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Dabbs v. Sun Life Assurance Co. of Canada (1998), 165 D.L.R. (4th) 482, 113 O.A.C. 307, [1999] I.L.R. I-3629, 41 O.R. (3d) 97, 7 C.C.L.I. (3d) 38, 27 C.P.C. (4th) 243 (Ont. C.A.) — applied

Dabbs v. Sun Life Assurance Co. of Canada (1998), 235 N.R. 390 (note), 118 O.A.C. 399 (note) (S.C.C.) — applied

Haney Iron Works Ltd. v. Manufacturers Life Insurance Co. (1998), 169 D.L.R. (4th) 565, 9 C.C.L.I. (3d) 253 (B.C. S.C.) — referred to

Nantais v. Telectronics Proprietary (Canada) Ltd. (1995), 127 D.L.R. (4th) 552, 40 C.P.C. (3d) 245, 25 O.R. (3d) 331 (Ont. Gen. Div.) — considered

Nantais v. Telectronics Proprietary (Canada) Ltd. (1995), 40 C.P.C. (3d) 263, 129 D.L.R. (4th) 110, 25 O.R. (3d) 331 at 347 (Ont. Gen. Div.) — considered

Ontario New Home Warranty Program v. Chevron Chemical Co. (June 17, 1999), Doc. 22487/96 (Ont. S.C.J.) — applied

Sawatzky v. Société Chirurgicale Instrumentarium Inc. (August 4, 1999), Doc. Vancouver C954740 (B.C. S.C.) — referred to

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — considered

s. 5(2) — considered

s. 8(3) — considered

s. 26(4) — considered

s. 26(6) — considered

s. 29(2) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

MOTION for approval of settlement in two companion class proceedings.

Winkler J.:

Nature of the Motion

1 This is a motion for approval of a settlement in two companion class proceedings commenced under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, the "Transfused Action" and the "Hemophiliac Action," brought on behalf of persons infected by Hepatitis-C from the Canadian blood supply. The Transfused Action was certified as a class proceeding by order of this court on June 25, 1998, as later amended on May 11, 1999. On the latter date, an order was also issued certifying the Hemophiliac Action. There are concurrent class proceedings in respect of the same issues before the courts in Quebec and British Columbia. The Ontario proceedings apply to all persons in Canada who are within the class definition with the exception of any person who is included in the proceedings in Quebec and British Columbia. The motion before this court concerns a Pan-Canadian agreement intended to effect a national settlement, thus bringing to an end this aspect to the blood tragedy. Settlement approval motions similar to the instant proceeding have been contemporaneously heard by courts in Quebec and British Columbia with a view to bringing finality to the court proceedings across the country.

The Parties

2 The plaintiff class in the Transfused Action are persons who were infected with Hepatitis C from blood transfusions between January 1, 1986 to July 1, 1990. The plaintiff class in the Hemophiliac Action are persons infected with Hepatitis C from the taking of blood or blood products during the same time period.

3 The defendants in the Ontario actions are the Canadian Red Cross Society ("CRCS"), Her Majesty the Queen in Right of Ontario, and the Attorney General of Canada. The Ontario classes are national in scope. Therefore, the other Provincial and Territorial Governments of Canada, with the exception of Quebec and British Columbia, have moved to be included in the Ontario actions as defendants but only if the settlement is approved.

4 The court has granted intervenor status to a number of individuals, organizations and public bodies, namely, Hubert Fullarton and Tracy Goegan, the Canadian Hemophilia Society, the Thalassemia Foundation of Canada, the Hepatitis C Society of Canada, the Office of the Children's Lawyer and the Office of the Public Guardian and Trustee of Ontario.

5 Pursuant to an order of this court, PricewaterhouseCoopers received and presented to the court over 80 written objections to the settlement from individuals afflicted with Hepatitis-C. In addition, 11 of the objectors appeared at the hearing of the motion to proffer evidence as to their reasons for objecting to the settlement.

6 The approval of the settlement before the court is supported by class counsel and the Ontario and Federal Crown defendants. In addition to these parties, the Provincial and Territorial governments who seek to be included if the settlement is approved, and the intervenors, the Canadian Hemophilia Society, the Office of the Children's Lawyer and the Office of the Public Guardian and Trustee made submissions in support of approval of the settlement. The Canadian Red Cross Society ("CRCS") appeared, but did not participate, all actions against it having been stayed by order of Mr. Justice Blair dated July 28, 1999, pursuant to a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. The other intervenors and individual objectors voiced concerns about the settlement and variously requested that the court either reject the settlement or vary some of its terms in the interest of fairness.

Background

7 Both actions were commenced as a result of the contamination of the Canadian blood supply with infectious viruses during the 1980s. The background facts are set out in the pleadings and the numerous affidavits forming the record on this motion. The following is a brief summary.

8 The national blood supply system in Canada was developed during World War II by the CRCS. Following WWII, the CRCS was asked to carry on with the operation of this national system, and did so as part of its voluntary activities without significant financial support from any government. As a result of its experience and stewardship of system, the CRCS had a virtual monopoly on the collection and distribution of blood and blood products in Canada.

9 Over time the demand for blood grew and Canada turned to a universal health care system. Because of these developments, the CRCS requested financial assistance from the provincial and territorial governments. The governments, in turn, demanded greater oversight over expenditures. This led to the formation of the Canadian Blood Committee which was composed of representatives of the federal, provincial and territorial governments. The CBC became operational in the summer of 1982. Other than this overseer committee, there was no direct governmental regulation of the blood supply in Canada.

10 The 1970s and 80s were characterized medically by a number of viral infection related problems stemming from contaminated blood supplies. These included hepatitis and AIDS. The defined classes in these two class actions, however, are circumscribed by the time period beginning January 1, 1986 and ending July 1, 1990. During the class periods, the CRCS was the sole supplier and distributor of whole blood and blood products in Canada. The viral infection at the center of these proceedings is now known as Hepatitis C.

11 Hepatitis is an inflammation of the liver that can be caused by various infectious agents, including contaminated blood and blood products. The inflammation consists of certain types of cells that infiltrate the tissue and produce by-products called cytokines or, alternatively, produce antibodies which damage liver cells and ultimately cause them to die.

12 One method of transmission of hepatitis is through blood transfusions. Indeed, it was common to contract hepatitis through blood transfusions. However, due to the limited knowledge of the effects of contracting hepatitis, the risk was considered acceptable in view of the alternative of no transfusion which would be, in many cases, death.

13 As knowledge of the disease evolved, it was discovered that there were different strains of hepatitis. The strains identified as Hepatitis A ("HAV") and Hepatitis B ("HBV") were known to the medical community for some time. HAV is spread through the oral-fecal route and is rarely fatal. HBV is blood-borne and may also be sexually transmitted. It can produce violent illness for a prolonged period in its acute phase and may result in death. However, most people infected with HBV eliminate the virus from their system, although they continue to produce antibodies for the rest of their lives.

14 During the late 1960s, an antigen associated with HBV was identified. This discovery led to the development of a test to identify donated blood contaminated with HBV. In 1972, the CRCS implemented this test to screen blood donations. It soon became apparent that post-transfusion hepatitis continued to occur, although much less frequently. In 1974, the existence of a third form of viral hepatitis, later referred to as Non-A Non-B Hepatitis ("NANBH") was postulated.

15 This third viral form of hepatitis became identified as Hepatitis C ("HCV") in 1988. Its particular features are as follows:

(a) transmission through the blood supply if HCV infected donors are unaware of their infected condition and if there is no, or no effective, donor screening;

(b) an incubation period of 15 to 150 days;

(c) a long latency period during which a person infected may transmit the virus to others through blood and blood products, or sexually, or from mother to fetus; and

(d) no known cure.

16 The claims in these actions are founded on the decision by the CRCS, and its overseers the CBC, not to conduct testing of blood donations to the Canadian blood supply after a "surrogate" test for HCV became available and had been put into widespread use in the United States.

17 In a surrogate test a donor blood sample is tested for the presence of substances which are associated with the disease. The surrogate test is an indirect method of identifying in a blood sample the likelihood of an infection that cannot be identified directly because no specific test exists. During the class period, there were two surrogate tests capable of being used to identify the blood donors suspected of being infected with HCV, namely, a test to measure the ALT enzyme in a donor's blood and a test to detect the anti-HBc, a marker of HBV, in the blood.

18 The ALT enzyme test was useful because it highlights inflammation of the liver. There is an increased level of ALT enzymes in the blood when a liver is inflamed. The test is not specific for any one liver disease but rather indicates inflammation from any cause. Elevated ALT enzymes are a marker of liver dysfunction which is often associated with HCV.

19 The anti-HBc test detects exposure to HBV and is relevant to the detection of HCV because of the assumption that a person exposed to HBV is more likely than normal to have been exposed to HCV, since both viruses are blood-borne and because the populations with higher rates of seroprevalence were believed to be similar.

20 The surrogate tests were subjected to various studies in the United States. Among other aspects, the studies analyzed the efficacy of each test in preventing NANBH post-transfusion infection and the extent to which the rejection of blood donations would be increased. The early results of the studies did not persuade the agencies responsible for blood banks in the U.S. to implement surrogate testing as a matter of course. However, certain individuals, including Dr. Harvey Alter, a leading U.S. expert on HCV, began a campaign to have the U.S. blood agencies change their policies. In consequence, in April 1986 the largest U.S. blood agency decided that both surrogate tests should be implemented, and further, that the use of the tests would become a requirement of the agency's standard accreditation program in the future. This effectively made surrogate testing the national standard in the U.S. and by August 1, 1986, all or virtually all volunteer blood banks in the U.S. screened blood donors by using the ALT and anti-HBc tests.

21 This course was not followed in Canada. Although there was some debate amongst the doctors involved with the CRCS, surrogate testing was not adopted. Rather, in 1984 a meeting was held at the CRCS during which a multi-centre study was proposed. The purpose of the study was to determine the incidence of NANBH in Canada. The CRCS blood centres proposed to take part in the study were those in Toronto, Montreal, Ottawa, Edmonton and Vancouver.

22 Prior to the 1984 meeting however, Dr. Victor Feinman of Mount Sinai Hospital had already begun a study to determine the incidence of NANBH in those who had received blood transfusions. This study had a significant limitation in that it did not measure the effectiveness of surrogate testing. Although the limitation was known to the CRCS, the medical directors agreed at their meeting on March 29-30, 1984 to review Dr. Feinman's research to determine whether the proposed CRCS multi-centre study was still required. Ultimately, the CRCS did not conduct the multi-centre study.

23 The CRCS was aware of the American decision to implement surrogate testing in 1986 but opted instead to await a full assessment of the results of the Dr. Feinman study and the impact of testing for the Human-Immunodeficiency Virus ("HIV") and "self-designation" as possible surrogates to screen for NANBH.

24 This decision was criticized by Dr. Alter. In an article published in the *Medical Post* in February 1988, Dr. Alter was quoted as stating that:

> while the use of surrogate markers is far from ideal, the lack of any specific test to identify [NANBH], coupled with the serious chronic consequences of the disease, makes the need for these surrogate tests essential.

25 The CRCS never implemented surrogate testing. In late 1988, HCV was isolated. The Chiron Corporation developed a test for anti-HCV for use by blood banks. In March 1990, the CRCS blood centres began implementing the anti-HCV test, and by June 30, 1990, all centres had implemented the test. Hence the class definitions stipulated in the two certification orders before this court, covers the period between January 1, 1986 and July 1, 1990, which corresponds to the interval between the widespread use of surrogate testing in the U.S. and the universal adoption of the Chiron HCV test in Canada. The classes are described fully below.

The Claims

26 It is alleged by the plaintiffs in both actions that had the defendants taken steps to implement the surrogate testing, the incidence of HCV infection from contaminated blood would have been reduced by as much as 75% during the class period. Consequently, they bring the actions on behalf of classes described as the Ontario Transfused Class and the Ontario Hemophiliac

Class. The plaintiffs assert claims based in negligence, breach of fiduciary duty and strict liability in tort as against all of the defendants.

The Classes

27 The Ontario Transfused Class is described as:

(a) all persons who received blood collected by the CRCS contaminated with HCV during the Class Period and who are or were infected for the first time with HCV and who are:

(i) presently or formerly resident in Ontario and receive blood in Ontario and who are or were infected with post-transfusion HCV;

(ii) resident in Ontario and received blood in any other Province or Territory of Canada other than Quebec and who are or were infected with post-transfusion HCV;

(iii) resident elsewhere in Canada and received blood in Canada, other than in the Provinces of British Columbia and Quebec, and who are or were infected with post-transfusion HCV;

(iv) resident outside Canada and received blood in any Province or Territory of Canada, other than in the Province of Quebec, and who are or were infected with post-transfusion HCV; and

(v) resident anywhere and received blood in Canada and who are or were infected with post-transfusion HCV and who are not included as class members in the British Columbia Transfused Class Action or the Quebec Transfused Class Action;

(b) the Spouse of a person referred to in subparagraph (a) who is or was infected with HCV by such person; and

(c) the child of a person referred to in subparagraph (a) or (b) who is or was infected with HCV by such person.

28 The Ontario Hemophiliac Class is described as:

(a) all persons who have or had a congenital clotting factor defect or deficiency, including a defect or deficiency in Factors V, VII, VIII, IX, XI, XII, XIII or von Willebrand factor, and who received or took Blood (as defined in Section 1.01 of the Hemophiliac HCV Plan) during the Class Period and who are:

(i) presently or formerly a resident in Ontario and received or took Blood in Ontario and who are or were infected with HCV;

(ii) resident in Ontario and received or took Blood in any other Province or Territory of Canada other than Quebec and who are or were infected with HCV;

(iii) resident elsewhere in Canada and received or took Blood in Canada other than in the Provinces of British Columbia and Quebec. and who are or were infected with HCV;

(iv) resident outside Canada and received or took Blood in any Province or Territory in Canada, other than in the Province of Quebec, and who are or were infected with HCV; and

(v) resident anywhere and received or took Blood in Canada and who are not included as class members in the British Columbia Hemophiliac Class Action or the Quebec Hemophiliac Class Action;

(b) the Spouse of a person referred to in subparagraph (a) who is or was infected with HCV by such person; and

(c) the child of a person referred to subparagraph (a) or (b) who is or was infected with HCV by such person.

29 In addition in each of the actions, there is a "Family" class described, in the Ontario Transfused Class, as follows:

(a) the Spouse, child, grandchild, parent, grandparent or sibling of an Ontario Transfused Class Member;

(b) the spouse of a child, grandchild, parent or grandparent of an Ontario Transfused Class Member;

(c) a former Spouse of an Ontario Transfused Class Member;

(d) a child or other lineal descendant of a grandchild of an Ontario Transfused Class Member;

(e) a person of the opposite sex to an Ontario Transfused Class Member who cohabitated for a period of at least one year with that Class Member immediately before his or her death;

(f) a person of the opposite sex to an Ontario Transfused Class Member who was cohabitating with that Class Member at the date of his or her death and to whom that Class Member was providing support or was under a legal obligation to provide support on the date of his or her death; and

(g) any other person to whom an Ontario Transfused Class Member was providing support for a period of at least three years immediately prior to his or her death.

There is a similarly described Family Class in the Hemophiliac Action.

The Proposed Settlement

30 The parties have presented a comprehensive package to the court. Not only does it pertain to these actions, but it is also intended to be a Pan-Canadian agreement to settle the simultaneous class proceedings before the courts in Quebec and British Columbia. The settlement will not become final and binding until it is approved by courts in all three provinces. It consists of a Settlement Agreement, a Funding Agreement and Plans for distribution of the settlement funds in the Transfused Action and the Hemophiliac Action.

31 The Settlement Agreement creates the following two Plans:

(1) the Transfused HCV Plan to compensate persons who are or were infected with HCV through a blood transfusion received in Canada in the Class Period, their secondarily-infected Spouses and children and their other family members; and

(2) the Hemophiliac HCV Plan to compensate hemophiliacs who received or took blood or blood products in Canada in the Class Period and who are or were infected with HCV, their secondarily-infected Spouses and children and their other family members.

32 To fund the Agreement, the federal, provincial and territorial governments have promised to pay the settlement amount of $1,118,000,000 plus interest accruing from April 1, 1998. This will total approximately $1,207,000,000 as of September 30, 1999.

33 The Funding Agreement contemplates the creation of a Trust Fund on the following basis:

(i) a payment by the Federal Government to the Trust Fund, on the date when the last judgment or order approving the settlement of the Class Actions becomes final, of 8/11ths of the settlement amount, being the sum of approximately $877,818,181, subject to adjustments plus interest accruing after September 30, 1999 to the date of payment; and

(ii) a promise by each Provincial and Territorial Government to pay a portion of its share of the 3/11ths of the unpaid balance of the settlement amount as may be requested from time to time until the outstanding unpaid balance of the settlement amount together with interest accruing has been paid in full.

34 The Governments have agreed that no income taxes will be payable on the income earned by the Trust, thereby adding, according to the calculations submitted to the court, a present value of about $357,000,000 to the settlement amount.

35 The Agreement provides that the following claims and expenses will be paid from the Trust Fund:

(a) persons who qualify in accordance with the provisions of the Transfused HCV Plan;

(b) persons who qualify in accordance with the provisions of the Hemophiliac HCV Plan;

(c) spouses and children secondarily-infected with HIV to a maximum of 240 who qualify pursuant to the Program established by the Governments (which is not subject to Court approval);

(d) final judgments or Court approved settlements payable by any FPT Government to a Class Member or Family Class Member who opts out of one of the Class Actions or is not bound by the provisions of the Agreement or a person who claims over or brings a third-party claim in respect of the Class Member's receiving or taking of blood or blood products in Canada in the Class Period and his or her infection with HCV, plus one-third of Court-approved defence costs;

(e) subject to the Courts' approval, the costs of administering the Plans, including the costs of the persons hereafter enumerated to be appointed to perform various functions under the Agreement;

(f) subject to the Courts' approval, the costs of administering the HIV Program, which Program administration costs, in the aggregate, may not exceed $2,000,000; and

(g) subject to Court approval, fees, disbursements, costs, GST and other applicable taxes of Class Action Counsel.

Class Members Surviving as of January 1, 1999

36 Other than the payments to the HIV sufferers, which I will deal with in greater detail below, the plans contemplate that compensation to the class members who were alive as of January 1, 1999, will be paid according to the severity of the medical condition of each class member. All class members who qualify as HCV infected persons are entitled to a fixed payment as compensation for pain and suffering and loss of amenities of life based upon the stage of his or her medical condition at the time of qualification under the Plan. However, the class member will be subsequently entitled to additional compensation if and when his or her medical condition deteriorates to a medical condition described at a higher compensation level. This compensation ranges from a single payment of $10,000, for a person who has cleared the disease and only carries the HCV antibody, to payments totaling $225,000 for a person who has decompensation of the liver or a similar medical condition.

37 The compensation ranges are described in the Agreement as "Levels." In addition to the payments for loss of amenities, class members with conditions described as being at compensation Level 3 or a higher compensation Level (4 or above), and whose HCV caused loss of income or inability to perform his or her household duties, will be entitled to compensation for loss of income or loss of services in the home.

38 The levels, and attendant compensation, for class members are described as follows:

(i) Level 1

Qualification	Compensation
A blood test demonstrates that the HCV antibody is present in the blood of a class member.	A lump sum payment of $10,000 plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(ii) Level 2

Qualification	Compensation
A polymerase chain reaction test (PCR) demonstrates that HCV is present in the blood of a class member.	Cumulative compensation of $30,000 which comprises the $10,000 payment at level 1, plus a payment of $15,000 immediately and another $5,000 when the court determines that the Fund is sufficient to do so, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(iii) Level 3

Qualification	Compensation
If a class member develops non-bridging fibrosis, or receives compensable drug therapy (i.e. Interferon or Ribavirin), or meets a protocol for HCV compensable treatment regardless of whether the treatment is taken, then the class member qualifies for Level 3 benefits.	Option 1 — $60,000 comprised of the level 1 and 2 payments plus an additional $30,000 Option 2 — $30,000 from the Level 1 and 2 benefits, and if the additional $30,000 from Option 1 is waived, compensation for loss of income or loss of services in the home, subject to a threshold qualification. In addition, at this level, the class member is entitled to an additional $1,000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(iv) Level 4

Qualification	Compensation
If a class member develops bridging fibrosis, he or she qualifies as a Level 4 claimant	There is no further fixed payment beyond that of Level 3 at this level. In addition to those previously defined benefits, the claimant is entitled to compensation for loss of income or loss of services in the home, $1,000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(v) Level 5

Qualification	Compensation
A class member who develops (a) cirrhosis; (b) unresponsive porphyria cutanea tarda which is causing significant disfigurement and disability; (c) unresponsive thrombocytopenia (low platelets) which result in certain other conditions; or (d) glomerulonephritis not requiring dialysis, he or she qualifies as a Level 5 claimant.	$125,000 which consists of the prior $60,000, if the claimant elected Option 1 at Level 3, plus an additional $65,000 plus the claimant is entitled to compensation for loss of income or loss of services in the home, $1,000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(vi) Level 6

Qualification	Compensation
If a class member receives a liver transplant, or develops: (a) decompensation of the liver; (b) hepatocellular cancer; (c) B-cell lymphoma; (d) symptomatic mixed cryoglobullinemia; (e) glomerulonephritis requiring dialysis; or (f) renal failure, he or or she qualifies as a Level 6 claimant.	$225,000 which consists of the $125,000 available at the prior levels plus an additional $100,000 plus the claimant is entitled to compensation for loss of income or loss of services in the home, $1,000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses. The claimant is also entitled to reimbursement for costs of care up to $50,000 per year.

39 There are some significant "holdbacks" of compensation at certain levels. As set out in the table above, a claimant who is entitled to the $20,000 compensation payment at level 2 will initially be paid $15,000 while $5,000 will be held back in the Fund. If satisfied that there is sufficient money in the Fund, the Courts may then declare that the holdback shall be removed in accordance with Section 10.01(1)(i) of the Agreement and Section 7.03 of the Plans. Claimants with monies held back will then receive the holdback amount with interest at the prime rate from the date they first became entitled to the payment at Level 2. In addition, any claimant that qualifies for income replacement at Level 4 or higher will be subjected to a holdback of 30% of the compensation amount. This holdback may be removed, and the compensation restored, on the same terms as the Level 2 payment holdback.

40 There is a further limitation with respect to income, namely, that the maximum amount subject to replacement has been set at $75,000 annually. Again this limitation is subject to the court's review. The court may increase the limit on income, after the holdbacks have been removed, and the held benefits restored, if the Fund contains sufficient assets to do so.

41 Payment of loss of income is made on a net basis after deductions for income tax that would have been payable on earned income and after deduction of all collateral benefits received by the Class Member. Loss of income payments cease upon a Class Member reaching age 65. A claim for the loss of services in the home may be made for the lifetime of the Class Member.

Class Members Dying Before January 1, 1999

42 If a Class Member who died before January 1, 1999, would have qualified as a HCV infected person but for the death, and if his or her death was caused by HCV, compensation will be paid on the following terms:

(a) the estate will be entitled to receive reimbursement for uninsured funeral expenses to a maximum of $5,000 and a fixed payment of $50,000, while approved family members will be entitled to compensation for loss of the deceased's guidance, care and companionship on the scale set out in the chart at paragraph 82 below and approved defendants may be entitled to compensation for their loss of support from the deceased or for the loss of the deceased's services in the home ("Option 1"); or

(b) at the joint election of the estate and the approved family members and dependants of the deceased, the estate will be entitled to reimbursement for uninsured funeral expenses to a maximum of $5,000, and the estate and the approved family members and dependants will be jointly entitled to compensation of $120,000 in full settlement of all of their claims ("Option 2").

43 Under the Plans when a deceased HCV infected person's death is caused by HCV, the approved dependants may be entitled to claim for loss of support until such time as the deceased would have reached age 65 but for his death.

44 Payments for loss of support are made on a net basis after deduction of 30% for the personal living expenses of the deceased and after deduction of any pension benefits from CPP received by the dependants.

45 The same or similar holdbacks or limits will initially be imposed on the claim by dependants for loss of support under the Plans as are imposed on a loss of income claim. The $75,000 cap on pre-claim gross income will be applied in the calculation

of support and only 70% of the annual loss of support will be paid. If the courts determine that the Trust Fund is sufficient and vary or remove the holdbacks or limits, the dependants will receive the holdbacks, or the portion the courts direct, with interest from the time when loss of support was calculated subject to the limit.

46 Failing agreement among the approved dependants on the allocation of loss of support between them, the Administrator will allocate loss of support based on the extent of support received by each of the dependants prior to the death of the HCV infected person.

Class Members Cross-Infected with HIV

47 Notwithstanding any of the provisions of the Hemophiliac HCV Plan, a primarily-infected hemophiliac who is also infected with HIV may elect to be paid $50,000 in full satisfaction of all of his or her claims and those of his or her family members and dependants.

48 Persons infected with HCV and secondarily-infected with HIV who qualify under a Plan (or, where the person is deceased, the estate and his or her approved family members and dependants) may not receive compensation under the Plan until entitlement exceeds the $240,000 entitlement under the Program after which they will be entitled to receive any compensation payable under the Plan in excess of $240,000.

49 Under the Hemophiliac HCV Plan, the estate, family members and dependants of a primarily-infected hemophiliac who was cross-infected with HIV and who died before January 1, 1999 may elect to receive a payment of $72,000 in full satisfaction of their claims.

The Family Class Claimants

50 Each approved family class member of a qualified HCV infected person whose death was caused by HCV is entitled to be paid the amount set out below for loss of the deceased's guidance, care and companionship:

Relationship	Compensation
Spouse	$25,000
Child under 21 at time of death of class member	$15,000
Child over 21 at time of death of class member	$5,000
Parent or sibling	$5,000
Grandparent or Grandchild	$500

51 If a loss of support claim is not payable in respect of the death of a HCV infected person whose death was caused by his or her infection with HCV, but the approved dependants resided with that person at the time of the death, then these dependants are entitled to be compensated for the loss of any services that the HCV infected person provided in the home at the rate of $12 per hour to a maximum of 20 hours per week.

52 The Agreement and/or the Plans also provide that:

(a) all compensation payments to claimants who live in Canada will be tax free;

(b) compensation payments will be indexed annually to protect against inflation;

(c) compensation payments other than payments for loss of income will not affect social benefits currently being received by claimants;

(d) life insurance payments received by or on behalf of claimants will not be taken into account for any purposes whatsoever under the Plans; and

(e) no subrogation payments will be paid directly or indirectly.

The Funding Calculations

53 Typically in settlements in personal injury cases, where payments are to be made on a periodic basis over an extended period of time, lump sum amounts are set aside to fund the extended liabilities. The amount set aside is based on a calculation which determines the "present value" of the liability. The present value is the amount needed immediately to produce payments in the agreed value over the agreed time. This calculation requires factoring in the effects of inflation, the return on the investment of the lump sum amount and any income or other taxes which might have to be paid on the award or the income it generates. Dealing with this issue in a single victim case may be relatively straightforward. Making an accurate determination in a class proceeding with a multitude of claimants suffering a broad range of damages is a complex matter.

54 Class counsel retained the actuarial firm of Eckler Partners Ltd. to calculate the present value of the liabilities for the benefits set out in the settlement. The calculations performed by Eckler were based on a natural history model of HCV constructed by the Canadian Association for the Study of the Liver ("CASL") at the request of the parties. As stated in the Eckler report at p.3, "the results from the [CASL] study form the basis of our assumptions regarding the development of the various medical outcomes." However, the Eckler report also notes that in instances where the study was lacking in information, certain extensions to some of the probabilities were supplied by Dr. Murray Krahn who led the study. In certain other situations, additional or alternative assumptions were provided by class counsel.

55 The class in the Transfused Action is comprised of those persons who received blood transfusions during the class period and are either still surviving or have died from a HCV related cause. The CASL study indicates that the probable number of persons infected with HCV through blood transfusion in the class period, the "cohort" as it is referred to in the study, is 15,707 persons. The study also estimates the rates of survival of each infected person. From these estimates, Eckler projects that the cohort as of January 1, 1999 is 8,104 persons. Of those who have died in the intervening time, 76 are projected to be HCV related deaths and thus eligible for the death benefits under the settlement.

56 In the case of the Hemophiliac class, the added factor of cross-infection with HIV, and the provisions in the plan dealing with this factor, require some additional considerations. Eckler was asked to make the following assumptions based primarily on the evidence of Dr. Irwin Walker:

> (a) the Hemophiliac cohort size is approximately 1645 persons
>
> (b) 15 singularly infected and 340 co-infected members of this cohort have died prior to January 1, 1999; the 15 singularly infected and 15 of those co-infected will establish HCV as the cause of death and claim under the regular death provisions (but there is no $120,000 option in this plan); the remaining 325 co-infected will take the $72,000 option.
>
> (c) a further 300 co-infected members are alive at January 1, 1999; of these, 80%, i.e. 240, will take the $50,000 option;
>
> (d) 990 singularly infected hemophiliacs are alive at January 1, 1999
>
> (e) the remaining 60 co-infected and the 990 singularly infected hemophiliacs will claim under the regular provisions and should be modeled in the same way as the transfused persons, i.e. apply the same age and sex profiles, and the same medical, mortality and other assumptions as for the transfused group, except that the 60 co-infected claimants will not have any losses in respect of income.

57 Because of the structure of this agreement, Eckler was not required to consider the impact of income or other taxes on the investment returns available from the Fund. With respect to the rate of growth of the Fund, Eckler states at p. 10 that:

> A precise present value calculation would require a formula incorporating the gross rate of interest and the rate of inflation as separate parameters. However, virtually the same result will flow from a simpler formula where the future payments are discounted at a net rate equal to the excess of the gross rate of interest over the assumed rate of inflation.

Eckler calculates the annual rate of growth of the Fund will be 3.4% per year on this basis. This is referred to as the "net discount rate."

58 There is one other calculation that is worthy of particular note. In determining the requirements to fund the income replacement benefits set out in the settlement, Eckler used the average industrial aggregate earnings rate in Canada estimated for 1999. From this figure, income taxes and other ordinary deductions were made to arrive at a "pre-claim net income." Then an assumption is made that the class members claiming income compensation will have other earnings post-claim that will average 40% of the pre-claim amount. The 60% remaining loss, in dollars expressed as $14,500, multiplied by the number of expected claimants, is the amount for which funding is required. Eckler points out candidly at p. 20 that:

> [in regard to the assumed average of Post-claim Net Income]...we should bring to your attention that without any real choice, the foregoing assumed level of 40% was still based to a large extent on anecdotal input and out intuitive judgement on this matter rather than on rigourous scientific studies which are simply not available at this time.

There are other assumptions and estimates which will be dealt with in greater detail below.

59 The Eckler conclusion is that if the settlement benefits, including holdbacks, and the other liabilities were to be paid out of the Fund, there is a present value deficit of $58,533,000. Prior to the payment of holdbacks, the Fund would have a surplus of $34,173,000.

The Thalassemia Victims

60 Prior to analyzing the settlement, I turn to the concerns advanced by The Thalassemia Foundation of Canada. The organization raises the objection that the plan contains a fundamental unfairness as it relates to claims requirements for members of the class who suffer from Thalassemia.

61 Thalassemia, also known as Mediterranean Anemia or Cooley's Anemia, is an inherited form of anemia in which affected individuals are unable to make normal hemoglobin, the oxygen carrying protein of the red blood cell. Mutations of the hemoglobin genes are inherited. Persons with a thalassemia mutation in one gene are known as carriers or are said to have thalassemia minor. The severe form of thalassemia, thalassemia major, occurs when a child inherits two mutated genes, one from each parent. Children born with thalassemia major usually develop the symptoms of severe anemia within the first year of life. Lacking the ability to produce normal adult hemoglobin, children with thalassemia major are chronically fatigued; they fail to thrive; sexual maturation is delayed and they do not grow normally. Prolonged anemia causes bone deformities and eventually will lead to death, usually by their fifth birthday.

62 The only treatment to combat thalassemia major is regular transfusions of red blood cells. Persons with thalassemia major receive 15 cubic centimeters of washed red blood cells per kilogram of weight every 21 to 42 days for their lifetime. That is, a thalassemia major person weighing 60 kilograms (132 pounds) may receive 900 cubic centimeters of washed red blood cells each and every transfusion. Such a transfusion corresponds to four units of blood. Persons with thalassemia major have not been treated with pooled blood. Therefore, in each transfusion a thalassemia major person would receive blood from four different donors and over the course of a year would receive 70 units of blood from potentially 70 different donors. Over the course of the Class Period, a class member with thalassemia major might have received 315 units of blood from potentially 315 different donors.

63 Over the past three decades, advances in scientific research have allowed persons with thalassemia major in Canada to live relatively normal lives. Life expectancy has been extended beyond the fourth decade of life, often with minimal physical symptoms. In Canada approximately 300 persons live with thalassemia major.

64 Of the 147 transfused dependent thalassemia major patients currently being treated in the Haemoglobinopathy Program at the Hospital for Sick Children and Toronto General Hospital, 48 have tested positive using HCV antibody tests. Fifty-one percent of the population at TGH have tested positive; only 14% of the population of HSC have tested positive. The youngest

of these persons was born in 1988; 9 of them are 13 years of age or older but less than 18 years of age; the balance are adults. Nine thalassemia major patients in the Haemoglobinopathy Program have died since HCV testing was available in 1991. Seven of these persons were HCV positive. The Foundation estimates that there are approximately 100 thalassemia major patients across Canada who are HCV positive.

65 The unfairness pointed to by the Thalassemia Foundation is that class members suffering from thalassemia are included in the Transfused Class, and therefore must follow the procedures for that class in establishing entitlement. It is contended that this is fundamentally unfair to thalassemia victims because of the number of potential donors from whom each would have received blood or blood products. It is said that by analogy to the hemophiliac class, and the lesser burden of proof placed on members of that class, a similar accommodation is justified. I agree.

66 This is a situation where it is appropriate to create a sub-class of thalassemia victims from the Transfused Class. Sub-classes are provided for in s. 5(2) of the *CPA* and the power to amend the certification order is contained in s. 8(3) of the *Act*. The settlement should be amended to apply the entitlement provisions in the Hemophiliac Plan *mutatis mutandis* to the Thalassemia sub-class.

Law and Analysis

67 Section 29(2) of the *CPA* provides that:

> A settlement of a class proceeding is not binding unless approved by the court.

68 While the approval of the court is required to effect a settlement, there is no explicit provision in the *CPA* dealing with criteria to be applied by the court on a motion for approval. The test to be applied was, however, stated by Sharpe J. in *Dabbs v. Sun Life Assurance Co. of Canada* (February 24, 1998), Doc. Toronto 96-CT-022862 (Ont. Gen. Div.) (*Dabbs No. 1*) at para. 9:

> ...the court must find that in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it.

69 In the context of a class proceeding, this requires the court to determine whether the settlement is fair, reasonable and in the best interests of the class as a whole, not whether it meets the demands of a particular member. As this court stated in *Ontario New Home Warranty Program v. Chevron Chemical Co.* (June 17, 1999), Doc. 22487/96 (Ont. S.C.J.) at para. 89:

> The exercise of settlement approval does not lead the court to a dissection of the settlement with an eye to perfection in every aspect. Rather, the settlement must fall within a zone or range of reasonableness.

70 Sharpe J. stated in *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.), aff'd (1998), 41 O.R. (3d) 97 (Ont. C.A.), leave to appeal to S.C.C. dismissed October 22, 1998 [reported (1998), 235 N.R. 390 (note) (S.C.C.)], (*Dabbs No. 2*) at 440, that "reasonableness allows for a range of possible resolutions." I agree. The court must remain flexible when presented with settlement proposals for approval. However, the reasonableness of any settlement depends on the factual matrix of the proceeding. Hence, the "range of reasonableness" is not a static valuation with an arbitrary application to every class proceeding, but rather it is an objective standard which allows for variation depending upon the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation.

71 Generally, in determining whether a settlement is "fair, reasonable and in the best interests of the class as a whole," courts in Ontario and British Columbia have reviewed proposed class proceeding settlements on the basis of the following factors:

1. Likelihood of recovery, or likelihood of success;

2. Amount and nature of discovery evidence;

3. Settlement terms and conditions;

4. Recommendation and experience of counsel;

5. Future expense and likely duration of litigation;

6. Recommendation of neutral parties if any;

7. Number of objectors and nature of objections; and

8. The presence of good faith and the absence of collusion.

See *Dabbs No. 1* at para. 13, *Haney Iron Works Ltd. v. Manufacturers Life Insurance Co.* (1998), 169 D.L.R. (4th) 565 (B.C. S.C.) at 571. See also Conte, *Newberg on Class Actions*, (3rd ed) (West Publishing) at para. 11.43.

72 In addition to the foregoing, it seems to me that there are two other factors which might be considered in the settlement approval process: i) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation; and ii) information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiation. These two additional factors go hand-in-glove and provide the court with insight into whether the bargaining was interest-based, that is reflective of the needs of the class members, and whether the parties were bargaining at equal or comparable strength. A reviewing court, in exercising its supervisory jurisdiction is, in this way, assisted in appreciating fully whether the concerns of the class have been adequately addressed by the settlement.

73 However, the settlement approval exercise is not merely a mechanical *seriatim* application of each of the factors listed above. These factors are, and should be, a guide in the process and no more. Indeed, in a particular case, it is likely that one or more of the factors will have greater significance than others and should accordingly be attributed greater weight in the overall approval process.

74 Morover, the court must take care to subject the settlement of a class proceeding to the proper level of scrutiny. As Sharpe J. stated in *Dabbs No. 2* at 439-440:

> A settlement of the kind under consideration here will affect a large number of individuals who are not before the court, and I am required to scrutinize the proposed settlement closely to ensure that it does not sell short the potential rights of those unrepresented parties. I agree with the thrust of Professor Watson's comments in "Is the Price Still Right? Class Proceedings in Ontario," a paper delivered at a CIAJ Conference in Toronto, October 1997, that class action settlements "must be seriously scrutinized by judges" and that they should be "viewed with some suspicion." On the other hand, all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection.

75 The preceding admonition is especially apt in the present circumstances. Class counsel described the agreement before the court as "the largest settlement in a personal injury action in Canadian history." The settlement is Pan-Canadian in scope, affects thousands of people, some of whom are thus far unaware that they are claimants, and is intended to be administered for over 80 years. It cannot be seriously contended that the tragedy at the core of these actions does not have a present and lasting impact on the class members and their families. While the resolution of the litigation is a noteworthy aim, an improvident settlement would have repercussions well into the future.

76 Consequently, this is a case where the proposed settlement must receive the highest degree of court scrutiny. As stated in the *Manual for Complex Litigation*, 3rd Ed. (Federal Judicial Centre: West Publishing, 1995) at 238:

> Although settlement is favoured, court review must not be perfunctory; the dynamics of class action settlement may lead the negotiating parties — even those with the best intentions — to give insufficient weight to the interests of at least some class members. *The court's responsibility is particularly weighty when reviewing a settlement involving a non-opt-out class or future claimants.* (Emphasis added.)

77 The court has been assisted in scrutinizing the proposed settlement by the submissions of several intervenors and objectors. I note that some of the submissions, as acknowledged by counsel for the objectors, raised social and political concerns about the settlement. Without in any way detracting from the importance of these objections, it must be remembered that these matters have come before the court framed as class action lawsuits. The parties have chosen to settle the issues on a legal basis and the agreement before the court is part of that legal process. The court is therefore constrained by its jurisdiction, that is, to determine whether the settlement is fair and reasonable and in the best interests of the classes as a whole in the context of the legal issues. Consequently, extra-legal concerns even though they may be valid in a social or political context, remain extra-legal and outside the ambit of the court's review of the settlement.

78 However, although there may have been social or political undertones to many of the objections, legal issues raised by those objections, either directly or peripherally, are properly considered by the court in reviewing the settlement. Counsel for the objectors described the legal issues raised, in broad terms, as objections to:

(a) the adequacy of the total value of the settlement amount;

(b) the extent of compensation provided through the settlement;

(c) the sufficiency of the settlement Fund to provide the proposed compensation;

(d) the reversion of any surplus;

(e) the costs of administering the Plans; and

(f) the claims process applicable to Thalassemia victims.

I have dealt with the objection regarding the Thalassemia victims above. The balance of these objections will be addressed in the reasons which follow.

79 It is well established that settlements need not achieve a standard of perfection. Indeed, in this litigation, crafting a perfect settlement would require an omniscient 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. The *CPA* mandates that class members retain, for a certain time, the right to opt out of a class proceeding. This ensures an element of control by allowing a claimant to proceed individually with a view to obtaining a settlement or judgement that is tailored more to the individual's circumstances. In this case, there is the added advantage in that a class member will have the choice ot opt out while in full knowledge of the compensation otherwise available by remaining a member of the class.

80 This settlement must be reviewed on an objective standard, taking into account the need to provide compensation for all of the class members while at the same time recognizing the inherent difficulty in crafting a universally satisfactory settlement for a disparate group. In other words, the question is does the settlement provide a reasonable alternative for those Class Members who do not wish to proceed to trial?

81 Counsel for the class and the Crown defendants urged this court to consider the question on the basis of each class member's likely recovery in individual personal injury tort litigation. They contend that the benefits provided at each level are similar to the awards class members who are suffering physical manifestations of HCV infection approximating those set out in the different levels of the structure of this settlement would receive in individual litigation. In my view, this approach is flawed in the present case.

82 An award of damages in personal injury tort litigation is idiosyncratic and dependent on the individual plaintiff before the court. Here, although the settlement is structured to account for Class Members with differing medical conditions by establishing benefits on an ascending classification scheme, no allowances are made for the spectrum of damages which individual class members within each level of the structure may suffer. The settlement provides for compensation on a "one-size fits all" basis

to all Class Members who are grouped at each level. However, it is apparent from the evidence before the court on this motion that the damages suffered as a result of HCV infection are not uniform, regardless of the degree of progression.

83 The evidence of Dr. Frank Anderson, a leading practitioner working with HCV patients in Vancouver, describes in detail the uncertain prognosis that accompanies HCV and the often debilitating, but unevenly distributed, symptomology that can occur in connection with infection.

He states:

> Once infected with HCV, a person will either clear HCV after an acute stage of develop chronic HCV infection. At present, the medical literature establishes that approximately 20-25% of all persons infected clear HCV within approximately one year of infection. Those persons will still test positive for the antibody and will probably do so for the rest of their lives, but will not test positive on a PCR test, nor will they experience any progressive liver disease due to HCV.
>
> Persons who do not clear the virus after the acute stage of the illness have chronic HCV. They may or may not develop progressive liver disease due to HCV, depending on the on the course HCV takes in their body and whether treatment subsequently achieves a sustained remission. A sustained remission means that the virus is not detectable in the blood 6 months after treatment, the liver enzymes are normal, and that on a liver biopsy, if one were done, there would be no inflammation. Fibrosis in the liver is scar tissue caused by chronic inflammation, and as such is not reversible, and will remain even after therapy. It is also possible to spontaneously clear the virus after the acute phase of the illness but when this happens and why is not well understood. The number of patients spontaneously clearing the virus is small.
>
> HCV causes inflammation of the liver cells. The level of inflammation varies among HCV patients. ... the inflammation may vary in intensity from time to time.
>
> . . . . .
>
> Inflammation and necrosis of liver cells results in scarring of liver tissue (fibrosis). Fibrosis also appears in various patterns in HCV patients... Fibrosis can stay the same or increase over time, but does not decrease, because although the liver can regenerate cells, it cannot reverse scarring. On average it takes approximately 20 years from point of infection with Hepatitis C until cirrhosis develops, and so on a scale of 1 to 4 units the best estimate is that the rate of fibrosis progression is 0.133 units per year.
>
> . . . . .
>
> Once a patient is cirrhotic, they are either a compensated cirrhotic, or a decompensated cirrhotic, depending on their liver function. In other words, the liver function may still be normal even though there is fibrosis since there may be enough viable liver cells remaining to maintain function. These persons would have compensated cirrhosis. If liver function fails the person would then have decompensated cirrhosis. The liver has very many functions and liver failure may involve some or many of these functions. Thus decompensation may present in a number of ways with a number of different signs and symptoms.
>
> A compensated cirrhotic person has generally more than one third of the liver which is still free from fibrosis and whose liver can still function on a daily basis. They may have some of the symptoms discussed below, but they may also be asymptomatic.
>
> Decompensated cirrhosis occurs when approximately 2/3 of the liver is compromised (functioning liver cells destroyed) and the liver is no longer able to perform one or more of its essential functions. It is diagnosed by the presence of one or more conditions which alone or in combination is life threatening without a transplant. This clinical stage of affairs is also referred to as liver failure or end stage liver disease. The manifestations of decompensation are discussed below. Once a person develops decompensation, life expectancy is short and they will generally die within approximately 2-3 years unless he or she receives a liver transplant.

> Patients who progress to cirrhosis but not to decompensated cirrhosis may develop hepatocellular cancer ("HCC"). This is a cancer, which originates from liver cells, but the exact mechanism is uncertain. The simple occurrence of cirrhosis may predispose to HCC, but the virus itself may also stimulate the occurrence of liver cell cancer. Life expectancy after this stage is approximately 1-2 years.
>
> .....
>
> The symptoms of chronic HCV infection, prior to the disease progressing to cirrhosis or HCC include: fatigue, weight loss, upper right abdominal pain, mood disturbance, and tension and anxiety....
>
> Of those symptoms, fatigue is the most common, the most subjective and the most difficult to assess... There is also general consensus that the level of fatigue experienced by an individual infected with HCV does not correlate with liver enzyme levels, the viral level in the blood, or the degree of inflammation or fibrosis on biopsy. It is common for the degree of fatigue to fluctuate from time to time.

Dr. Anderson identifies some of the symptoms associated with cirrhosis which can include skin lesions, swelling of the legs, testicular atrophy in men, enlarged spleen and internal hemorrhaging. Decompensated cirrhosis symptomatic effects, he states, can include jaundice, hepatic encephalopathy, protein malnutrition, subacute bacterial peritonitis and circulatory and pulmonary changes. Dr. Anderson also states, in respect of his own patients, that "at least 50% of my HCV infected patients who have not progressed to decompensated cirrhosis or HCC are clinically asymptomatic."

84 It is apparent, in light of Dr. Anderson's evidence, that in the absence of evidence of the individual damages sustained by class members, past precedents of damage awards in personal injury actions cannot be applied to this case to assess the reasonableness of the settlement for the class.

85 This fact alone is not a fatal flaw. There have long been calls for reform of the "once and for all" lump sum awards that are usually provided in personal injury actions. As stated by Dickson J. in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 (S.C.C.), at 236:

> The subject of damages for personal injury is an area of the law which cries out for legislative reform. The expenditure of time and money in the determination of fault and of damage is prodigal. The disparity resulting from lack of provision for victims who cannot establish fault must be disturbing. When it is determined that compensation is to be made, it is highly irrational to be tied to a lump sum system and a once-and-for-all award.
>
> The lump sum award presents problems of great importance. It is subject to inflation, it is subject to fluctuation on investment, income from it is subject to tax. After judgment new needs of the plaintiff arise and present needs are extinguished; yet, our law of damages knows nothing of periodic payment. The difficulties are greatest where there is a continuing need for intensive and expensive care and a long-term loss of earning capacity. It should be possible to devise some system whereby payments would be subject to periodic review and variation in the light of the continuing needs of the injured person and the cost of meeting those needs.

86 The "once-and-for-all" lump sum award is the common form of compensation for damages in tort litigation. Although the award may be used to purchase annuities to provide a "structured" settlement, the successful claimant receives one sum money that is determined to be proper compensation for all past and future losses. Of necessity, there is a great deal of speculation involved in determining the future losses. There is also the danger that the claimant's future losses will prove to be much greater than are contemplated by the award of damages received because of unforeseen problems or an inaccurate calculation of the probability of future contingent events. Thus even though the claimant is successful at trial, in effect he or she bears the risk that there may be long term losses in excess of those anticipated. This risk is especially pronounced when dealing with a disease or medical condition with an uncertain prognosis or where the scientific knowledge is incomplete.

87 The present settlement is imaginative in its provision for periodic subsequent claims should the class member's condition worsen. The underlying philosophy upon which the settlement structure is based is set forth in the factum of the plaintiffs in the Transfused Action. They state at para. 10 that:

> The Agreement departs from the common law requirement of a single, once-and-for-all lump sum assessment and instead establishes a system of periodic payments to Class Members and Family Class Members depending on the evolving severity of their medical condition and their needs.

88 This forward-looking provision addresses the concern expressed by Dickson J. with respect to the uncertainty and unfairness of a once and for all settlement. Indeed, the objectors and intervenors acknowledge this in that they do not take issue with the benefit distribution structure of the settlement as much as they challenge the benefits provided at the levels within the structure.

89 These objections mirror the submissions in support of the settlement, in that they are largely based on an analogy to a tort model compensation scheme. For the reasons already stated, this analogy is not appropriate because the proper application of the tort model of damages compensation would require an examination of each individual case. In the absence of an individualized examination, the reasonableness, or adequacy, of the settlement cannot be determined by a comparison to damages that would be obtained under the tort model. Rather the only basis on which the court can proceed in a review of this settlement is to consider whether the total amount of compensation available represents a reasonable settlement, and further, whether those monies are distributed fairly and reasonably among the class members.

90 The total value of the Pan-Canadian settlement is estimated to be $1.564 billion dollars. This is calculated as payment or obligation to pay by the federal, provincial and territorial governments in the an amount of $1.207 billion on September 30, 1999, plus the tax relief of $357 million over the expected administrative term of the settlement. This amount is intended to settle the class proceedings in Ontario, British Columbia and Quebec. The Ontario proceeding, as stated above, covers all of those class members in Canada other than those included in the actions in British Columbia and Quebec.

91 Counsel for the plaintiffs and for the settling defendants made submissions to the court with respect the length and intensity of the negotiations leading up to the settlement. There was no challenge by any party as to the availability of any additional compensation. I am satisfied on the evidence that the negotiations achieved the maximum total funding that could be obtained short of trial.

92 In applying the relevant factors set out above to the global settlement figure proposed, I am of the view that the most significant consideration is the substantial litigation risk of continuing to trial with these actions. The CRCS is the primary defendant. It is now involved in protracted insolvency proceedings. Even if the court-ordered stay of litigation proceedings against it were to be lifted, it is unlikely that there would be any meaningful assets available to satisfy a judgment. Secondly, there is a real question as to the liability of the Crown defendants. Counsel for the plaintiffs candidly admit that there is a probability, which they estimate at 35%, that the Crown defendants would not be found liable at trial. Counsel for the federal government places the odds on the Crown successfully defending the actions somewhat higher at 50%. I note that none of the opposing intervenors or objectors challenge these estimates. In addition to the high risk of failure at trial, given the plethora of complex legal issues involved in the proceedings, there can be no question that the litigation would be lengthy, protracted and expensive, with a final result, after all appeals are exhausted, unlikely until years into the future.

93 Moving to the remaining factors, although there have been no examinations for discovery, the extensive proceedings before the Krever Commission serve a similar purpose. The settlement is supported by the recommendation of experienced counsel as well as many of the intervenors. There is no suggestion of bad faith or collusion tainting the settlement. The support of the intervenors, particularly the Canadian Hemophilia Society which made submissions regarding the meetings held with class members, is indicative of communication between class counsel and the class members. Although, there were some objectors who raised concerns about the degree of communication with the Transfused Class members, these complaints were not strenuously pursued. Perhaps the most compelling evidence of the adequacy of the communications with the class members

regarding the settlement is the relatively low number of objections presented to the court considering the size of the classes. Finally, counsel for all parties made submissions, which I accept, regarding the rigourous negotiations that resulted in the final settlement.

94 In conclusion, I find that the global settlement represents a reasonable settlement when the significant and very real risks of litigation are taken into account.

95 The next step in the analysis is to determine whether the monies available are allocated in such a way as to provide for a fair and reasonable distribution among the class members. In my view, as the settlement agreement is presently constituted, they are not. My concern lies with the provision dealing with opt out claimants. Under the agreement, if opt out claimants are successful in individual litigation, any award such a claimant receives will be satisfied out of the settlement Fund. While this has the potential of depleting the Fund to the detriment of the class members, thus rendering the settlement uncertain, the far greater concern is the risk of inequity, that this creates in the settlement uncertain, the far greater concern is the risk of inequity, that this creates in the settlement distribution. The *Manual for Complex Litigation* states at 239 that whether "claimants who are not members of the class are treated significantly differently" than members of the class is a factor that may "be taken into account in the determination of the settlement's fairness, adequacy and reasonableness..."

96 In principle, there is nothing egregious about the payment of settlement funds to non-class members. Section 26(6) of the *CPA* provides the court with the discretion to sanction or direct payments to non-class members. In effect, the opt out provision reflects the intention of the defendants to settle all present and future litigation. This objective is not contrary to the scheme of the CPA per se. See, for example, the reasons of Brenner J. in *Sawatzky v. Société Chirurgicale Instrumentarium Inc.* (August 4, 1999), Doc. Vancouver C954740 (B.C. S.C.), adopted by this court in *Bisignano v. La Corporation Instrumentarium Inc.* (September 1, 1999), Doc. 22404/96 (Ont. S.C.J.)

97 However, given that the settlement must be "fair, reasonable and in the best interests of the class," the court cannot sanction a provision which gives opt out claimants the potential for preferential treatment in respect of access to the Fund. The opt out provision as presently written has this potential effect where an opt out claimant either receives an award or settlement in excess of the benefits that he or she would have received had they not opted out and which must be satisfied out of the Fund. Alternatively, the preferential treatment could also occur where the opt out claimant receives an award similar to their entitlement under the settlement in quantum but without regard for the time phased payment structure of the settlement.

98 In my view, where a defendant wishes to settle a class proceeding by providing a single Fund to deal with both the claims of the class members and the claims of individuals opting out of the settlement, the payments out of the Fund must be made on an equitable basis amongst all of the claimants. Fairness does not require that each claimant receive equal amounts but what cannot be countenanced is a situation where an opt out claimant who is similarly situated to a class member receives a preferential payment.

99 The federal government argues that fairness ensues, even in the face of the different treatment, because the opt out claimant assumes the risk of individual litigation. I disagree. Because the defendants intend that all claims shall be satisfied from a single fund, individual litigation by a claimant opting out of the class pits that claimant against the members of the class. The opt out claimant stands to benefit from success because he or she may achieve an award in excess of the benefits provided under the settlement. This works to the detriment of the class members by the reducing the total amount of the settlement. More importantly however, the benefits to the class members will not increase as a result of unsuccessful opt out claimants.

100 In the instant case, fairness requires a modification to the opt out claimant provision of the settlement. The present opt out provision must be deleted and replaced with a provision that in the event of successful litigation by an opt out claimant, the defendants are entitled to indemnification from the Fund only to the extent that the claimant would have been entitled to claim from the Fund had he or she remained in the class. This must of necessity include the time phasing factor. Such a provision ensures fairness in that there is no prospect of preferential distribution from the Fund, nor will the class suffer any detrimental effect as a result of the outcome of the individual litigation. The change also provides a complete answer to the complaint that

the current opt out provision renders the settlement uncertain. Similarly, the modification renders the provision for defence costs to be paid out of the Fund unnecessary and thus it must be deleted.

101 Accordingly, the opt out provision of the settlement would not be an impediment to court approval with the modifications set out above.

102 In my view, the remainder of distribution scheme is fair and reasonable with this alteration to the opt out provision. It is beyond dispute that the compensation at any level will not be perfect, nor will it be tailored to individual cases but perfection is not the standard to be applied. The benefit levels are fair. More pointedly, fairness permeates the settlement structure in that each and every class member is provided an opportunity to make subsequent claims if his or her condition deteriorates. An added advantage is that there is a pre-determined, objective qualifying scheme so that class members will be able to readily assess their eligibility for additional benefits. Thus, while a claimant may not be perfectly compensated at any particular level, the edge to be gained by a scheme which terminates the litigation while avoiding the pitfalls of an imperfect, one-time-only lump sum settlement is compelling.

103 In any event, the settlement structure also provides a reasonable basis for the distribution of the funds available. Class counsel described the distribution method as a "need not greed" system, where compensation is meant, within limits, to parallel the extent of the damages. There were few concerns raised about the compensation provided at the upper levels of the scheme. Rather, the majority of the objections centred on the benefits provided at Levels 1, 2 and 3. The damages suffered by those whose conditions fall within these Levels are clearly the most difficult to assess. This is particularly true in respect of those considered to be at Level 2. However, in order to provide for the subsequent claims, compromises must be made and in this case, I am of the view that the one chosen is reasonable.

104 Regardless of the submissions made with respect to comparable awards under the tort model, it is clear from the record that the compensatory benefits assigned to claimants at different levels were largely influenced by the total of the monies available for allocation. As stated in the CASL study at p. 3:

> At the request of the Federal government of Canada, provincial governments, and Hepatitis C claimants, i.e. individuals infected with hepatitis C virus during the period of 1986 to 1990, an impartial group, the Canadian Association for the Study of the Liver (CASL) was asked to construct a natural history model of Hepatitis C. *The intent of this effort was to generate a model that would be used by all parties, as guide to disbursing funds set aside to compensate patients infected with hepatitis C virus through blood transfusion.*

105 Of necessity, the settlement cannot, within each broad category, deal with individual differences between victims. Rather it must be general in nature. In my view, the allocation of the monies available under the settlement is "fair, reasonable and in the best interests of the class as a whole."

106 In making this determination, I have not ignored the submissions made by certain objectors and intervenors regarding the sufficiency of the Fund. They asserted that the apparent main advantage of this settlement, the ability to "claim time and time again" is largely illusory because the Fund may well be depleted by the time that the youngest members of the class make claims against it.

107 I cannot accede to this submission. The Eckler report states that with the contemplated holdbacks of the lump sum at Level 2 and the income replacement at Level 4 and above, the Fund will have a surplus of $34,173,000. Admittedly, Eckler currently projects a deficit of $58,533,000 if the holdbacks are released.

108 However, the Eckler report contains numerous caveats regarding the various assumptions that have been made as a matter of necessity, including the following, which is stated in section 12.2:

> A considerable number of assumptions have been made in order to calculate the liabilities in this report. Where we have made the assumptions, we used our best efforts based on our understanding of the plan benefits; in general, where we have made simplifying assumptions or approximations, we have tried to err on the conservative side, i.e. increasing costs

> and liabilities. In many instances we have relied on counsel for the assumptions and understand that they have used their best efforts in making these. Nevertheless, the medical outcomes are very unclear — e.g. the CASL report indicates very wide ranges in its confidence intervals for the various probabilities it developed. There is substantial room for variation in the results. The differences will emerge in the ensuing years as more experience is obtained on the actual cohort size and characteristics of the infected claimants. These differences and the related actuarial assumptions will be re-examined at each periodic assessment of the Fund.

109 Unfortunately, but not unexpectedly, the limitations of the underlying medical studies upon which Eckler has based its report require the use of assumptions. For example, the report prepared by Dr. Remis, dated July 6, 1999, states at p. 642:

> There are important limitations to the analyses presented here and, in particular, with the precision of the estimates of the number of HCV-infected recipients who are likely to qualify for benefits under the Class Action Settlement...
>
> The proportion of transfusion recipients who will ultimately be diagnosed is particularly important in this regard and has substantial impact on the final estimate. We used an estimate of 70% as the best case estimate for this proportion based on the BC experience but the actual proportion could be substantially different from this, depending on the type, extent and success of targeted notification activities that will be undertaken, especially in Ontario and Quebec. This could alter the ultimate number who eventually qualify for benefits by as much as 1,500 in either direction.

110 The report of the CASL study states at p. 22:

> Our attempt to project the natural history of the 1986-1990 post transfusion HCV infected cohort has limitations. Perhaps foremost among these is our lack of understanding of the long-term prognosis of the disease. For periods beyond 25 years, projections remain particularly uncertain. The wide confidence intervals surrounding long-term projections highlight this uncertainty.
>
> Other key limitations are lack of applicability of these projections to children and special groups.

111 The size of the cohort and the percentage of the cohort which will make claims against the Fund are critical assumptions. Significant errors in either assumption will have a dramatic impact on the sufficiency of the Fund. Recognizing this, Eckler has chosen to use the most conservative estimates from the information available. The cohort size has been estimated from the CASL study rather than other studies which estimate approximately 20% less surviving members. Furthermore, Eckler has calculated liabilities on the basis that 100% of the estimated cohort will make claims against the Fund.

112 Class counsel urged the court to consider the empirical evidence of the "take-up rate" demonstrated in the completed class proceeding, *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 (Ont. Gen. Div.), leave to appeal dismissed (1995), 129 D.L.R. (4th) 110 (Ont. Gen. Div.), to support a conclusion that the Fund is sufficient. In *Nantais* , all of the class members were known and accordingly received actual notice of the settlement. Seventy-two per cent of the class chose to make claims, or "take-up" the settlement. It was contended that this amounted to strong evidence that less than one hundred per cent of the classes in these proceedings would take up this settlement. I cannot accept the analogy. While I agree that it is unlikely that the entire estimated cohort will take up the settlement, it is apparent from the caveats expressed in the reports provided to the court that the estimate of the cohort size may be understated by a significant number. Accordingly, for practical purposes, a less than one hundred per cent take up rate could well be counter-balanced by a concurrent miscalculation of the cohort size.

113 Although I cannot accept the *Nantais* experience as applicable on this particular point, the Eckler report stands alone as the only and best evidence before the court from which to determine the sufficiency of the Fund. Eckler has recognized the deficiencies inherent in the information available by using the most conservative estimates throughout. This provides the court with a measure of added comfort. Not to be overlooked as well, the distribution of the Fund will be monitored by this court and the courts in Quebec and British Columbia, guided by periodically revised actuarial projections. In my view, the risk that the Fund will be completely depleted for latter claimants is minimal.

114 Consequently, given the empirical evidence proffered by Dr. Anderson as to the asymptomatic potential of HCV infection, the conservative approach taken by Eckler in determining the likely claims against the Fund and the role of the courts in monitoring the ongoing distributions, I am of the view that the projected shortfall of $58,000,000 considered in the context of the size of the overall settlement, is within acceptable limits. I find on the evidence before me, that the Fund is sufficient to provide the benefits and, thus in this respect, the settlement is reasonable.

115 I turn now to the area of concern raised by counsel for the intervenor the Hepatitis C Society of Canada (the "Society"), namely the provision that mandates reversion of the surplus of the Plans to the defendants. The Society contends that this provision *simpliciter* is repugnant to the basis on which this settlement is constructed. It argues that the benefit levels were established on the basis of the total monies available, rather than a negotiation of benefit levels *per se*. Thus, it states there is a risk that the Fund will not be sufficient to provide the stated benefits and further, that this risk lies entirely with the class members because the defendants have no obligation to supplement the Fund if it proves to be deficient for the intended purpose. Moreover, the Society argues that the use of conservative estimates in defining the benefit levels, although an attempt at ensuring sufficiency, has the ancillary negative effect of minimizing the benefits payable to each class member under the settlement. Therefore, the Society contends that a surplus, if any develops in the ongoing administration of the Fund, should be used to augment the benefits for the class members.

116 The issue here is whether a reversion clause is appropriate in a settlement agreement in this class proceeding, and by extension, whether the inclusion of this clause is such that it would render the overall settlement unacceptable.

117 It is important to frame the submission of the Society in the proper context. This is not a case where the question of entitlement to an existing surplus is presented. Indeed, given the deficit projected by the Eckler report, it is conjectural at this stage whether the Fund will ever generate a surplus. If the Fund accumulates assets over and above the current Eckler projections, they must first be directed toward eliminating the deficit so that the holdbacks may be released.

118 The plan also provides that after the release of the holdbacks, the administrator may make an application to raise the $75,000 annual cap on income replacement if the Fund has sufficient assets to do so. It is only after these two areas of concern have been fully addressed that a surplus could be deemed to exist.

119 The clause in issue does not, according to the interpretation given to the court by class counsel, permit the withdrawal by the defendants of any actuarial surplus that may be identified in the ongoing administration of the Fund. Rather, they state that it is intended that the remainder of the Fund, if any, revert to the defendants only after the Plans have been fully administered in the year 2080.

120 Remainder provisions in trusts are not unusual. Further, I reiterate that it is, at this juncture, complete speculation as to whether a surplus, either ongoing or in a remainder amount, will exist in the Fund. However, accepting the submission of class counsel at face value, the reversion provision is anomalous in that it is neither in the best interests of the plaintiff classes nor in the interests of defendants. The period of administration of the Fund is 80 years. No party took issue with class counsel's submission that the defendants are not entitled under the current language to withdraw any surplus in the Fund until this period expires. Likewise, there is no basis within the settlement agreement upon which the class members could assert any entitlement to access any surplus during the term of the agreement. Thus, any surplus would remain tied up, benefiting neither party during the entire 80 year term of the settlement.

121 Quite apart from the question of tying up the surplus for this unreasonable period of time, there is the underlying question of whether in the context of this settlement, it is appropriate for the surplus to revert in its entirety to the defendants.

122 The court is asked to approve the settlement even though the benefits are subject to fluctuation and regardless that the defendants are not required to make up any shortfall should the Fund prove deficient. This is so notwithstanding that the benefit levels are not perfect. It is therefore in keeping with the nature of the settlement and in the interests of consistency and fairness that some portion of a surplus may be applied to benefit class members.

123 This is not to say that it is necessary, as the Society suggests, that in order to be in the best interests of the class members, any surplus must only be used to augment the benefits within the settlement agreement. There are a range of possible uses to which any surplus may be put so as to benefit the class as a whole without focusing on any particular class member or group of class members. This is in keeping with the *CPA* which provides in s. 26(4) that surplus funds may "be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members..." On the other hand, in the proper circumstances, it may not be beyond the realm of reasonableness to allow the defendants access to a surplus within the Fund prior to the expiration of the 80 year period.

124 To attempt to determine the range of reasonable solutions at present, when the prospect of a surplus is uncertain at best, would be to pile speculation upon speculation. In the circumstances therefore, the only appropriate course, in my opinion, is to leave the question of the proper application of any surplus to the administrator of the Fund. The administrator may recommend to the court from time to time, based on facts, experience with the Fund and future considerations, that all or a portion of the surplus be applied for the benefit of the class members or that all or a portion be released to the defendants. In the alternative, the surplus may be retained within the Fund if the administrator determines that this is appropriate. Any option recommended by the administrator would, of course, be subject to requisite court approval. This approach is in the best interests of the class and creates no conflicts between class members. Moreover, it resolves the anomaly created by freezing any surplus for the duration of the administration of the settlement. If the present surplus reversion clause is altered to conform with the foregoing reasons, it would meet with the court's approval.

125 There was an expressed concern as to the potential for depletion of the Fund through excessive administrative costs. The court shares this concern. However, the need for efficient access to the plan benefits for the class members and the associated costs that this entails must also be recognized. This requires an ongoing balancing so as to keep administrative costs in line while at the same time providing a user friendly claims administration. The courts, in their supervisory role, will be vigilant in ensuring that the best interests of the class will be the predominant criterion.

Disposition

126 In ordinary circumstances, the court must either approve or reject a settlement in its entirety. As stated by Sharpe J. in *Dabbs No. 1* at para. 10:

> It has often been observed that the court is asked to approve or reject a settlement and that it is not open to the court to rewrite or modify its terms; *Poulin v. Nadon*, [1950] O.R. 219 (C.A.) at 222-3.

127 These proceedings, emanating from the blood tragedy, are novel and unusually complex. The parties have adverted to this in the settlement agreement which contemplates the necessity for changes of a non-material nature in Clause 12.01:

> This Agreement will not be effective unless and until it is approved by the Court in each of the Class Actions, and *if such approvals are not granted without any material differences therein*, this Agreement will be thereupon terminated and none of the Parties will be liable to any other Parties hereunder. (Emphasis added.)

128 The global settlement submitted to the court for approval is within the range of reasonableness having regard for the risk inherent in carrying this matter through to trial. Moreover, the levels of benefits ascribed within the settlement are acceptable having regard for the accessibility of the plan to successive claims in the event of a worsening of a class member's condition. This progressive approach outweighs any deficiencies which might exist in the levels of benefits.

129 I am satisfied based on the Eckler report that the Fund is sufficient, within acceptable tolerances to provide the benefits stipulated. There are three areas which require modification, however, in order for the settlement to receive court approval. First, regarding access to the Fund by opt out claimants, the benefits provided from the Fund for an opt out claimant cannot exceed those available to a similarly injured class member who remains in the class. This modification is necessary for fairness and the certainty of the settlement. Secondly, the surplus provision must be altered so as to accord with these reasons. Thirdly, in the interests of fairness, a sub-class must be created for the thalassemia victims to take into account their special circumstances.

130 The defendants have expressed their intention to be bound by the settlement if it receives court approval absent any material change. As stated, this reflects their acknowledgment of the complexity of the case, the scientific uncertainty surrounding the infections and the fact this settlement is crafted with a degree of improvisation.

131 The changes to the settlement required to obtain the approval of this court are not material in nature when viewed from the perspective of the defendants. Accepting the assumed value of $10,000,000 attributed to the opt outs by class counsel, a figure strongly supported by counsel for the defendants, the variation indicated is *de minimis* in the context of a $1.564 billion dollar settlement. The change required in respect of the surplus provision resolves the anomaly of tying up any surplus for the entire 80 year period of the administration of the settlement. In any event, given the projected $58,000,000 deficit, the question of a surplus is highly conjectural. The creation of the sub-class of thalassemia victims, in the context of the cohort size is equally *de minimis*. I am prepared to approve the settlement with these changes.

132 However, should the parties to the agreement not share the view that these changes are not material in nature, they may consider the proposed changes as an indication of "areas of concern" within the meaning the words of Sharpe J. in *Dabbs No. I* at para. 10:

> As a practical matter, it is within the power of the court to indicate areas of concern and afford the parties the opportunity to answer and address those concerns with changes to the settlement...

133 The victims of the blood tragedy in Canada cannot be made whole by this settlement. No one can undo what has been done. This court is constrained in these settlement approval proceedings by its jurisdiction and the legal framework in which these proceedings are conducted. Thus, the settlement must be reviewed from the standpoint of its fairness, reasonableness and whether it is in the best interests of the class as a whole. The global settlement, its framework and the distribution of money within it, as well the adequacy of the funding to produce the specified benefits, with the modifications suggested in these reasons, are fair and reasonable. There are no absolutes for purposes of comparison, nor are there any assurances that the scheme will produce a perfect solution for each individual. However, perfection is not the legal standard to be applied nor could it be achieved in crafting a settlement of this nature. All of these points considered, the settlement, with the required modifications, is in the best interests of the class as a whole.

I am obliged to counsel, the parties and the intervenors and especially to the individual objectors who took the time to either file a written objection or appear in person at the hearings.

Motion granted.

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2011 ONSC 1647
Ontario Superior Court of Justice [Commercial List]

Robertson v. ProQuest Information & Learning Co.

2011 CarswellOnt 1770, 2011 ONSC 1647, [2011] O.J. No. 1160, 199 A.C.W.S. (3d) 757

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of a Plan of Compromise or Arrangement of Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc. and Canwest (Canada) Inc.

Heather Robertson, Plaintiff and Proquest Information and Learning Company, Cedrom-Sni Inc., Toronto Star Newspapers Ltd., Rogers Publishing Limited and Canwest Publishing Inc., Defendants

Pepall J.

Judgment: March 15, 2011
Docket: 03-CV-252945CP, CV-10-8533-00CL

Counsel: Kirk Baert, for Plaintiff
Peter J. Osborne, Kate McGrann, for Canwest Publishing Inc.
Alex Cobb, for CCAA Applicants
Ashley Taylor, Maria Konyukhova, for Monitor

Subject: Civil Practice and Procedure; Insolvency

Table of Authorities

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Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — considered

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Robertson v. Thomson Canada Ltd. (2009), 2009 CarswellOnt 3660, 80 C.P.C. (6th) 77 (Ont. S.C.J.) — considered

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — referred to

s. 29 — considered

s. 34 — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

MOTION by representative plaintiff journalist and defendant publishing company for approval of settlement of two actions.

***Pepall J.*:**

Overview

1 On January 8, 2010, I granted an initial order pursuant to the provisions of the *Companies' Creditors Arrangement Act* ("*CCAA*") in favour of Canwest Publishing Inc. ("CPI") and related entities (the "LP Entities"). As a result of this order and subsequent orders, actions against the LP Entities were stayed. This included a class proceeding against CPI brought by Heather Robertson in her personal capacity and as a representative plaintiff (the "Representative Plaintiff"). Subsequently, CPI brought a motion for an order approving a proposed notice of settlement of the action which was granted. CPI and the Representative Plaintiff then jointly brought a motion for approval of the settlement of both the class proceeding as against CPI and the *CCAA* claim. The Monitor supported the request and no one was opposed. I granted the judgment requested and approved the settlement with endorsement to follow. Given the significance of the interplay of class proceedings with *CCAA* proceedings, I have written more detailed reasons for decision rather than simply an endorsement.

Facts

2 The Representative Plaintiff commenced this class proceeding by statement of claim dated July 25, 2003 and the action was case managed by Justice Cullity. He certified the action as a class proceeding on October 21, 2008 which order was subsequently amended on September 15, 2009.

3 The Representative Plaintiff claimed compensatory damages of $500 million plus punitive and exemplary damages of $250 million against the named defendants, ProQuest Information and Learning LLC, Cedrom-SNI Inc., Toronto Star Newspapers Ltd., Rogers Publishing Limited and CPI for the alleged infringement of copyright and moral rights in certain works owned by class members. She alleged that class members had granted the defendants the limited right to reproduce the class members' works in the print editions of certain newspapers and magazines but that the defendant publishers had proceeded to reproduce, distribute and communicate the works to the public in electronic media operated by them or by third parties.

4 As set out in the certification order, the class consists of:

A. All persons who were the authors or creators of original literary works ("Works") which were published in Canada in any newspaper, magazine, periodical, newsletter, or journal (collectively "Print Media") which Print Media have been

reproduced, distributed or communicated to the public by telecommunication by, or pursuant to the purported authorization or permission of, one or more of the defendants, through any electronic database, excluding electronic databases in which only a precise electronic reproduction of the Work or substantial portion thereof is made available (such as PDF and analogous copies) (collectively "Electronic Media"), excluding:

(a) persons who by written document assigned or exclusively licensed all of the copyright in their Works to a defendant, a licensor to a defendant, or any third party; or

(b) persons who by written document granted to a defendant or a licensor to a defendant a license to publish or use their Works in Electronic Media; or

(c) persons who provided Works to a not for profit or non-commercial publisher of Print Media which was licensor to a defendant (including a third party defendant), and where such persons either did not expect or request, or did not receive, financial gain for providing such Works; or

(d) persons who were employees of a defendant or a licensor to a defendant, with respect to any Works created in the course of their employment.

Where the Print Media publication was a Canadian edition of a foreign publication, only Works comprising of the content exclusive to the Canada edition shall qualify for inclusion under this definition.

(Persons included in clause A are thereinafter referred to as "Creators". A "licensor to a defendant" is any party that has purportedly authorized or provided permission to one or more defendants to make Works available in Electronic Media. References to defendants or licensors to defendants include their predecessors and successors in interest)

B. All persons (except a defendant or a licensor to a defendant) to whom a Creator, or an Assignee, assigned, exclusively licensed, granted or transmitted a right to publish or use their Works in Electronic Media.

(Persons included in clause B are hereinafter referred to as "Assignees")

C. Where a Creator or Assignee is deceased, the personal representatives of the estate of such person unless the date of death of the Creator was on or before December 31, 1950.

5 As part of the *CCAA* proceedings, I granted a claims procedure order detailing the procedure to be adopted for claims to be made against the LP Entities in the *CCAA* proceedings. On April 12, 2010, the Representative Plaintiff filed a claim for $500 million in respect of the claims advanced against CPI in the action pursuant to the provisions of the claims procedure order. The Monitor was of the view that the claim in the *CCAA* proceedings should be valued at $0 on a preliminary basis.

6 The Representative Plaintiff's claim was scheduled to be heard by a claims officer appointed pursuant to the terms of the claims procedure order. The claims officer would determine liability and would value the claim for voting purposes in the *CCAA* proceedings.

7 Prior to the hearing before the claims officer, the Representative Plaintiff and CPI negotiated for approximately two weeks and ultimately agreed to settle the *CCAA* claim pursuant to the terms of a settlement agreement.

8 When dealing with the consensual resolution of a *CCAA* claim filed in a claims process that arises out of ongoing litigation, typically no court approval is required. In contrast, class proceeding settlements must be approved by the court. The notice and process for dissemination of the settlement agreement must also be approved by the court.

9 Pursuant to section 34 of the *Class Proceedings Act*, the same judge shall hear all motions before the trial of the common issues although another judge may be assigned by the Regional Senior Judge (the "RSJ") in certain circumstances. The action had been stayed as a result of the CCAA proceedings. While I was the supervising CCAA judge, I was also assigned by the RSJ to hear the class proceeding notice and settlement motions.

10 Class counsel said in his affidavit that given the time constraints in the *CCAA* proceedings, he was of the view that the parties had made reasonable attempts to provide adequate notice of the settlement to the class. It would have been preferable to have provided more notice, however, given the exigencies of insolvency proceedings and the proposed meeting to vote on the *CCAA* Plan, I was prepared to accept the notice period requested by class counsel and CPI.

11 In this case, given the hybrid nature of the proceedings, the motion for an order approving notice of the settlement in both the class action proceeding and the *CCAA* proceeding was brought before me as the supervising *CCAA* judge. The notice procedure order required:

1) the Monitor and class counsel to post a copy of the settlement agreement and the notice order on their websites;

2) the Monitor to publish an English version of the approved form of notice letter in the National Post and the Globe and Mail on three consecutive days and a French translation of the approved form of notice letter in La Presse for three consecutive days;

3) distribution of a press release in an approved form by Canadian Newswire Group for dissemination to various media outlets; and

4) the Monitor and class counsel were to maintain toll-free phone numbers and to respond to enquiries and information requests from class members.

12 The notice order allowed class members to file a notice of appearance on or before a date set forth in the order and if a notice of appearance was delivered, the party could appear in person at the settlement approval motion and any other proceeding in respect of the class proceeding settlement. Any notices of appearance were to be provided to the service list prior to the approval hearing. In fact, no notices of appearance were served.

13 In brief, the terms of the settlement were that:

a) the *CCAA* claim in the amount of $7.5 million would be allowed for voting and distribution purposes;

b) the Representative Plaintiff undertook to vote the claim in favour of the proposed *CCAA* Plan;

c) the action would be dismissed as against CPI;

d) CPI did not admit liability; and

e) the Representative Plaintiff, in her personal capacity and on behalf of the class and/or class members, would provide a licence and release in respect of the freelance subject works as that term was defined in the settlement agreement.

14 The claims in the action in respect of CPI would be fully settled but the claims which also involved ProQuest would be preserved. The licence was a non-exclusive licence to reproduce one or more copies of the freelance subject works in electronic media and to authorize others to do the same. The licence excluded the right to licence freelance subject works to ProQuest until such time as the action was resolved against ProQuest, thereby protecting the class members' ability to pursue ProQuest in the action. The settlement did not terminate the lawsuit against the other remaining defendants. Under the *CCAA* Plan, all unsecured creditors, including the class, would be entitled to share on a pro rata basis in a distribution of shares in a new company. The Representative Plaintiff would share pro rata to the extent of the settlement amount with other affected creditors of the LP Entities in the distributions to be made by the LP Entities, if any.

15 After the notice motion, CPI and the Representative Plaintiff brought a motion to approve the settlement. Evidence was filed showing, among other things, compliance with the claims procedure order. Arguments were made on the process and on the fairness and reasonableness of the settlement.

16 In her affidavit, Ms. Robertson described why the settlement was fair, reasonable and in the best interests of the class members:

> In light of Canwest's insolvency, I am advised by counsel, and verily believe, that, absent an agreement or successful award in the Canwest Claims Process, the prospect of recovery for the Class against Canwest is minimal, at best. However, under the Settlement Agreement, which preserves the claims of the Class as against the remaining defendants in the class proceeding in respect of each of their independent alleged breaches of the class members' rights, as well as its claims as against ProQuest for alleged violations attributable to Canwest content, there is a prospect that members of the Class will receive some form of compensation in respect of their direct claims against Canwest.
>
> Because the Settlement Agreement provides a possible avenue of recovery for the Class, and because it largely preserves the remaining claims of the Class as against the remaining defendants in the class proceeding, I am of the view that the Settlement Agreement represents a reasonable compromise of the Class claim as against Canwest, and is both fair and reasonable in the circumstances of Canwest's insolvency.

17 In the affidavit filed by class counsel, Anthony Guindon of the law firm Koskie Minsky LLP noted that he was not in a position to ascertain the approximate dollar value of the potential benefit flowing to the class from the potential share in a pro rata distribution of shares in the new corporation. This reflected the unfortunate reality of the *CCAA* process. While a share price of $11.45 was used, he noted that no assurance could be given as to the actual market price that would prevail. In addition, recovery was contingent on the total quantum of proven claims in the claims process. He also described the litigation risks associated with attempting to obtain a lifting of the *CCAA* stay of proceedings. The likelihood of success was stated to be minimal. He also observed the problems associated with collection of any judgment in favour of the Representative Plaintiff. He went on to state:

> ... The Representative Plaintiff, on behalf of the Class, could have elected to challenge Canwest's initial valuation of the Class claim of $0 before a Claims Officer, rather than entering into a negotiated settlement. However, a number of factors militated against the advisability of such a course of action. Most importantly, the claims of the Class in the class proceeding have not been proven, and the Class does not enjoy the benefit of a final judgment as against Canwest. Thus, a hearing before the Claims Officer would necessarily necessitate a finding of liability as against Canwest, in addition to a quantification of the claims of the Class against Canwest.
>
> ... a negative outcome in a hearing before a Claims Officer could have the effect of jeopardizing the Class claims as against the remaining defendants in the class proceeding. Such a finding would not be binding on a judge seized of a common issues trial in the class proceeding; however, it could have persuasive effect.
>
> Given the likely limited recovery available from Canwest in the Claims Process, it is the view of Class Counsel that a negotiated resolution of the quantification of Class claim as against Canwest is preferable to risking a negative finding of liability in the context of a contested Claims hearing before a Claims Officer.

18 The Monitor was also involved in the negotiation of the settlement and was also of the view that the settlement agreement was a fair and reasonable resolution for CPI and the LP Entities' stakeholders. The Monitor indicated in its report that the settlement agreement eliminated a large degree of uncertainty from the *CCAA* proceeding and facilitated the approval of the Plan by the requisite majorities of stakeholders. This of course was vital to the successful restructuring of the LP Entities. The Monitor recommended approval of the settlement agreement.

19 The settlement of the class proceeding action was made prior to the creditors' meeting to vote on the Plan for the LP Entities. The issues of the fees and disbursements of class counsel and the ultimate distribution to class members were left to be dealt with by the class proceedings judge if and when there was a resolution of the action with the remaining defendants.

Discussion

20 Both motions in respect of the settlement were heard by me but were styled in both the *CCAA* proceedings and the class proceeding.

21 As noted by Jay A. Swartz and Natasha J. MacParland in their article "*Canwest Publishing - A Tale of Two Plans*" [1] :

> "There have been a number of *CCAA* proceedings in which settlements in respect of class proceedings have been implemented including *McCarthy v. Canadian Red Cross Society, (Re:) Grace Canada Inc., Muscletech Research and Development Inc.*, and *(Re:) Hollinger Inc.* ... The structure and process for notice and approval of the settlement used in the LP Entities restructuring appears to be the most efficient and effective and likely a model for future approvals. Both motions in respect of the Settlement, discussed below, were heard by the *CCAA* judge but were styled in both proceedings." [citations omitted]

(a) Approval

(i) CCAA Settlements in General

22 Certainly the court has jurisdiction to approve a *CCAA* settlement agreement. As stated by Farley J. in *Lehndorff General Partner Ltd., Re,* [2] the *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Very broad powers are provided to the *CCAA* judge and these powers are exercised to achieve the objectives of the statute. It is well settled that courts may approve settlements by debtor companies during the *CCAA* stay period: *Calpine Canada Energy Ltd., Re* [3] ; *Air Canada, Re* [4] ; and *Playdium Entertainment Corp., Re.* [5] To obtain approval of a settlement under the *CCAA*, the moving party must establish that: the transaction is fair and reasonable; the transaction will be beneficial to the debtor and its stakeholders generally; and the settlement is consistent with the purpose and spirit of the *CCAA*. See in this regard *Air Canada, Re* [6] and *Calpine Canada Energy Ltd., Re.* [7]

(ii) Class Proceedings Settlement

23 The power to approve the settlement of a class proceeding is found in section 29 of the *Class Proceedings Act*, 1992 [8] . That section states:

> 29(1) A proceeding commenced under this *Act* and a proceeding certified as a class proceeding under this *Act* may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.
>
> (2) A settlement of a class proceeding is not binding unless approved by the court.
>
> (3) A settlement of a class proceeding that is approved by the court binds all class members.
>
> (4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,
>
> (a) an account of the conduct of the proceedings;
>
> (b) a statement of the result of the proceeding; and
>
> (c) a description of any plan for distributing settlement funds.

24 The test for approval of the settlement of a class proceeding was described in *Dabbs v. Sun Life Assurance Co. of Canada* [9] .The court must find that in all of the circumstances the settlement is fair, reasonable and in the best interests of those affected by it. In making this determination, the court should consider, amongst other things:

a) the likelihood of recovery or success at trial;

b) the recommendation and experience of class counsel; and

c) the terms of the settlement.

As such, it is clear that although the *CCAA* and class proceeding tests for approval are not identical, a certain symmetry exists between the two.

25 A perfect settlement is not required. As stated by Sharpe J. (as he then was) in *Dabbs v. Sun Life Assurance Co. of Canada* [10] :

> Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.

26 Where there is more than one defendant in a class proceeding, the action may be settled against one of the defendants provided that the settlement is fair, reasonable and in the best interests of the class members: *Ontario New Home Warranty Program v. Chevron Chemical Co.* [11]

(iii) The Robertson Settlement

27 I concluded that the settlement agreement met the tests for approval under the *CCAA* and the *Class Proceedings Act*.

28 As a general proposition, settlement of litigation is to be promoted. Settlement saves time and expense for the parties and the court and enables individuals to extract themselves from a justice system that, while of a high caliber, is often alien and personally demanding. Even though settlements are to be encouraged, fairness and reasonableness are not to be sacrificed in the process.

29 The presence or absence of opposition to a settlement may sometimes serve as a proxy for reasonableness. This is not invariably so, particularly in a class proceeding settlement. In a class proceeding, the court approval process is designed to provide some protection to absent class members.

30 In this case, the proposed settlement is supported by the LP Entities, the Representative Plaintiff, and the Monitor. No one, including the non-settling defendants all of whom received notice, opposed the settlement. No class member appeared to oppose the settlement either.

31 The Representative Plaintiff is a very experienced and sophisticated litigant and has been so recognized by the court. She is a freelance writer having published more than 15 books and having been a regular contributor to Canadian magazines for over 40 years. She has already successfully resolved a similar class proceeding against Thomson Canada Limited, Thomson Affiliates, Information Access Company and Bell Global Media Publishing Inc. which was settled for $11 million after 13 years of litigation. That proceeding involved allegations quite similar to those advanced in the action before me. In approving the settlement in that case, Justice Cullity described the involvement of the Representative Plaintiff in the class proceeding:

> The Representative Plaintiff, Ms. Robertson, has been actively involved throughout the extended period of the litigation. She has an honours degree in English from the University of Manitoba, and an M.A. from Columbia University in New York. She is the author of works of fiction and non-fiction, she has been a regular contributor to Canadian magazines and newspapers for over 40 years, and she was a founder member of each of the Professional Writers' Association of Canada and the Writers' Union of Canada. Ms. Robertson has been in communication with class members about the litigation since its inception and has obtained funds from them to defray disbursements. She has clearly been a driving force behind the litigation: *Robertson v. Thomson Canada Ltd.* [12]

32 The settlement agreement was recommended by experienced counsel and entered into after serious and considered negotiations between sophisticated parties. The quantum of the class members' claim for voting and distribution purposes, though not identical, was comparable to the settlement in *Robertson v. Thomson Canada Ltd.*. In approving that settlement, Justice Cullity stated:

> Ms. Robertson's best estimate is that there may be 5,000 to 10,000 members in the class and, on that basis, the gross settlement amount of $11 million does not appear to be unreasonable. It compares very favourably to an amount negotiated among the parties for a much wider class in the U.S. litigation and, given the risks and likely expense attached to a continuation of the proceeding, does not appear to be out of line. On this question I would, in any event, be very reluctant to second guess the recommendations of experienced class counsel, and their well informed client, who have been involved in all stages of the lengthy litigation. [13]

33 In my view, Ms. Robertson's and Mr. Guindon's description of the litigation risks in this class proceeding were realistic and reasonable. As noted by class counsel in oral argument, issues relating to the existence of any implied license arising from conduct, assessment of damages, and recovery risks all had to be considered. Fundamentally, CPI was in an insolvency proceeding with all its attendant risks and uncertainties. The settlement provided a possible avenue for recovery for class members but at the same time preserved the claims of the class against the other defendants as well as the claims against ProQuest for alleged violations attributable to CPI content. The settlement brought finality to the claims in the action against CPI and removed any uncertainty and the possibility of an adverse determination. Furthermore, it was integral to the success of the consolidated plan of compromise that was being proposed in the *CCAA* proceedings and which afforded some possibility of recovery for the class. Given the nature of the CCAA Plan, it was not possible to assess the final value of any distribution to the class. As stated in the joint factum filed by counsel for CPI and the Representative Plaintiff, when measured against the litigation risks, the settlement agreement represented a reasonable, pragmatic and realistic compromise of the class claims.

34 The Representative Plaintiff, Class Counsel and the Monitor were all of the view that the settlement resulted in a fair and reasonable outcome. I agreed with that assessment. The settlement was in the best interests of the class and was also beneficial to the LP Entities and their stakeholders. I therefore granted my approval.

Motion granted.

Footnotes

1 Annual Review of Insolvency Law, 2010, J.P. Sarra Ed, Carswell, Toronto at page 79.

2 (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at 31 .

3 2007 ABQB 504 (Alta. Q.B.) at para. 71; leave to appeal dismissed 2007 ABCA 266 (Alta. C.A. [In Chambers]).

4 (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]).

5 (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]) at para. 23.

6 *Supra.* at para. 9.

7 *Supra.* at para. 59.

8 S.O. 1992, C.6.

9 [1998] O.J. No. 1598 (Ont. Gen. Div.) at para. 9.

10 (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.) at para 30.

11 [1999] O.J. No. 2245 (Ont. S.C.J.) at para. 97.

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2009 CarswellOnt 4850
Ontario Superior Court of Justice

Marcantonio v. TVI Pacific Inc.

2009 CarswellOnt 4850, [2009] O.J. No. 3409, 179 A.C.W.S. (3d) 761, 82 C.P.C. (6th) 305

JOE MARCANTONIO (Plaintiff) and TVI PACIFIC INC., CLIFFORD M. JAMES, ROBERT C. ARMSTRONG, C. BRIAN CRAMM, JAN R. HOREJSI, PETER C.G. RICHARDS, and JOHN W. ADKINS (Defendants)

Lax J.

Heard: June 17, 2009
Judgment: August 10, 2009
Docket: Toronto CV-08-35806100CP

Counsel: A. Dimitri Lascaris, Monique L. Radlein for Plaintiff
Eric R. Hoaken for Defendants

Subject: Civil Practice and Procedure; Corporate and Commercial; Securities

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MOTION by parties seeking certification of class proceeding and approval of settlement and fees.

Lax J.:

1 This is a securities class action brought pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA") arising from alleged misrepresentations and stock options manipulation. The parties settled the action on April 22, 2009, and brought a motion for, among other things, an order certifying the action as a class proceeding for settlement purposes, approving the settlement and approving class counsel fees. I granted the order with reasons to follow. These are my reasons.

Nature of the Claim

2 TVI Pacific Inc. ("TVI") is a publicly-traded mining company with its shares listed on the Toronto Stock Exchange ("TSX"). The individual defendants were directors of TVI. This action is brought on behalf of an Ontario class of persons and entities who acquired TVI securities on or after March 30, 2006, and held some or all of the securities on August 9, 2007. It is alleged that during the class period the defendants (1) conspired and breached their duty of care to TVI shareholders by issuing materially false and/or inaccurate audited financial statements for years ended 2005 and 2006 and interim unaudited financial statements for the quarter ended March 31, 2007; and (2) granted in-the-money stock options in contravention of TVI's Stock Option Plan, TSX rules and securities legislation in Ontario and Quebec. With respect to the financial statements, TVI subsequently issued two corrective disclosures on August 9, 2007 and December 18, 2007.

3 On March 3, 2008, Siskinds LLP filed a class proceeding against the defendants on behalf of Mr. Florent Audette, a Quebec resident. At that time, no Ontario resident had come forward to represent the interests of the class in Ontario. On April 10, 2008, this action was filed on behalf of Mr. Joe Marcantonio, an Ontario resident, alleging claims similar to those made in the Audette Ontario action. On July 25, 2008, the Quebec affiliate of Siskinds, filed the Petition styled *Audette c. TVI Pacific inc.* [2009 CarswellQue 4712 (Que. S.C.)] in Quebec Superior Court and Mr. Audette gave instructions to hold the Audette Ontario action in abeyance. After the settlement was reached, Mr. Audette instructed Siskinds to request the discontinuance of the Audette Ontario action.

4 Mr. Marcantonio served his certification record in October 2008. On the eve of the due date for the filing of the defendants' responding materials, the defendants initiated settlement discussions. Following several months of negotiations, the parties concluded a settlement agreement that provides for:

(a) a gross settlement fund of $2.1 million;

(b) TVI's agreement to make efforts to re-price certain outstanding stock options; and

(c) the adoption of corporate governance measures designed to prevent future options manipulation.

5 As a result of the settlement, the parties jointly sought certification for the purposes of settlement, settlement approval and approval of legal fees and disbursements on behalf of an Ontario class defined as:

> All persons and entities, who acquired securities of TVI during the Class Period, and who held some or all of those securities on August 9, 2007, other than Excluded Persons and Quebec Class Members, but specifically including the Exempt Quebec Members.

Certification

6 Numerous cases hold that where certification is sought for the purposes of settlement, the certification requirements must be met, but are not applied as stringently. Perell J. has helpfully gathered the authorities together and they can be found in *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (Ont. S.C.J.) at para. 30.

7 For settlement purposes, I am satisfied that each of the criteria for certification is satisfied. The pleadings disclose a cause of action against the defendants for negligence, negligent and fraudulent misrepresentation, and conspiracy. The pleading asserts that the plaintiff intends to seek leave under s. 138.8(1) of the *Securities Act*, R.S.O. 1990, c. S.5 ("OSA") to amend the Statement of Claim to plead the cause of action in s. 138.3 of the *OSA*. There is an identifiable class defined by objective criteria that (a) identifies persons with a potential claim, (b) describes who is entitled to notice, and (c) defines those who will be bound by the result: *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Ont. Gen. Div.) at para. 10.

8 The claims of the class members raise the following common issue:

> Did the defendants, or any of them, breach duties of care owed to the Ontario class, by reason of the alleged acts, omissions, disclosures or non-disclosures relating to the issuance and/or restatement of TVI's audited consolidated financial statements for the years ended December 31, 2005 and 2006, and its interim unaudited consolidated financial statements for the quarter ended March 31, 2007, and or to TVI's stock option practices during or prior to the Class Period?

9 Individual litigation of securities cases can be difficult, time-consuming and expensive. Many claims would never be advanced because they are uneconomic for an individual investor to pursue. A class action is the optimal method of procuring a remedy for a group of investors who allege they have been harmed in similar ways as a single determination of the defendants' liability eliminates duplication of fact-finding and legal analysis. Further, a class action has the potential to act as an essential and useful supplement to the deterrent effects of regulatory oversight. It enhances the incentive for directors and officers to ensure that their disclosures to the investing public are materially accurate, thereby enhancing investor protection. Consequently, a class proceeding is the preferable procedure because it provides a fair, efficient and manageable method of determining the common issue, and advances the proceeding in accordance with the goals of access to justice, judicial economy and behaviour modification.

10 Mr. Marcantonio is a member of the proposed Ontario class and would fairly and adequately represent its interests. He does not have, regarding the common issues or any issues arising out of the common issues, any interests in conflict with the interests of other Ontario class members. He has an understanding of the issues and allegations raised in the Ontario action and has actively participated in the litigation and the settlement process.

Settlement Approval

11 To approve a settlement, the court must find that the settlement is fair, reasonable and in the best interests of the class as a whole: *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Ont. Gen. Div.) at para. 9; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (Ont. S.C.J.) at paras. 68-69. To be approved, the settlement must fall within a zone or range of reasonableness: *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (Ont. S.C.J.) at para. 89, Winkler J. (now C.J.O.).

12 In determining whether to approve a settlement, the court uses the following factors as a guide, although some will have more or less significance than others and some may not be present in a particular case: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the risk, future expense and likely duration of litigation; (f) the recommendation of neutral parties, if any; (g) the number of objectors and nature of objections; (h) the presence of good faith, arm's length bargaining and the absence of collusion; (i) the information conveying to the court the dynamics of, and the positions taken by the parties during the negotiations; and (j) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation. See *Parsons v. Canadian Red Cross Society*, *supra* at paras. 71-72.

13 Before the court is a comprehensive affidavit of Mr. Charles Wright who is a Siskinds' partner and an experienced class action lawyer. He was directly involved in the prosecution and resolution of this action. His evidence points to a number of factors that commend this settlement as fair and reasonable and in the best interests of the class. I review some of these below.

14 Securities class actions are not that common perhaps because there are substantial risks in prosecuting them. Unlike purchasers in the primary market, who are provided a right of action under the *OSA*, until recently, secondary market purchasers had to persuade the court that the defendants owed them a duty of care. In response, defendants have argued, and courts have often held, that secondary market purchasers have to demonstrate that they actually relied upon the defendants' misrepresentations. On December 31, 2005, Bill 198, now embodied in Part XXIII.1 of the *OSA*, came into force. It was a response to the perceived failure of the common law to provide an effective remedy for secondary market misrepresentation. Part XXIII.1 removes the reliance requirement through the creation of a statutory right of action. However, the right of action is subject to obtaining leave of the court and there has never been a leave decision under the new legislation.

15 In addition to the uncertainty surrounding the ability to advance the statutory cause of action, the plaintiff in this action also faced the risk of not being able to establish (i) that the representations or omissions were materially misleading; (ii) that the class had incurred the damages claimed; and (iii) to the extent necessary for purposes of the common law claims, detrimental reliance.

16 Class counsel's estimate of class damages was $16 million. In the course of settlement discussions, class counsel retained Mr. Paul Mulholland, an expert in the measurement of securities class action damages, to assess actual damages suffered by the class during the class period. It is Mr. Mulholland's opinion that class damages as assessed by a court would not approach this number, but rather would likely fall between the lowest and highest estimates of the statutorily established limits on the defendants' liability, as explained below.

17 The statutory claim under Part XXIII.1 of the *OSA* is subject to liability limits. It caps the issuer's liability at the greater of 5% of the pre-misrepresentation market capitalization of the defendant issuer and $1 million. The statute directs how market capitalization is to be calculated. Class counsel performed this calculation and determined that TVI's liability limit fell within the range of about $2.8 million to $4.2 million.

18 Part XXIII.1 of the *OSA* also sets caps on the liability of directors and officers. Class counsel performed this calculation and determined that these liability limits were $189,500 (rounded to $200,000). The application of the liability limits (absent proof of fraud) would thus limit total recovery from the defendants to a range of approximately $3 million to $4.4 million. As a result, even if the plaintiff and class members were completely successful at trial, they would have had difficulty obtaining damages greater than $4.4 million, and could be limited to damages of as little as $3 million.

19 The caps discussed above do not apply to the common law claims for damages arising from negligence and negligent and fraudulent misrepresentation. However, as I have mentioned, the damages assessment of Mr. Mulholland is that these damages, if proved, would fall within the statutory limits. Moreover, as noted earlier, misrepresentation claims can be difficult to certify as reliance is a necessary element of proof: *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.) at para. 18. As well, the defendants had due diligence and reasonable reliance defences available to them and there was a risk that these defences would succeed.

20 The court requires sufficient evidence in order to exercise an objective, impartial and independent assessment of the fairness of the settlement: *Dabbs*, *supra* at para. 15. However, it is not necessary for formal discovery to have occurred at the time of settlement, and settlements reached at an early stage of the proceedings can be appropriate. In this case, no discoveries or other examinations were completed, but I am satisfied that class counsel had significant information about the case as a result of their own investigations and the information that was obtained from the defendants in the course of settlement discussions. In particular, the defendants provided to class counsel an expert opinion which they had obtained. The defendants' expert concluded that the damages of the class were negligible as all or virtually all of the share price decreases resulted from news affecting the mining industry as a whole and were unrelated to the erroneous financial statements. Although class counsel disputed this, it was in light of this opinion that Mr. Mulholland was retained.

21 The settlement amount of $2.1 million represents a substantial portion of the potentially recoverable damages of between $3 million and $4.4 million assessed by Mr. Mulholland. As a percentage of gross recovery, it represents between 48% and 70% of his assessment of loss. On a net recovery basis, taking into account class counsel's requested fees and administration expenses,

which together are in the amount of $809,287.17, the class would recover between 29% and 43% of the loss. This recovery is fair and reasonable and compares very favourably with the percentage net recovery in other securities class action settlements, such as *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, [2002] O.J. No. 1855 (Ont. S.C.J.), and *Lawrence v. Atlas Cold Storage* (February 12, 2009), Doc. Toronto 04-CV-263289CP (Ont. S.C.J.) where net recovery was in the range of 20%.

22 With respect to the options-related allegations, the information provided by the defendants made it clear that many of the problems were a result of poor procedures, rather than intentional fault. It also became clear that any benefits to the defendants were negligible due to the decrease in TVI's share price. This resulted in certain options becoming substantially out-of-the-money.

23 Nonetheless, in order to address the allegations concerning the granting of in-the-money stock options, the settlement agreement provides that TVI will make all reasonable efforts to effect the re-pricing of these options. In addition, it provides that TVI will develop and implement corporate governance measures as specified in the agreement to address its stock option granting practices. For the purpose of obtaining advice concerning the recommended corporate governance measures, class counsel retained and relied on advice from Dr. Richard Leblanc, Assistant Professor of Law, Corporate Governance & Ethics at York University. In the opinion of class counsel, these reforms are productive enhancements of significant value to shareholders.

24 Although Ontario class counsel received a number of inquiries about the settlement following publication of the notices approved by the court, there are no objectors. The distribution protocol harmonizes the plaintiff's theory of damages with s.138.5 of the *OSA*. The result is a formula that takes into account the two corrective disclosures and is designed to fairly and rationally allocate the proceeds of the net settlement amount among authorized claimants based on the relative strength of the class members' claims as the class period progressed and damages were incurred.

25 At the time of settlement, the action was still in the early stages of litigation. Without a settlement, the plaintiff would have faced the expense of a leave motion under the new secondary market liability provisions of the *OSA*, a contested certification motion, discovery, a trial of the common issues, and inevitable appeals at each stage. Absent a settlement, there would have been no payment to class members for a number of years. A settlement brings the significant benefit of finality and an immediate payment to class members.

26 This settlement is the product of arm's length bargaining by very experienced counsel. There is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by class counsel, is presented for court approval. As Justice Sharpe (as he then was) stated in *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 2811 (Ont. Gen. Div.) at para. 32:

> ... The recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputation for integrity and diligent effort on behalf of their clients is also on the line. ...

27 In light of the risks the plaintiff faced, the possible range of damages recoverable, the substantial benefit available to class members, and the recommendation of class counsel who have extensive experience in litigating class actions and particular expertise in securities class actions and stock options manipulation, I am satisfied that the settlement is fair, reasonable and in the best interests of the class. For these reasons, it was approved.

Class Counsel Fees

28 The fees of class counsel are to be fixed and approved on the basis of whether they are fair and reasonable in all of the circumstances. This is determined in light of the risk undertaken and the degree of success or result achieved: *Maxwell v. MLG Ventures Ltd.* (1996), 30 O.R. (3d) 304 (Ont. Gen. Div. [Commercial List]); *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Ont. Gen. Div.); *Serwaczek v. Medical Engineering Corp.*, [1996] O.J. No. 3038 (Ont. Gen. Div.); *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (Ont. S.C.J.). This approach was approved in *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 (Ont. C.A.), at 423.

29 In the context of the *CPA*, a premium on fees is the reward for taking on meritorious but difficult matters. The courts have recognized that the objectives of the *CPA* - judicial economy, access to justice and behaviour modification - are dependent, in part, upon counsel's willingness to take on class proceedings, which in turn depends on the incentives available to counsel to assume the risks and burden of class proceedings: *Gagne*, *supra*; *Parsons*, *supra*; *Ford v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (Ont. S.C.J.).

30 The need for a meaningful premium on fees is particularly important in cases involving more modest damage amounts where the maximum potential upside to class counsel is limited. Otherwise, there is a risk that counsel would decline to pursue cases giving rise to modest damages and smaller issuers would effectively become immunized from class litigation. This need is heightened in the context of the evolving practice of securities class actions where notice and administration costs are fixed expenses whether the settlement amount is $20 million or $2 million. As a result, in smaller settlements, costs and legal fees represent a larger percentage of the settlement fund. For example, in this case, these administrative costs (roughly $210,000) together with the requested fees of 25% of the settlement amount represent 39% of gross recovery, whereas in a $20 million settlement, the same costs with the same fee request would represent 27% of gross recovery.

31 Class counsel request fees in accordance with a written fee agreement dated April 10, 2008. It provides that legal fees will be charged on a percentage basis in an amount representing 25% of "all benefits obtained for the class members, including costs, notice and administration," plus disbursements and GST. Ontario class counsel and Quebec class counsel agreed to request legal fees such that their cumulative requests for legal fees do not exceed 25% of the settlement amount plus disbursements and applicable taxes. They estimated that the Ontario class constitutes 90% of the class defined in the settlement agreement, and that the Quebec class constitutes 10% of the class. As a result, Ontario class counsel request legal fees in the amount of $472,500, which represents 25% of the portion of the settlement amount allocated to the Ontario class, plus GST and disbursements in the amount of $42,667.69. Quebec class counsel will request legal fees in the amount of $52,500. The combined legal fee requests total $525,000 or 25% of the monetary settlement benefit of $2.1 million. The amount requested is consistent with the retainer agreement and in line with percentage contingency fees that have been awarded in other class actions.

32 In *VitaPharm*, *supra* at para. 67, Justice Cumming summarized some of the factors to be considered by the court when fixing class counsel's fees: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (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 fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

33 The risks in undertaking this litigation include the following:

(a) that the court would dismiss certain of the claims on a preliminary motion;

(b) that there has never been a leave decision under the new investor protection legislation under Part XXIII.1 of the *OSA*, and the court may not have granted leave to plead causes of action under s. 138.3;

(c) that the court would not certify the action, or would not certify a national class;

(d) that the plaintiff would not be able to establish actionable misrepresentations, or would fail to establish a causal connection between the misrepresentations and some or all of the losses alleged; and

(e) that any judgment in favour of the plaintiff and the class would be appealed, so that the benefits of any such judgment would be significantly delayed.

34 In determining a fee award, the court may consider the manner in which counsel has conducted the proceeding. Whether counsel have agreed to indemnify the representative plaintiff against an adverse costs award, thereby saving the class from having to pay the statutory 10% to the Class Proceedings Fund, is a relevant factor in fixing fees: *Bellaire v. Daya*, [2007]

O.J. No. 4819 (Ont. S.C.J.) at para. 81. Counsel in this case have done this. The class also benefits from class counsel having requested and reviewed fixed-fee quotations from several Administrators to ensure the most cost-effective administration of the settlement agreement.

35 In assessing the success achieved, I have already noted that the settlement amount of $2.1 million represents recovery of a substantial portion of the damages sustained by the class. The implementation of the corporate governance measures and the re-pricing of stock options also provide a benefit to class members and future TVI shareholders. Counsel are not asking the court to attach value to this aspect of the settlement, even though the retainer agreement provides for legal fees to be calculated as a percentage of "all benefits obtained for the class" and these are benefits obtained for the class. Further, class members benefit from a settlement term that required the defendants to pay the settlement amount into an escrow account which is earning interest. This will increase the net settlement amount available to class members. It will also decrease the fee request as a percentage of the recovery because class counsel do not seek interest on their legal fees and disbursements.

36 The method of determining fees set out in s. 33 of the *CPA* - the 'lodestar' method - has been the subject of judicial and academic criticism. Justice Cullity recently commented on its deficiencies in *Martin v. Barrett*, [2008] O.J. No. 2105 (Ont. S.C.J.) at paras. 38-39; see also, *Endean v. Canadian Red Cross Society*, [2000] B.C.J. No. 1254 (B.C. S.C.) at paras. 15-16, 19; Benjamin Alarie, "Rethinking the Approval of Class Counsel's Fees in Ontario Class Actions" (2007) 4(1) *Canadian Class Action Review* 15 at 37-38.

37 A multiplier can reward lawyers who accumulate unnecessary time and punish those who are able to do things effectively in less time. I do not have to grapple with these difficulties in this case as the retainer agreement does not provide that fees are to be calculated by applying a multiplier and none is requested. Nonetheless, based on time included in the evidence on the motion, and based on consideration of only the monetary benefits obtained for the class, by the time the litigation is concluded and interest accrues on the settlement amount, counsel estimate the multiplier will be approximately 2.5. This settlement was achieved at an early stage, but if a multiplier were to be applied, I consider a multiplier in this range to be acceptable having regard to the risks assumed and the results obtained for class members in the circumstances of this case.

38 For these reasons, I concluded that the fees requested were fair and reasonable and I awarded legal fees in the amount of $472,500, plus applicable taxes, and disbursements in the amount of $42,667.69 to Ontario class counsel. The settlement that I approved settles the claims asserted in this action and the Audette Ontario action. As the classes are identical, the interests of the class proposed in the Audette Ontario action are resolved by the settlement of the Ontario action. Accordingly, the discontinuance of the Audette Ontario action does not prejudice the putative class in that action and an order was granted discontinuing that action.

Motion granted; action certified as class proceeding; settlement and fees approved.

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2011 ONSC 1146
Ontario Superior Court of Justice

Metzler Investment GmbH v. Gildan Activewear Inc.

2011 CarswellOnt 1252, 2011 ONSC 1146, [2011] O.J. No. 885, 17 C.P.C. (7th) 190, 198 A.C.W.S. (3d) 609

Metzler Investment GmbH, Plaintiff and Gildan Activewear Inc., Glenn J. Chamandy, Glenn Chamandy Holdings Corporation and Laurence G. Sellyn, Defendants

L.C. Leitch J.

Heard: January 25, February 1, 2011
Judgment: February 28, 2011*
Docket: 58574 CP

Counsel: Anthony O'Brien, Dimitri Lascaris, Michael G. Robb, for Plaintiff
Steve Tenai, Suzanne Wood, for Defendants

Subject: Civil Practice and Procedure

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Cases considered by *L.C. Leitch J.*:

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Parsons v. Canadian Red Cross Society (1999), 1999 CarswellOnt 2932, 40 C.P.C. (4th) 151, 103 O.T.C. 161 (Ont. S.C.J.) — referred to

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Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6
s. 29 — pursuant to

Securities Act, R.S.O. 1990, c. S.5
Pt. XXIII.1 [en. 2002, c. 22, s. 185] — referred to

RULING on approval of parties' settlement agreement.

L.C. Leitch J.:

1 The plaintiff seeks an order that the settlement provided for in a settlement agreement dated August 2, 2010 (the "Settlement Agreement") is fair, reasonable and in the best interest of the Ontario Class and is approved pursuant to s. 29 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

2 The form of order sought by counsel contains provisions releasing the defendants from claims by the representative plaintiff and each member of the Ontario Class and incorporates and adopts the definitions set out in the Settlement Agreement.

3 The Settlement Agreement resolves this action and parallel proceedings in Québec and the United States.

4 The settlement is conditional upon approval by this court and the court in Québec and the United States.

The factors for consideration in approving negotiated settlements

5 The case law has made clear that the following are factors to be considered on settlement approvals:

- likelihood of recovery or likelihood of success
- amount and nature of discovery, evidence or investigation
- settlement terms and conditions
- recommendation and experience of counsel
- future expense and likely duration of litigation and risk
- recommendation of neutral parties, if any
- number of objectors and nature of objections
- the presence of good faith, arms length bargaining and the absence of collusion
- the degree and nature of communications by counsel and the representative plaintiffs with class members during this litigation
- information conveying to the court the dynamics of, and then positions taken by the parties during the negotiation

(see *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Ont. Gen. Div.) at para. 13, *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (Ont. S.C.J.) at paras 71-72.)

Terms and Conditions of the Settlement

6 Pursuant to the Settlement Agreement, the defendants caused its insurers to pay into an escrow account 22.5 million dollars in U.S. dollars. As the Settlement Agreement states, it is not a claims made settlement and none of the settlement amount shall be returned or otherwise paid to the defendants or its insurers funding the settlement unless the Settlement Agreement is terminated in accordance with its terms.

7 The settlement amount will be distributed amongst all class members who submit valid claim forms to the administrator after payment of any administration costs and legal fees and expenses awarded by the courts.

8 The Settlement Agreement contains a plan of allocation which provides that 89% of the net settlement amount is allocated for pro-rata distribution among Authorized Canadian Claimants, while the remaining 11% of the net settlement amount is allocated for pro-rata distribution among Authorized U.S. Claimants.

9 Pursuant to the definitions in the Settlement Agreement, all Canadian residents are within the definition of an Authorized Canadian Claimant. Based on the trading volume on the New York Stock Exchange (NYSE) and the Toronto Stock Exchange (TSX) Mr. Wright, who has filed an affidavit in support of the settlement approval, has deposed that Authorized Canadian Claimants will fare substantially better than authorized U.S. Claimants under the settlement. A majority of the trading during the Class Period occurred on the NYSE but the NYSE purchasers (excluding the small member of Canadian residents) will receive only 11% of the net settlement amount.

10 As Mr. Wright has also deposed, ultimately the amount of each Class Member's compensation from the net settlement amount will depend upon: (i) the number and the price of Eligible Shares purchased by the Class Member; (ii) the time and the price at which the Class Member sold such Eligible Shares, if at all; (iii) the total number and value of claims for compensation filed with the administrator; (iv) whether the Class Member falls within the Authorized Canadian Claimant or the Authorized U.S. Claimant category.

11 The operative part of the Settlement Agreement makes sense. The allocation amongst the Class Members seems appropriate.

12 In considering the approval of the Settlement Agreement in Ontario, the submission of Mr. Wright's affidavit that the settlement is significantly weighted in favour of Canadian Class Members is important.

13 I am satisfied that the Class Members will have their claims administered in a timely matter and that the administration of the settlement can be conducted in a fair, efficient, independent and manageable manner.

14 As counsel submitted, the Settlement Agreement represents very significant recovery in a challenging, hotly contested case.

15 Furthermore, the amount provided for in the Settlement Agreement is within the range specified in the retainer agreement as a reasonable settlement in the action.

16 The foregoing factors favour approval of the settlement.

How was the settlement reached?

17 The Settlement Agreement resulted from extensive negotiations conducted over several months. The parties were assisted in their settlement negotiations by The Honourable Judge Layn R. Phillips, a former United States attorney and United States District Judge. As Mr. Wright deposed, the mediation was complex and after two days of mediation the parties had not agreed on the essential financial terms of a settlement. However, negotiations continued. Thereafter, Judge Phillips made a mediator's recommendation that the case settle for the amount provided for in the Settlement Agreement, and all parties accepted that recommendation.

18 The proposed settlement provides certainty to the class members facing hotly contested lengthy litigation fraught with uncertainties and provides a measure of recovery, which Judge Phillips, a neutral party, recommended.

19 It is clear the settlement resulted from good faith, arms length bargaining in the absence of collusion.

20 Counsel for the plaintiff had the opportunity to review mediation briefs prepared by each of the parties for the purposes of the two day mediation, as well as documentary production from the defendants for the purposes of confirmatory discovery prior to the execution of the Settlement Agreement.

21 As Mr. Wright deposed, plaintiff's counsel had more than adequate information available from which to make an appropriate recommendation concerning the resolution of this action.

22 Consideration of the above noted factors supports approval of the settlement.

Are there any objections to these settlements? Have any Class Members opted out?

23 Counsel advised that the Notice Program was very effective. There was a focused and targeted mailing that was possible because of the information provided by the defendants. As a result, there was a direct mailing to almost 25,000 people.

24 No class members have opted out of the proposed settlement. There were three pieces of correspondence received as a result of the Notice Program but no valid opt out requests were received.

25 There have been no objections to the settlement.

26 Considering the extent of direct mailing pursuant to the Notice Program it is significant that there have been no objections or opts out and the fact that there were no objections and no valid opt outs favours approval of the Settlement Agreement.

Recommendation from counsel and the representative plaintiff

27 Experienced counsel recommends the approval of the Settlement Agreement. As Mr. Wright deposed, the Settlement Agreement delivers a substantial, immediate benefit to Ontario Class Members on claims which plaintiff's counsel consider meritorious but which undoubtedly face significant risks.

28 As plaintiff's counsel submitted, they were well informed and had a good basis on which to assess the plaintiff's prospects in the litigation.

29 I am satisfied that counsel has undertaken sufficient investigation to analyze the settlement and the benefits to class members.

30 In addition, it is significant that the plaintiff instructed Class Counsel to seek the Court's approval of the Settlement Agreement. The plaintiff is a sophisticated commercial investor with a very significant direct interest in the action.

31 The recommendation of experienced counsel is entitled to considerable weight given their ability to weigh the factors bearing on the reasonableness of the settlement.

Was the plaintiff's claim likely to be challenged if the action was not settled?

32 This litigation involved numerous and substantial risks as particularized in Mr. Wright's affidavit.

33 In particular, the defendants intended to challenge the plaintiff's common-law claims on an appeal from the motion to strike decision, when the motion for certification was heard and ultimately at trial. There remained a contentious issue that the plaintiff's negligent misrepresentation claim could not succeed because it could not establish actual reliance on the alleged misrepresentations. There is a very significant issue with respect to whether an alternate theory of liability can be advanced to avoid the need to prove individual reliance. As observed by Mr. Wright, the defendant's position on this issue was strengthened by the decision in *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 (Ont. S.C.J.).

34 There also was a contentious issue with whether a representation with respect to a future event is actionable. In other words, can statements or forecasts about the future sustain a claim for misrepresentation?

35 In addition, the plaintiff faced the risks of obtaining the required leave under Part XXIII.I of the Ontario *Securities Act*. As counsel observed, there is minimal guidance from case law in relation to such leave applications with only one decision having been released which was the subject of an appeal at the time of this hearing (leave to appeal that decision was subsequently denied: 2011 ONSC 1035 (Ont. S.C.J.)).

36 Furthermore, as a result of the Schulman affidavit having been struck, confidential witnesses referred to in that affidavit were required to swear affidavits in support of the plaintiff's motion for leave. Mr. Wright deposed in his affidavit at the time of settlement, none of those witnesses had agreed to swear such affidavits. Thus, the plaintiff faced the uncertainty of whether it could satisfy its evidentiary burden on the motion for leave.

37 In addition, as Mr. Wright outlined, there were risks relating to the scope of any certified Class as well as issues with respect to the quantum of damages. As Mr. Wright deposed, the defendant's mediation brief foreshadowed a number of arguments that the defendants would have advanced in mitigation of the quantum of damages.

38 Finally it is clear as Mr. Wright deposed, that continued pursuit of the Ontario action would involve the expense of arguing a contested leave and certification motion, holding oral discoveries containing documentary discovery, attendance at a trial of common issues and perhaps holding trials to make determinations regarding any individual issues and even if the plaintiff was successful at all stages of the proceeding, the Ontario action would not have resolved for many years. Therefore, the Settlement Agreement provides the additional advantage of delivering immediate benefits to Class Members without the risk and delay inherent in protracted litigation.

39 The formidable risks and barriers in the litigation and the inevitable delay before trial favour approval of the Settlement Agreement.

Conclusion

40 Considering the foregoing factors, I am satisfied that in all the circumstances the Settlement Agreement is a fair and reasonable resolution of this action and in the best interest of the Ontario Class Members.

Order accordingly.

Footnotes

* A corrigendum issued by the Court on March 4, 2011 has been incorporated herein.

End of Document

2012 ONSC 911
Ontario Superior Court of Justice

Robinson v. Rochester Financial Ltd.

2012 CarswellOnt 1368, 2012 ONSC 911, [2012] 5 C.T.C. 24,
[2012] O.J. No. 534, 212 A.C.W.S. (3d) 20, 27 C.P.C. (7th) 351

Kathryn Robinson and Rick Robinson (Plaintiffs/Moving Parties) and Rochester Financial Limited et al. (Defendants/Respondents)

G.R. Strathy J.

Heard: January 17, 2012
Judgment: February 7, 2012
Docket: 08-CV-349792 CP

Counsel: David Thompson, Matthew G. Moloci, for Plaintiffs
Glenn Smith, Sean O'Donnell, for Defendant, Fraser Milner Casgrain LLP
John Finnigan, for Monitor, Grant Thornton Limited

Subject: Income Tax (Federal); Civil Practice and Procedure

Table of Authorities

Cases considered by *G.R. Strathy J.*:

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Dabbs v. Sun Life Assurance Co. of Canada (1998), 235 N.R. 390 (note), 118 O.A.C. 399 (note), 41 O.R. (3d) 97n (S.C.C.) — referred to

Fakhri v. Alfalfa's Canada Inc. (2005), 2005 BCSC 1123, 2005 CarswellBC 1858, 20 C.P.C. (6th) 70, 47 B.C.L.R. (4th) 379 (B.C. S.C.) — considered

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Garland v. Enbridge Gas Distribution Inc. (2006), 56 C.P.C. (6th) 357, 2006 CarswellOnt 9605 (Ont. S.C.J.) — considered

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MacKinnon v. Vancouver City Savings Credit Union (2004), 2004 CarswellBC 2889, 2004 BCSC 1604, 34 B.C.L.R. (4th) 322 (B.C. S.C.) — referred to

McCarthy v. Canadian Red Cross Society (2007), 2007 CarswellOnt 3735 (Ont. S.C.J.) — considered

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Parsons v. Coast Capital Savings Credit Union (2010), 6 B.C.L.R. (5th) 261, 321 D.L.R. (4th) 338, 489 W.A.C. 111, 289 B.C.A.C. 111, [2010] 12 W.W.R. 222, 2010 BCCA 311, 2010 CarswellBC 1507 (B.C. C.A.) — referred to

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Smith Estate v. National Money Mart Co. (2011), 2011 CarswellOnt 1920, 331 D.L.R. (4th) 208, 3 C.P.C. (7th) 223, 276 O.A.C. 237, 106 O.R. (3d) 37, 2011 ONCA 233 (Ont. C.A.) — considered

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Walker v. Union Gas Ltd. (2009), 2009 CarswellOnt 662, 74 C.P.C. (6th) 366 (Ont. S.C.J.) — considered

Windisman v. Toronto College Park Ltd. (1996), 1996 CarswellOnt 2970, 10 O.T.C. 375, 3 C.P.C. (4th) 369 (Ont. Gen. Div.) — followed

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6
s. 32(1) — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
Generally — referred to

Request for approval of settlement of class action.

G.R. Strathy J.:

1 This endorsement sets out my reasons for approving the settlement of this class action and approving the fees and disbursements of class counsel, an Order to that effect having been issued on January 17, 2012.

2 The action relates to a tax shelter called the Banyan Tree Foundation Gift Program, which operated in 2003-2007. It has been referred to as a "leveraged" charitable donation program because, in return for a proportionately small out-of-pocket payment, a taxpayer was purportedly entitled to ratchet-up his or her donation and to receive a charitable tax receipt equivalent to 3 $^{1}/_{2}$ times the amount of his or her cash outlay.

3 The leverage was supposed to be provided by a "loan" to the participant, made by one of the defendants, Rochester Financial Limited, secured by a promissory note. Part of the participant's cash payment was described as a "security deposit", which was supposed to be invested so that it would pay off the loan before the taxpayer was ever called upon to pay it.

4 The effect of this was to allow the taxpayer to profit from his or her donation - in the case of a taxpayer in the highest bracket, a payment of $2,700 would secure a tax credit of $4,600, resulting in a profit of about $1,900.

5 The program was promoted by the Banyan Tree Foundation through a network of salespeople who were paid substantial commissions.

6 Canada Revenue Agency ("C.R.A.") disallowed the charitable donation tax credits claimed by participants in the Gift Program. It took the position that the "donation" made by the taxpayer was not a gift for the purposes of the *Income Tax Act*, because the loan was not *bona fide* and there were nothing more than book-keeping entries to give an aura of respectability to the transaction. It said that the participants were never at risk to repay their loans and that the program was a sham, designed to have the appearance of a legitimate charitable donation, when the real purpose was to enrich the taxpayer rather than benefit a charity. It therefore disallowed the charitable donation tax credits, and the participants were required to repay the taxes they had deducted, with interest.

7 Not only did the participants lose their deductions, their security deposits have disappeared, apparently due to defalcation by the investment manager.

8 In January 2010, Justice Lax certified this action as a class proceeding: *Robinson v. Rochester Financial Ltd.*, 2010 ONSC 463, [2010] O.J. No. 187 (Ont. S.C.J.).

9 There is no realistic prospect of recovery from any of the parties directly responsible for the Gift Program. This leaves the defendant law firm, Fraser Milner Casgrain LLP ("FMC"), as the last party standing. It provided legal opinions that the Gift Program complied with the applicable tax legislation and that the tax receipts issued by the Banyan Tree Foundation should be recognized by C.R.A.

10 As a result of mediation before a former judge of this Court, class counsel negotiated a settlement, subject to Court approval, of class members' claims against FMC for the total sum of $11 million. Approximately $7.75 million of this amount will be paid to class members in proportion to the charitable contributions they made, under a distribution plan that will be administered by class counsel. The balance will be used to pay the fees and disbursements of class counsel and the costs of administration of the settlement. In addition to this cash distribution, the plaintiffs asked the Court to make a declaration that the promissory notes executed by class members in connection with the Gift Program are unenforceable.

11 The proposed settlement, and the order I have granted, are somewhat unusual in that all individuals who have previously opted-out of this action, will have the opportunity to opt back in and to enjoy the benefits of the settlement. One of the reasons for this is that, following certification, Banyan Tree Foundation engaged in a misinformation campaign, designed to encourage class members to opt-out of this proceeding, suggesting that class members who opted out would be unable to challenge their C.R.A. reassessments. When this was brought to my attention by class counsel, I issued an order dated June 25, 2010, providing for further notice to class members and an opportunity to revoke their opt-outs. I am satisfied that, in the particular circumstances of this case, it is appropriate to extend this relief in connection with the settlement.

12 Those class members who have previously opted-out, and wish to remain outside the Class, need not do anything further.

13 There were approximately 2,825 participants in the Gift Program. They have received extensive individual notice of the proposed settlement. Approximately 500 objections to the settlement have been delivered. Almost all of these objectors have sent a standard form letter that appears to have been authored by Mr. Tim Millard, an accountant who was also a salesman for the Gift Program and who had approximately 40 clients who are class members. Mr. Millard and two other class members, Mr. Harrington and Dr. Maier, attended the hearing and made submissions. About seven or eight other class members attended the hearing but made no submissions.

14 The uniform concern expressed by Mr. Millard, Mr. Harrington and Dr. Maier, who spoke at the hearing, and by those class members who sent in the standard form letter, related not to the amount of the settlement, but rather to the proposed term of the settlement that would declare the "loan" portion of the taxpayer's contribution to the Gift Program (i.e., the leveraged portion), void and unenforceable. These objectors were concerned that a declaration to this effect would potentially adversely affect any future appeals they may make of their tax assessments or re-assessments.

15 This issue was raised at the hearing and, as a result of further discussions between class counsel and the objectors, a revised form of order, satisfactory to Messrs Millard, Harrington and Maier, was approved. That form of order, simply declares that the loan agreements and promissory notes executed by class members in connection with the Gift Program are unenforceable by the defendants, their successors and assigns.

16 A handful of objectors who sent written communications were concerned about the relatively modest amount they would receive under the settlement in comparison to the loss of their contributions, the loss of their anticipated deductions and any penalties and interest they may be required to pay. I will discuss this issue below.

17 In order to approve a settlement, the court must be satisfied that it is fair, reasonable and in the best interests of the class: *Nunes v. Air Transat A.T. Inc.*, 2005 CarswellOnt 2503 (Ont. S.C.J.) at para. 7; *Ford v. F. Hoffmann-La Roche Ltd.* (2005), [2005] O.J. No. 1118 (Ont. S.C.J.). The "fairness and reasonableness" analysis will vary from case to case, but courts frequently turn to the factors set out in *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Ont. Gen. Div.), at 13; and (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.) at 440-444; aff'd (1998), 41 O.R. (3d) 97 (Ont. C.A.); leave to appeal to S.C.C. denied [1998] S.C.C.A. No. 372 (S.C.C.):

(a) the presesence of arm's length bargaining and the absence of collusion;

(b) the proposed settlement terms and conditions;

(c) the number of objectors and nature of objections;

(d) the amount and nature of discovery, evidence or investigation;

(e) the likelihood of recovery or likelihood of success;

(f) the recommendations and experience of counsel;

(g) the future expense and likely duration of litigation;

(h) information conveying to the court the dynamics of, and the positions taken by the parties during the negotiations;

(i) the recommendation of neutral parties, if any; and,

(j) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation.

18 I am satisfied that most of these factors have been addressed in this settlement. The settlement is clearly the product of hard bargaining at arms' length, facilitated by an experienced mediator. It comes with the recommendation of highly qualified and reputable counsel, who have engaged the assistance of expert tax counsel. The concerns of the overwhelming majority of

objectors have been satisfied. The settlement is clearly a compromise, but liability of FMC was a very contentious issue. FMC would argue, if the matter proceeded to trial, that its opinions were consistent with the state of the law as it existed at the time and that the subsequent hardening of the position of C.R.A. and, it would appear, the appellate case law, was not something that could have been foreseen at the time. There were other issues that would also be brought into play by FMC, including whether class members relied on its opinions. A significant discount of the claim was warranted to reflect the real risk that the claim against FMC would not succeed.

19 While a very small number of objectors have expressed concerns about the amount of the settlement, the vast majority of the objectors were concerned only with the issue of the proposed relief in relation to their loans. Over eighty percent of class members have made no comment on the settlement. I acknowledge, however, that some class members think that the settlement amount is too low. Every settlement is necessarily a compromise. It reflects the possibility that the class may recover nothing if the action goes to trial and that there is a benefit to early resolution.

20 For the purposes of a settlement approval motion, I should assume that if the settlement is not approved, the action will proceed to trial. In effect, I would be substituting my view of the prospects of success for the views of class counsel, who have lived with this action since its outset and who are familiar with the risks and benefits of continuing with the action. While I can, in appropriate cases, appoint *amicus* to assist my examination of the settlement, I have in this case a high level of confidence in the fairness and reasonableness of the settlement and I approve it.

Fee of Class Counsel

21 Class counsel entered into a contingency fee retainer agreement with the representative plaintiffs that provided for a contingent fee of 25% of the total value of any settlement. They request approval of the payment of $3,252,682.65 for their fees, disbursements and taxes.

22 I find that the fee agreement meets the requirements of s. 32(1) of the *Class Proceedings Act*, S.O. 1992, c. 6 (the "*C.P.A.*") and that it is fair and reasonable, having regard to the factors set out in the case law, as summarized in *Ford v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (Ont. S.C.J.) at para. 67.

23 In this case, I consider the following circumstances of particular significance:

(a) this action would never have been commenced, let alone successfully resolved, had it not been been for the initiative, tenacity and persistence of class counsel in the face of widespread apathy on the part of all class members;

(b) class counsel funded disbursements of almost $200,000, making it unnecessary to apply to the Class Proceedings Fund;

(c) class counsel have gone without any compensation at all through four years of litigation;

(d) class counsel gave an indemnity to the representative plaintiffs with respect to any adverse costs award - the assumption of a significant risk of not only receiving no fees and disbursements, but the possibility of a substantial six figure costs award against them;

(e) the matter was complex and the outcome was far from certain;

(f) the result achieved is financially significant and every class member will receive actual cash compensation;

(g) in addition to the cash value of the settlement, class members will receive the added benefit of a declaration that their loans and promissory notes are unenforceable, a matter of some concern to class members;

(h) the time spent by class counsel was about 4,600 hours with a face value of about $1.8 million, and the proposed fee represents a multiplier of less than 2;

(i) there has been no real opposition to class counsel's fee by class members, whose only significant objection related to the scope of the proposed declaration; and

(j) the payment of the proposed fee does not significantly dilute the recovery by class members, and their ability to pay the fee is not an issue.

24 Having supervised this proceeding for more than two years, I am satisfied that class counsel have demonstrated commendable diligence, perseverance and skill in pursuing a very challenging piece of litigation and bringing it to a successful conclusion.

25 I do not propose to repeat the observations I made in *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, [2011] O.J. No. 5781 (Ont. S.C.J.), concerning the value of contingency fees in the fair compensation of class counsel. In my view, with the benefit of hindsight, it is fair and reasonable that class members should pay the fee requested by class counsel and I approve that fee.

Compensation for the Representative Plaintiffs

26 Class counsel have made a request for compensation in the amount of $5,000 for each of the representative plaintiffs, relying on the authority of *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Ont. Gen. Div.), on the basis that the plaintiffs have rendered "active and necessary assistance" in the prosecution of the case.

27 In *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105, [2011] O.J. No. 5781 (Ont. S.C.J.), I set out the principles applicable to this request at para. 93:

> The payment of compensation to a representative plaintiff is exceptional and rarely done: *McCarthy v. Canadian Red Cross Society*, [2007] O.J. No. 2314 (S.C.J.) at para. 20; *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen. Div.); *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.); *Bellaire v. Daya*, [2007] O.J. No. 4819 (S.C.J.) at para. 71. It should not be done as a matter of course. Any proposed payment should be closely examined because it will result in the representative plaintiff receiving an amount that is in excess of what will be received by any other member of the class he or she has been appointed to represent: *McCutcheon v. Cash Store Inc.*, [2008] O.J. No. 5241 (S.C.J.) at para. 12. That said, where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class, it may be appropriate to award some compensation: *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen. Div.) at para. 28.

28 Class counsel says that this is one of those exceptional cases in which compensation should be paid. As I have noted, class counsel faced considerable apathy on the part of class members and it was exceedingly difficult to find someone prepared to take on the role of representative plaintiff until Mr. and Mrs. Robinson stepped up to the plate. Taking on that role required that they expose private personal financial information, including their income tax returns for the years they participated in the Gift Program. They each spent more than 300 hours in assisting class counsel in the prosecution of the action. In comparison, they will receive a modest award of about $6,000 under the settlement.

29 In *Windisman*, above, Sharpe J. observed, at para. 28:

> Ordinarily, an individual litigant is not entitled to be compensated for the time and effort expended in relation to prosecuting an action. In my view, there is an important distinction to be drawn with reference to class proceedings. The representative plaintiff undertakes the proceedings on behalf of a wider group and that wider group will, if the action is successful, benefit by virtue of the representative plaintiff's effort. If the representative plaintiff is not compensated in some way for time and effort, the plaintiff class would be enriched at the expense of the representative plaintiff to the extent of that time and effort. In my view, where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class, the representative

> plaintiff may be compensated on a quantum meruit basis for the time spent. I agree with the American commentators that such awards should not be seen as routine. The evidence here is that Ms. Windisman took a very active part at all stages of this action. It seems clear that the case would not have been brought but for her initiative. She assumed the risk of costs and she devoted an unusual amount of time and effort to communicating with other class members, acting as a liaison with the solicitors, and assisting the solicitors at all stages of the proceeding. She kept careful records of her time and effort.

30 In that case, the representative plaintiff had kept docketed time entries showing 81.2 hours of time and estimated a further 25 hours of undocketed time. Sharp J. awarded compensation of $4,000, to be deducted from the net recovery of the class.

31 This issue brings into play some conflicting values. On the one hand, we do not wish to create a conflict of interest between the representative plaintiffs and the class, by giving the former more substantial contribution. This was discussed by Winkler J. in *Tesluk v. Boots Pharmaceutical PLC*, [2002] O.J. No. 1361 (Ont. S.C.J.):

> In the present circumstances the work of the Representative Plaintiffs was unnecessary to the preparation or presentation of the case. Indeed, their work did not begin until after the settlement had been structured. Their work did not result in any monetary success for the class. If they were to be compensated in the manner requested they would be the only class members to receive any direct monetary compensation. The entire settlement is in the form of Cy-pres distribution. The representative plaintiffs are seeking some $80,000 in total which is to be deducted from the settlement. By way of contrast, in Windisman, the representative plaintiff took an active part at all stages of the proceeding, the case would not have been brought except for her initiative, she assumed the risk of costs, and devoted an unusual amount of time communicating with class members and assisting counsel. The class members received a direct monetary benefit due in part to her efforts.
>
> While the work of the representative plaintiffs is commendable, to compensate them for the work when the settlement funds for the entire class are being donated to research without a single penny finding its way into the hands of a class member would be contrary to the precept of the Cy-pres distribution in particular and to a class proceeding generally. Compensation for representative plaintiffs must be awarded sparingly. The operative word is that the functions undertaken by the Representative Plaintiffs must be "necessary", such assistance must result in monetary success for the class and in any event, if granted, should not be in excess of an amount that could be purely compensatory on a quantum meruit basis. Otherwise, where a representative plaintiff benefits from the class proceeding to a greater extent than the class members, and such benefit is as a result of the extraneous compensation paid to the representative plaintiff rather than the damages suffered by him or her, there is an appearance of a conflict of interest between the representative plaintiff and the class members. A class proceeding cannot be seen to be a method by which persons can seek to receive personal gain over and above any damages or other remedy to which they would otherwise be entitled on the merits of their claims. This request is denied.

32 In *Hislop v. Canada (Attorney General)*, [2004] O.J. No. 1867 (Ont. S.C.J.), an action claiming CPP survivor's pensions for same sex partners, E. Macdonald J. awarded compensation of $15,000 to one representative plaintiff, two others received $10,000 each and two others received $5,000 each.

33 In *Garland v. Enbridge Gas Distribution Inc.*, [2006] O.J. No. 4907 (Ont. S.C.J.), Cullity J. awarded the representative plaintiff $25,000 for his efforts, which he described as an "exceptional contribution". He made the following observations at paras. 45 and 46:

> ... Mr Garland has, in my judgment, made out a strong case for compensation. He took the initiative in seeking legal advice with respect to the legality of late payment penalties and in instructing counsel to commence the proceedings. He was instrumental in keeping the legal team together when members of the class counsel sought to withdraw from the proceedings on the ground of a business conflict, and he accepted a large part of the responsibility for communicating with class members personally or through interviews with representatives of the media. He also played an active part in the settlement negotiations and, in particular, in obtaining agreement to the nature and details of the *cy pres* distribution - one of the matters for which he found it desirable to retain separate counsel.

> The litigation was commenced, and continued, by Mr Garland in the public interest and, I am satisfied, that throughout it his primary concern has been to protect and serve the interests of the class. It was on this ground that he firmly opposed counsel's proposal to replace the method of calculating their fee under the 1998 fee agreement with the application of a multiplier to be applicable irrespective of the gross recovery.

34 In *McCutcheon v. Cash Store Inc.*, [2008] O.J. No. 5241 (Ont. S.C.J.), Cullity J. approved a payment of $10,000, stating at paras. 22 and 23:

> Although I am not oblivious to the risk of engendering expectations that such payments will be approved as a matter of course, the request in this case is strongly supported by class counsel who have sworn to the significant amount of time expended by Mr McCutcheon in advancing the interests of the class. His efforts were not confined to meetings with class counsel but extended to communicating with other class members, monitoring developments in the pay-day loan industry and providing input and assistance to class counsel in the settlement negotiations. Counsel have testified to his active part in all stages of the litigation and his time and energy spent in liaising between them and class members. They have sworn that he accepted the personal exposure to an adverse costs award and, to the benefit of the class, that he did not choose to seek assistance from the Class Proceedings Fund. They have stated that the request for compensation was made entirely at their suggestion. While I consider the amount requested to be on the high side, I am satisfied that, independently of this payment and the payment of counsel fees, the settlement merits approval and that the total amount of class counsel fees and the representative plaintiff's compensation could be justified if, as in *Garland*, it consisted of counsel fees from which the representative plaintiff's compensation was to be paid. On the basis of the strong support provided by class counsel, I will approve the amount of $10,000. I will, however, reiterate what I have said in other cases that, as a general rule, all benefits and payments to be made by defendants should be treated as a single package when considering the fairness and reasonableness of a settlement from the viewpoint of a class. This, I believe, should be accepted whether or not there are expressed to be separate agreements for fees to be paid directly by defendants rather than out of a settlement amount otherwise earmarked for the benefit of the class. As in other parts of the law, substance must prevail over form.

35 In *Fakhri v. Alfalfa's Canada Inc.*, 2005 BCSC 1123, [2005] B.C.J. No. 1723 (B.C. S.C.), Gerow J. of the British Columbia Supreme Court awarded $5,000 as compensation for the representative plaintiff. In that case, the defendant had agreed to pay the amount directly to the representative, with the result that it would not dilute the recovery of the class. It was found that the plaintiff had delivered multiple affidavits, reviewed pleadings, provided instructions, attended the mediation and court hearings, and helped shape the final settlement. The judge found that the plaintiff's efforts on behalf of the class had an impact on the successful resolution of the proceeding.

36 In *Walker v. Union Gas Ltd.*, [2009] O.J. No. 536 (Ont. S.C.J.), Cumming J. approved a payment of $5,000 to the representative payment, out of the fees of class counsel. He observed that the plaintiff had spent more than 70 hours in the conduct of the litigation, including reviewing some 10 bankers' boxes of documents, cross-referencing documents and isolating bills, and traveling to Toronto for the meeting with the Class Proceedings Committee.

37 In the recent case of *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233, [2011] O.J. No. 1321 (Ont. C.A.), the Court of Appeal affirmed the motion judge's decision to award $3,000 compensation to the representative plaintiff. It suggested that generally such a fee should be paid out of the settlement fund, rather than out of class counsel's fees, to avoid any spectre of fees-plitting. In that case, the Court of Appeal observed, at para. 134, that judges of this court have taken different approaches with respect to the payment of fees for the representative plaintiffs. It noted that it had not previously dealt with the issue. We can take from the Court of Appeal's decision that the court may award compensation to a representative plaintiff in an "appropriate case".

38 In *McCarthy v. Canadian Red Cross Society*, [2007] O.J. No. 2314 (Ont. S.C.J.) there was a request for fees and disbursements to be paid to the representative plaintiff, in the amount of $75,000. In dismissing the request, Winkler J. observed at para. 20:

> Mr. McCarthy has fulfilled his obligation to the class as their representative. However, a distinction must be drawn between the professional advisors to the class and the representative plaintiff with respect to fees. Where it is necessary for the representative plaintiff to incur out-of-pocket expenses in acting in that capacity, such as attendance at discoveries as one example, it may be appropriate for class counsel to reimburse such amounts and claim it as a disbursement subject to recovery on approval by the Court. While each case turns on its facts, in my view, it is not generally appropriate for a representative plaintiff to receive a payment for fees or for time expended in the pursuit of the action. Further, any payment made to a representative plaintiff in connection with the action, whether directly or indirectly, and whether for reimbursement or otherwise, must be disclosed to the Court.

39 It would appear that judges in British Columbia have been less reluctant to award compensation for representative plaintiffs. In addition to *Fakhi v Alfalfa's Canada Inc.*, above, I will mention *Reid v. Ford Motor Co.*, 2006 BCSC 1454 (B.C. S.C.), in which a payment of $3,000 was approved on a *quantum meruit* basis, to be paid from class counsel fees and *MacKinnon v. Vancouver City Savings Credit Union*, 2004 BCSC 1604, 34 B.C.L.R. (4th) 322 (B.C. S.C.) in which a payment of $5,000 was approved to be paid as a disbursement.

40 In a recent decision of the British Columbia Court of Appeal in *Parsons v. Coast Capital Savings Credit Union*, 2010 BCCA 311, [2010] B.C.J. No. 1184 (B.C. C.A.), the representative plaintiff appealed an order of the settlement approval motion judge refusing to award compensation to the representative plaintiff in the amount of $10,000. The motion judge had concluded that British Columbia law only permitted compensation to be paid to the representative plaintiff where he or she has made a contribution that is over and above the contribution expected of a representative plaintiff, although it need not be an extraordinary contribution.

41 After a thorough review of the authorities in both Canada and the United States, the Court of Appeal concluded that it was not necessary for the class representative to show that he or she performed services of special significance. It said that where the representative plaintiff has fulfilled his or her duties, and a favourable settlement has been achieved, a "modest award in recognition of the effort expended on behalf of the class" would be appropriate. The Court stated, at paras. 20-3:

> I consider it is too narrow to say, as the judge did here, that services of special significance beyond the usual responsibilities under the *Act* are required for a separate award to the representative plaintiff. Where the representative plaintiff has fulfilled his or her duties, which will include attendance for examination in discovery, providing instructions on all steps taken in the litigation and on the settlement (which necessarily requires immersion in the substance of the case), and where a monetary settlement in favour of the class members is achieved, a modest award in recognition of the effort expended on behalf of the class members is consistent with restitutionary principles and recognition of the principle of *quantum meruit*. This expectation is further justified by the exposure to costs assumed by the representative plaintiff in commencing the action. While that risk is mitigated upon certification, there is a real exposure to costs assumed on commencing the action. Other intangible costs also are borne by such a plaintiff, including the sometimes not inconsiderable weight of being the leader of the claimants.
>
> In other words, I do not consider exceptional service is required. Rather competent service accompanied by positive results should be sufficient for recognition in this way, weighing in this factor the quantum of personal benefit achieved by the representative plaintiff with the overall benefit achieved for the class.
>
> In considering the quantum of such a payment, where the representative plaintiff's personal benefit is small but the collective benefit is great, there may be disproportion between personal benefit on the one hand and effort and responsibility on the other, so as to weigh in favour of a somewhat larger award. Nevertheless, in no case should the award be so large as to create the impression that the representative plaintiff was put into a conflict of interest. The outer bounds of what could be an appropriate compensatory award may vary from case to case, depending on factors such as the terms of settlement or award at issue and the personal circumstances of the representative plaintiff.

> In this case Ms. Parsons was a representative plaintiff in another action, and in the course of that proceeding her counsel observed the overdraft payment that grounded this action. In other words, Ms. Parsons did not initiate the claim. Nonetheless she exposed herself to costs in any proceedings that might have arisen prior to the certification application, she assumed responsibility for deriving benefit for others, she attended at an examination for discovery, she was available for conversation during the mediation, and in the end result she fronted an action that was significantly successful. In my view these features of the case, while not extraordinary, militate in favour of payment to her of a modest sum, described by her counsel as an honourarium.

42 The Court held that an award of $3,500, payable as a disbursement, would be appropriate. I note that one of the factors the Court of Appeal considered was the representative plaintiff's exposure to costs, a factor not relevant in this case due to the indemnity agreement.

43 In this particular case, while I acknowledge the contribution made by Kathryn Robinson and by Rick Robinson, and commend them on the work they have done to bring this matter to a successful conclusion on behalf of their fellow class members, I am not prepared to award such compensation. In my respectful view, requests for compensation for the representative plaintiff are becoming routine, as Sharpe J. anticipated in *Windisman*, above. I agree with those who have expressed the opinion that compensation should be reserved to those cases where, considering all the circumstances, the contribution of the plaintiff has been exceptional. The factors that might be appropriate for consideration could include:

(a) active involvement in the initiation of the litigation and retainer of counsel;

(b) exposure to a real risk of costs;

(c) signicant personal hardship or incovenience in connection with the prosecution of the litigation;

(d) time spent and activities undertaken in advancing the litigation;

(e) communication and interaction with other class members; and

(f) participation at various stages in the litigation, including discovery, settlement negotiations and trial.

44 I conclude, with some regret, that in this particular case the application of these factors, considered as a whole, do not dictate payment of compensation.

Conclusion

45 The settlement is therefore approved, as are the fees and disbursements of class counsel. I have also issued an order, on consent, discharging the Monitor, Grant Thornton Limited.

Settlement approved.

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2006 MBQB 285
Manitoba Court of Queen's Bench

Semple v. Canada (Attorney General)

2006 CarswellMan 482, 2006 MBQB 285, [2006] M.J. No. 498,
156 A.C.W.S. (3d) 751, 213 Man. R. (2d) 220, 40 C.P.C. (6th) 314

CHRISTINE SEMPLE, JANE MCCALLUM, STANLEY THOMAS NEPETAYPO, PEGGY GOOD, ADRIAN YELLOWKNEE, KENNETH SPARVIER, DENIS SMOKEDAY, RHONDA BUFFALO, MARIE GAGNON, SIMON SCIPIO, AS REPRESENTATIVES AND CLAIMANTS ON BEHALF OF THEMSELVES AND ALL OTHER INDIVIDUALS WHO ATTENDED RESIDENTIAL SCHOOLS IN CANADA, INCLUDING BUT NOT LIMITED TO ALL RESIDENTIAL SCHOOLS' CLIENTS OF THE PROPOSED CLASS COUNSEL, MERCHANT LAW GROUP, AS LISTED IN PART SCHEDULE 1 TO THIS CLAIM AND THE JOHN AND JANE DOES NAMED HEREIN, AND SUCH FURTHER JOHN AND JANE DOES AND OTHER INDIVIDUALS BELONGING TO THE PROPOSED CLASS, INCLUDING JOHN DOE I, JANE DOE I, JOHN DOE II, JANE DOE II, JOHN DOE III, JANE DOE III, JOHN DOE IV, JANE DOE IV, JOHN DOE V, JANE DOE V, JOHN DOE VI, JANE DOE VI, JOHN DOE VII, JANE DOE VII, JOHN DOE VIII, JANE DOE VIII, JOHN DOE IX, JANE DOE IX, JOHN DOE X, JANE DOE X, JOHN DOE XI, JANE DOE XI, JOHN DOE XII, JANE DOE XII, JOHN DOE XIII, JANE DOE XIII BEING A JANE AND JOHN DOE FOR EACH CANADIAN PROVINCE AND TERRITORY, AND OTHER JOHN AND JANE DOES, INDIVIDUAL, ESTATES NEXT-OF-KIN AND ENTITIES TO BE ADDED (PLAINTIFFS) and THE ATTORNEY GENERAL OF CANADA, THE PRESBYTERIAN CHURCH IN CANADA, THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE UNITED CHURCH OF CANADA, THE BOARD OF HOME MISSIONS IN THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH, THE BAPTIST CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN BAY, THE CANADA IMPACT NORTH MINISTRIES, THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY), THE DIOCESE OF SASKATCHEWAN, THE DIOCESE OF THE SYNOD OF CARIBOO, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE METHODIST CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (also known as THE METHODIST MISSIONARY SOCIETY OF CANADA), THE INCORPORATED SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE ANGLICAN CHURCH OF THE DIOCESE OF QUEBEC, THE SYNOD OF THE DIOCESE OF ATHABASCA, THE SYNOD OF THE ANGLICAN CHURCH OF THE DIOCESE OF BRANDON, THE ANGLICAN SYNODOF THE DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE SYNOD OF THE DIOCESE OF NEW WESTMINSTER, THE SYNOD OF THE DIOCESE

OF YUKON, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE BOARD OF HOME MISSIONS AND SOCIAL SERVICE OF THE PRESBYTERIAN CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA, SISTERS OF CHARITY, A BODY CORPORATE ALSO KNOWN AS SISTERS OF CHARITY OF ST. VINCENT DE PAUL, HALIFAX, ALSO KNOWN AS SISTERS OF CHARITY HALIFAX, ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX, LES SOEURS DE NOTRE DAME-AUXILIATRICE, LES SOEURS DE ST. FRANCOIS D'ASSISE, INSTITUT DES SOEURS DU BON CONSEIL, LES SOEURS DE SAINT-JOSEPH DE SAINT-HYACINTHE, LES OEUVRES DE JESUS-MARIE, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE, LES SOEURS DE L'ASSOMPTION DE LA SAINT VIERGE DE L'ALBERTA, LES SOEURS DE LA CHARITE DE ST.-HYACINTHE, LES SOEURS OBLATES DE L'ONTARIO, LES RESIDENCES OBLATES DU QUEBEC,LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE JAMES (THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY) THE CATHOLIC DIOCESE OF MOOSONEE, SOEURS GRISES DEMONTREAL/GREY NUNS OF MONTREAL, SISTERS OF CHARITY (GREY NUNS) OF ALBERTA, LES SOEURS DE LA CHARITE DES T.N.O. HOTEL-DIEU DE NICOLET, THE GREY NUNS OF MANITOBA INC. — LES SOEURS GRISES DU MANITOBA INC., LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE D'HUDSON-THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY, MISSIONARY OBLATES-GRANDIN, LES OBLATS DE MARIE IMMACULEE DU MANITOBA, THE ARCHIEPISCOPAL CORPORATION OF REGINA, THE SISTERS OF THE PRESENTATION, THE SISTERS OF ST. JOSEPH OF SAULT ST. MARIE, SISTERS OF CHARITY OF OTTAWA OBLATES OF MARY IMMACULATE-ST. PETER'S PROVINCE, THE SISTERS OF SAINT ANN, SISTERS OF INSTRUCTION OF THE CHILD JESUS, THE BENEDICTINE SISTERS OF MT. ANGEL OREGON, LES PERES MONTFORTAINS, THE ROMAN CATHOLIC BISHOP OF KAMLOOPS CORPORATION SOLE, THE BISHOP OF VICTORIA, CORPORATION SOLE, THE ROMAN CATHOLIC BISHOP OF NELSON CORPORATION SOLE, ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD, ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN, LA CORPORATION ARCHIEPISCOPALE CATHOLIQUE ROMAINE DE ST.BONIFACE, LES MISSIONAIRES OBLATES SISTERS DE ST.BONIFACE THE MISSIONARY OBLATES SISTERS OF ST. BONIFACE, ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT, THE ROMAN CATHOLIC BISHOP OF THUNDER BAY, IMMACULATE HEART COMMUNITY OF LOS ANGELES CA, ARCHDIOCESE OF VANCOUVER-THE ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER, ROMAN CATHOLIC DIOCESE OF WHITEHORSE, THE CATHOLIC EPISCOPALE CORPORATION OF MACKENZIE-FORT SMITH, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, EPISCOPAL CORPORATION OF SASKATOON, OMI LACOMBE CANADA INC. (DEFENDANTS)

Schulman J.

Judgment: December 15, 2006

Docket: Winnipeg Centre CI 05-01-43585

Counsel: Mr. K. Baert, Ms. C. Poltak, Mr. W. Percy, Mr. J. Horyski for National Certification Committee
Mr. J.K. Phillips for Assembly of First Nations, National Chief Phil Fontaine
Mr. N. Rosenbaum for Merchant Law Group
Ms. K. Coughlan, Ms. J. Oltean, Ms. A. Kenshaw for Attorney General of Canada
Mr. A. Pettingill for United Church of Canada, Anglican Church in Canada, Presbyterian Church in Canada
Mr. R. Donlevy, Mr. P. Baribeau for All Catholic entities

Subject: Civil Practice and Procedure; Public

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s. 35(1) — considered

s. 35(2) — considered

s. 35(3) — considered

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Generally — referred to

s. 7.1 [en. 2002, c. 5, s. 4] — referred to

MOTION for order certifying class action and approving settlement of Residential School Litigation.

***Schulman J.*:**

1 It is rare for this Court to have an opportunity to determine an issue of national and historic importance. This motion for an order certifying a class action and approving settlement of Residential School Litigation presents this Court with such an opportunity.

2 The motion has been brought with the consent of all parties. For more than a century the Government of Canada, hereafter referred to as Canada, implemented a policy under which it compelled Aboriginal children to leave their homes and attend Indian Residential Schools, hereafter referred to as IRS, that were supervised by Canada and run by various churches. This policy was designed to reengineer Aboriginal people into a European model by educating them to abandon their language, culture and way of life and adopt the language, culture and religions of other Canadians. Looking back on the policy in 2006, it is an understatement to say that it is well below standards by which we like to think we treat other people and created problems for the Aboriginal people which require being addressed on a pan Canadian basis. There were 130 schools and they were located in all the provinces and territories of Canada except Newfoundland, New Brunswick and Prince Edward Island. While attending the schools many of the children were abused physically, sexually and emotionally and they suffered damage that in turn has adversely affected generations of Aboriginal people. The proposed settlement, which the parties are anxious to have concluded, provides for and creates unique and comprehensive remedies to solve a serious problem that has confronted this country for decades. The agreement provides that it must be approved by judges in nine provinces and territorial courts and the settlement will fail unless all nine judges approve the settlement on substantially the same terms and conditions as provided in the settlement agreement.

3 As in all cases where a Court is asked to approve a settlement involving vulnerable plaintiffs, this Court must ask itself before considering a rejection of the settlement, whether it can guarantee a better result. Before granting approval subject to conditions which call for significant changes to the agreement, a Court must ask itself whether it is worth risking the unravelling of the agreement and leaving nearly 80,000 Aboriginal people and their families to pursue the remedies available to them prior to the agreement being signed.

4 As I understand it one or more of the judgments released by my colleagues in other provinces attach at least four conditions to their approval of the settlement. One of the conditions relates to the question of who is going to supervise the administration of the settlement. The agreement provides that the administration is to be supervised by the defendant, the Attorney General of Canada, whom I refer to as Canada. The condition of the judgments is that there be independent supervision subject to reporting to the Court. The judgment suggests that this may not be a material change in the agreement. I will discuss the risks that are created by the attaching of that and other conditions, in para. 33 of this judgment.

5 In addressing the issues presented, I deal with the following matters;

a) the present plight of litigants and other persons who may wish to make a claim;

b) an outline of the proposed settlement;

c) the principles applicable to a motion for certification and how they relate to this case;

d) the principles relating to Court approval and how they relate to this case;

e) the recommendation of counsel for the represented parties;

f) the positions advanced by persons not represented by counsel either in writing or in person;

g) improvements suggested by Winkler J. in the Baxter case;

h) the risks of a conditional approval; and

i) conclusion.

a) The present plight of litigants and other injured persons;

6 There are approximately 78,000 Aboriginal persons alive who attended and resided in Indian Residential Schools. Most of them live in Canada, although some live in the United States. Their numbers reduce weekly as 25 of them die. Ten thousand of them have sued the federal government and churches and perpetrators of abuse. Of them, 11 per cent or 1100 have sued in Manitoba in one or another of 289 actions. If these 78,000 people were to pursue the remedies to which they may be entitled, through the court process, it would present our court system and all those people with a daunting challenge. As a result of pre-trial procedures including Judicially Assisted Dispute Resolution Conferences the vast majority of civil actions in Manitoba are settled before trial. In our Court fewer than 100 civil cases each year are brought to trial. These abuse claims are claims which are least likely to settle before trial. It is hard to imagine, in the event of claims being commenced for 11 percent of 78,000 or 8500 persons, when we would next take on any other civil trial if all the Manitoba claims were readied for trial. What would happen to the workload of the other Courts in Canada if the rest of the claims were sued and set down for trial?

7 Now let us look at the situation confronting Aboriginal people who were devastated over the years by the events referred to in the pleadings. Many of them are impoverished. Many of them are illiterate. Culturally many of them are shy, reserved and reluctant to give evidence in Court. Relatively few of their claims have been tried to date. At the trials held to date, the plaintiffs have suffered the embarrassment of being required to give evidence publicly about the abuse they suffered many years before. In many of the cases they were required to recount their painful experience on prolonged examinations for discovery. One case took 16 years to wend its way to trial, appeal and the Supreme Court. The trial lasted 60 days. Another claim by 26 plaintiffs lasted six years. The trial was conducted in three segments a total of 108 days. Other cases have taken between two and six years from start to finish. Many of the plaintiffs are of very modest means and the cost of engaging experts, conducting assessments and leading the evidence at trial is very great.

8 In the context of this litigation, every plaintiff must overcome enormous hurdles in order to succeed in an action and realize on any judgment obtained. Starting with the question of realizing a judgment, it is in most cases of abuse, not good enough to obtain judgment against the perpetrator of abuse, because he or she may not have sufficient assets to pay the judgment. Consequently, it is necessary for each and every plaintiff to find a legal basis for holding Canada or a church liable, and in the case of the churches there is a real question of their ability to pay one or more of the judgments.

9 While we live in an era where unrepresented litigants are filing their own claims in unprecedented numbers, making a claim in these circumstances requires the preparation of a written pleading which will test the skills of an experienced pleader. Pleadings prepared below the minimum standard run the risk of being struck out or dismissed fairly early in a proceeding. Legal representation is pretty well a must in these claims.

10 If the Aboriginal plaintiffs find lawyers who will represent them and have the required expertise, one of the first problems to be addressed is whether the claim can be brought on a timely basis or whether it will be barred by the *Limitation of Actions Act* C.C.S.M. c. L 150 and like legislation in other provinces. In Manitoba the legislature attempted in 2002 to amend the statute and relieve plaintiffs from the harshness of a 30 year ultimate limitation period (S.M. 2002, c.5, s.4) but the amendment is unlikely to help many of this class of plaintiff because it is a principle of law that a defendant acquires a vested right to have the benefit of any limitation period in place at the time a wrong is committed even if the limitation provision is later repealed.

11 If a member of this class of plaintiffs is able to overcome the limitation problem which is inherent in these decades old claims, the claims may be met with attempts by the defendants to defeat the claims on a long list of grounds, a few of which I will describe briefly, many of which have not been tested in Court. Firstly, it may be argued that loss of language, culture and identity is not an item of damage for which Courts are able to award compensation. Secondly, the only legal basis for imposing liability against the federal government is by proof that a servant of Canada would be personally liable, if sued and that Canada is vicariously liable. In the case of claims pre-dating 1953, one would have to base the claim in negligence and show that the acts in question took place in the course of the wrong-doers employment. It was only by means of a legislative change in 1953 that Canada became liable for intentional torts of its servants. However, it may be argued that Canada is not liable for the tortious acts of all its employees. In one case the Supreme Court held that in order to support a finding of vicarious liability there had to

be a strong connection between what the employer was asking the employee to do and the wrongful conduct. The Court rejected a claim against a school where a man who was employed as a baker, driver and odd-job man assaulted a student in his living quarters. In negligence claims defendants might try to justify the actions of their servants by establishing that the operation of the schools and treatment of students met the standards of the times or contemporary standards. When one makes a claim in a civil action against another based on conduct that amounts to a crime, the burden of proof to be satisfied is proof on a balance of probabilities commensurate with the seriousness of the allegation. This is higher than the usual burden of proof in a civil trial.

12 In November 2003 Canada created an ADR system as an alternative to litigation. Under the ADR program victims of IRS are permitted to make claims for damages for acts of physical and sexual abuse by school employees. The amount of the award is set by one of 32 full time adjudicators based on a grid consisting of several categories for which an adjudicator is able to make an award to a limit of $245,000.00. The amounts awarded vary from province to province. The adjudicators do not have the authority to award damages for lost earnings. Canada pays 70 percent of the amount of the award leaving it to the claimant to collect the other 30 percent from the church sponsor of the IRS in question. Since inception 5000 claims have been filed and 4000 of them are outstanding.

b) An outline of the proposed settlement;

13 The settlement makes provision for payment by Canada with participation by several church defendants, of six kinds of payments, two of which are to residential students directly provided they were alive on May 30, 2005, and the rest of which address the broad social implications of the IRS legacy. Firstly, all former students alive at the above date will receive the sum of $10,000.00 for the first year of attendance in an IRS and a further sum of $3,000.00 for each year of attendance thereafter. An IRS student who attended one or more schools for say 12 years will receive $10,000.00 plus 11 times $3,000.00 or $43,000.00 without proof of legal liability on the part of anyone else and without proof of physical or sexual abuse. This category of payment is described as a Common Experience Payment (C.E.P.). It recognizes the common experience of all former students and arguably recognizes the loss of their culture, family ties and identity. Unless the student intends to make a claim for serious physical or sexual abuse or wrongful acts which are defined, the recipient must sign a release of all claims in exchange for payment. Canada has established a fund of $1.9 billion dollars to fund payments to every student. Canada bears the risk of any insufficiency in the fund. If there is a surplus it is not repaid to Canada but is to be paid according to a formula. The first sum up to $40 million goes to the National Indian Brotherhood Trust Fund and the Inuvialuit Education Foundation to be used for educational programs for all class members. If the surplus exceeds that amount, each C.E.P. recipient receives a pro rata share in the form of personal credits for personal or group education up to $3,000.00. Canada also pays the cost of verifying the claims and the administrative cost of distribution.

14 Under the terms of the proposed settlement, Canada has instituted a process under which it pays, pending finalization of the settlement, the sum of $8,000.00 as an interim payment to all persons otherwise entitled to a C.E.P. who were on May 30, 2005 over the age of 65.

15 Secondly, class members have the right to seek and obtain payment of additional compensation for serious physical abuse, sexual abuse and specified wrongful acts through an Independent Assessment Process known as IAP. The parties, having observed the ADR process in action for more than a year, conducted studies, noted the shortcomings and proposed a series of significant improvements that have been incorporated into the settlement agreement. The awards under IAP consist not only of the damage award of the ADR process with a limit increasing to $275,000.00 but also compensation for lost earnings of up to $250,000.00. Compensation is paid in full by Canada not only for acts of employees but also for acts of any adult lawfully on the IRS premises. Where the claim is for abuse by fellow students the onus shifts to Canada and the Churches to show that it had reasonable supervision in place at the time. Unlike the Court process, the IAP process follows the inquisitorial mode. The adjudicator questions the witnesses at a closed or private hearing. Canada has committed itself to provide resources to ensure that at least 2500 IAP hearings will be conducted each year and that all claims described as continuing claims be resolved within 6 years. There is provision for claims being referred to the courts in some circumstances, for example where the amount that a court might award exceeds the limit that the adjudicator might award. Any major changes to the IAP requires Court approval.

16 In addition to the fact that the IAP process is an improvement over the former ADR system as described in para. 15, there are eight additional improvements as follows: an expanded list of compensable acts; a decreased threshold for proof of abuse; for claims resolved prior to the IAP without church contribution, a 30 per cent top up where less than 100 per cent was received; for claims processed under IAP payment on a scale that is uniform across the country; for claims referred to the Courts, a waiver of all limitation defences; a means to compensate non student invitees for abuse suffered up to the age of 21; an independent screening process for IAP claims; and a means for claimants to give evidence by video conference in cases of failing health.

17 Thirdly, the settlement provides for Canada to fund to the extent of $60 million for five years, the setting up of a Truth and Reconciliation process, directed by a Commission consisting of nominees of former students, Aboriginal organizations, Churches and Canada. The goals of the Commission are to acknowledge the IRS experience; provide a safe setting for individuals to address the Commission; witness, promote and facilitate truth and reconciliation events at both national and community levels; educate the Canadian public about the IRS system and its impacts; create and make public a record for future study; prepare a report on the legacy of the IRS; and support commemorative events.

18 Fourthly, the settlement provides for a number of commemorative initiatives at national and community levels with a budget of $20 million and for the establishment of a $125 million dollar endowment over five years to fund Aboriginal healing programs.

19 In addition, Canada has made the following commitment:

> Health Canada will expand its current Indian Residential Schools Mental Health Support Program to be available to individuals who are eligible to receive compensation through the Independent Assessment Process, as well as to Common Experience Payment Recipients, and to those participating in Truth and Reconciliation and Commemoration activities. It will offer mental health counselling, transportation to access counselling and/or Elder/Traditional Healer services and emotional support services, which include Elder support. Health Canada will offer these services through its regional offices, including the Northern Secretariat which has an office located in Whitehorse, Yukon.

20 In addition, the Church organizations have agreed as part of the settlement to provide cash and in-kind services to a maximum of $102.8 million to develop new programs for class members and their families.

21 Importantly, Canada will be paying from a separate fund legal fees for the conduct of the various Court actions, for negotiation of the settlement agreement, for conduct of the C.E.P. claims and a contribution toward legal fees to be earned on the IAP claims to the extent of 15 percent of the awards. I will say more about this in para. 30 and 31.

22 The settlement agreement does not bind any member of the class to seek or accept the benefits provided in the agreement. It makes provision for class members to opt out of making a claim for C.E.P. and proceeding with a court claim. Para. 4.14 creates a threshold that if 5,000 persons opt out the agreement is invalidated and court approval set aside unless Canada chooses to waive compliance within a prescribed period.

c) The principles applicable to a motion for certification of a class action;

23 This motion for certification has been brought pursuant to *The Class Proceedings Act* C.C.S.M. c. C130. Section 4 provides:

> **Certification of class proceeding**
>
> 4. The court must certify a proceeding as a class proceeding on a motion under section 2 or 3 if
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of two or more persons;

(c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and

(e) there is a person who is prepared to act as the representative plaintiff who

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class of notifying class members of the class proceeding, and

(iii) does not have, on the common issues, an interest that conflicts with the interests of other class members.

All parties consent to the order being made. However the consent of the defendants is conditional on the settlement being confirmed by this Court and the Courts in eight other jurisdictions. The statute provides with regard to settlements:

Settlement, discontinuance and abandonment

35(1) A class proceeding may be settled, discontinued or abandoned only

(a) with the approval of the court; and

(b) on the terms the court considers appropriate.

Court approval of settlement

35(2) A settlement may be concluded in relation to the common issues affecting a subclass only

(a) with the approval of the court; and

(b) on the terms the court considers appropriate.

Settlement not binding unless approved

35(3) A settlement is not binding unless approved by the court.

It does not specify the matters to be considered in deciding whether to approve a settlement.

24 In my view it is clear that all of the criteria have been met for certification of the action as a class action. I wish to discuss briefly the requirement of s. 4(d) that a class proceeding be "the preferable procedure for the fair and efficient resolution of the common issues."

25 For the purpose of this section the class proceeding is the class proceeding sought by the parties including the implementation of the settlement with the C.E.P. payments (para. 13), IAP payments (para. 15), national and community based programs (paras. 17 to 20) and regime for payment of legal fees (paras. 30 and 31). That this procedure is preferable to the alternative which faces 78,000 claimants, our court systems and our community is self evident. I agree with the submissions of counsel that without rubber stamping a consent order a Court may properly be flexible and relax the standards that might be expected of a moving party in a contested motion. In the case of *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 4022 (Ont. S.C.J.), Nordheimer J. stated at para. 27:

¶27 The first issue is whether this action should be certified as a class proceeding for the purposes of the proposed settlement. The requirements for certification in a settlement context are the same as they are in a litigation context and are

set out in section 5 of the Class Proceedings Act, 1992. However, their application need not, in my view, be as rigorously applied in the settlement context as they should be in the litigation context, principally because the underlying concerns over the manageability of the ongoing proceeding are removed.

In my view that means that the preferable procedure requirement has been satisfied in the circumstances of this case leaving any question of manageability or administration of the carrying out of the settlement agreement as a matter to be considered along with all other aspects of the settlement in deciding whether to approve it.

d) Principles relating to approval of a settlement;

26 The minimum standards for obtaining court approval of a settlement have been described by the author in Class Actions in Canada by Ward K. Branch 2006 Canada Law Book Aurora, as follows:

> **16.30** While the Acts do not specify the test for approval, courts have held that the court must find that in all the circumstances the settlement is fair, reasonable and in the best interest of those affected by it. The settlement must be in the best interests of the class as a whole, not any particular member. Settlement approval should not lead the court to a dissection of the settlement with an eye to perfection in every aspect. Rather, the settlement must fall within a zone or range of reasonableness. In *Dabbs v. Sun Life Assurance Co. of Canada*, the court stated that the following factors were a useful list of criteria for assessing the reasonableness of a proposed settlement:
>
> (1) likelihood of recovery, or likelihood of success;
>
> (2) amount and nature of discovery evidence;
>
> (3) settlement terms and conditions;
>
> (4) recommendation and experience of counsel;
>
> (5) future expense and likely duration of litigation;
>
> (6) recommendation of neutral parties if any;
>
> (7) number of objectors and nature of objections;
>
> (8) the presence of good faith and the absence of collusion.
>
> These factors have been adopted in many other cases both inside and outside Ontario. It is not necessary that all of the enumerated factors be present in each case, nor is it necessary that each factor be given equal weight in the consideration of any particular settlement.

To these factors I would add that the court should also consider whether the refusal of approval or attaching of conditions to approval, puts the settlement in jeopardy of being unravelled. It should be remembered that there is no obligation on parties to resume negotiations, that sometimes parties who have reached their limit in negotiation, resile from their positions or abandon the effort. The reality is that based on the assertions made at our hearing, many unrepresented Aboriginal people want the agreement affirmed, want the process expedited and not delayed, and the fact is that expectations have been created by announcement of the settlement and by the making of interim payments referred to in para. 14.

27 While the proposed settlement may not be perfect, it certainly is within a zone of reasonableness. In my view it is fair, reasonable and in the best interest of the parties. In a companion proceeding, the motion for certification and approval in Ontario in the case of *Baxter v. Canada (Attorney General)* [2006 CarswellOnt 7879 (Ont. S.C.J.)] [2006] 00-CV-192059CP Winkler J. raises a concern about the manageability of the settlement of the action. That is certainly a matter to be considered on a motion for approval of a settlement. If, for example, a settlement were made with a party whose financial stability was in doubt the question might be more significant than in a case like this where the principal payer is the Government of Canada. I will

say more about my view of this question in para. 32 when I address the question of whether the issue is one which makes the settlement less than perfect but reasonable and whether Winkler J.'s proposal should be left as a suggestion for the parties to consider without making it a condition of approval.

e) Recommendation of counsel;

28 The settlement agreement was negotiated by all parties with the benefit of experienced counsel. Counsel have not only signed the agreement but they have jointly recommended to the Court that the settlement be approved. Moreover a number of them have provided affidavits in support of the motion.

f) Position of the parties who are not represented by counsel;

29 Fourteen persons filed written objections or comments in advance of the hearing. Several hundred persons, many of them members of the class, attended the hearing. Nineteen persons made oral presentations at the hearing touching on a number of subjects. Several of them supplemented the written presentations that they had filed in advance. Of those who complained about the settlement, more often it was because it was felt that payment should be made sooner rather than later. No substantive reason was offered for rejecting the settlement. Mr. Baert, counsel for the National Consortium responded to some of the points raised, providing clarification of the terms of the settlement. For my part I found the presentations moving and persuasive evidence as to how pervasive the damage caused to the Aboriginal community by the IRS policy and as to why it is in everyone's interest that the settlement be implemented without delay.

g) The feature of the settlement relating to payment of legal fees;

30 The judges in the companion judgments have analyzed the provisions of the settlement agreement relating to payment of legal fees. The claims to fees are large, multiples of ten million, but many years work have gone into the various proceedings by experienced counsel. The fees in question are being paid by Canada from a fund which is separate from the source of payment to the members of the class. Most of the legal bills have been reviewed by or by persons employed by Canada's representative and he has recommended payment of them. There is an issue relating to the claim for fees of one law firm but the settlement agreement sets out a reasonable formula for determination of the firm's fees. The area of concern for me is the question of the absence of express provision in the agreement for review of legal fees on IAP claims. Under the settlement agreement Canada will on the making of an award, pay to each claimant's counsel an additional 15 percent of the award on account of legal fees. It appears that many of the lawyers who will be conducting the proceedings in the IAP claims are acting on contingency agreements entered into before the settlement agreement was made. None of the agreements are before the court but it appears that prior to the making of the settlement agreement many contingency agreements were entered into under which law firms may be entitled to claim 30 per cent or more of the recovery in a court action. One firm that claims to represent several thousand claimants has undertaken not to charge any IAP claimant more than 15 percent of the recovery in addition to the amount received from Canada. That is, the firm has agreed to limit its claim to fees to 30 percent of the amount of the recovery. Even if every law firm in Canada were to agree to do the same, there is a risk that IAP claimants may be called on to pay unreasonably large amounts. On the IAP claims, liability is not in issue as the parties must have contemplated in composing the contingency agreements. There may be settlements short of hearing in some cases. It is easy to visualize circumstances in which no or relative small fee might be justified in addition to the contribution made by Canada.

31 Under section 55 of the *Legal Profession Act* S.M. 2002 c.44, lawyers practicing in Manitoba must give clients a copy of the contingency agreement on execution of it, failing which it will be unenforceable. Further, along with a copy of the agreement they must give the client a copy of the section that articulates their right to apply for a declaration that the agreement is unfair and unreasonable. However, the evidence shows that many members of the class are illiterate and likely not aware of their rights to have their legal bills reviewed. While no evidence was led on the point one presenter did tell us that she put her name on a list provided by a law firm which she believed related to an offer of information about making an IRS claim. She later was told that she had signed a contingency agreement and when she tried to terminate the services of the law firm she was told that she could not do so. Winkler J. has made a very practical suggestion in the *Baxter* case for implementing a procedure for review of legal fees in the IAP claim. I recommend that the parties give serious consideration to implementing his suggestion. Members

of the class made negative comments at the hearing before me about the amounts paid to lawyers and about the conduct of lawyers who persuaded them to sign contingency agreements. In this paragraph I have approved the settlement as it relates to payment for work done to this time. This settlement is historic and I feel sure that once implemented, Canadians will look back with pride on the way the parties have agreed to put to rest the issues arising from the IRS legacy. An effective review of the legal fees would ensure that the IRS legacy would not be viewed as a windfall to the legal profession.

h) Critique of the settlement

32 In the *Baxter* case Winkler J. has identified four deficiencies in the settlement agreement. The deficiencies have been summarized by Ball J. in para. 19 of his judgment in the companion case of *Sparvier v. Canada (Attorney General)*, 2006 SKQB 533 (Sask. Q.B.) (see his draft) as follows:

> (a) Financial information sufficient to enable the courts to make an informed decision regarding the anticipated cost of administration of the IAP will be provided for the purposes of approval and thereafter on a periodic basis (para. 52);
>
> (b) An autonomous supervisor or supervisory board will oversee the administration of the IAP, reporting ultimately to the court (para. 52);
>
> (c) The adjudicator hearing each case under the IAP will regulate counsel fees to be charged having regard to the complexity of the case, the result achieved, the intention to provide claimants with a reasonable settlement, and the fact that an additional 15% of the compensation award will be paid as fees by Canada (para. 78); and
>
> (d) The parties will establish a protocol for determining the manner in which issues relating to the ongoing administration of the settlement will be submitted to the courts in each jurisdiction for determination. This will ensure that the requirement for unanimous approval of all courts of any material amendment will not unduly hinder or delay the ability of the courts to make timely decisions (para. 81).

While I agree that the settlement might be better if the four changes were made, it might still be regarded imperfect for a variety of reasons. In para. 31 of my judgment I have articulated my concerns about the desirability of making provisions for review of counsel fees on IAP claims. However, I would not make such a provision a condition of approval. Of the remaining conditions the ones that raise a red flag are (a) and (b) relating to production of financial information and supervision of the administration of the CEP and IAP. Of this, Winkler J. has made the following findings in *Baxter*:

> [38] The potential for conflict for Canada between its proposed role as administrator and its role as continuing litigant is the first issue that must be addressed. One of the goals of this settlement is to resolve all ongoing litigation related to the residential schools. The structure of the administration must be consistent with this aim and not such as to render itself subject to claims of bias and partiality based on apparent conflicts of interest. If such perception exists, it has the potential to taint even those areas where the neutrality is more enshrined such as the adjudication process. Accordingly, the administration of the plan must be neutral and independent of any concerns that Canada, as a party to the settlement, may otherwise have. In order to satisfactorily achieve this requisite separation, the administrative function must be completely isolated from the litigation function with an autonomous supervisor or supervisory board reporting ultimately to the courts. This separation will serve to protect the interests of the class members and insulate the government from unfounded conflict of interest claims. To effectively accomplish this separation and autonomy it is not necessary to alter the administrative scheme by replacing the proposed administration or by imposing a third party administrator on the settlement. Rather, the requisite independence and neutrality can be achieved by ensuring that the person, or persons, appointed by Canada with authority over the administration of the settlement shall ultimately report to and take direction, where necessary, from the courts and not from the government. By extension, such person, or persons, once appointed by the government and approved by the courts, is not subject to removal by the government without further approval from the courts. This is consistent with the approach taken in all class action administrations and there is no reason to depart from that approach in this instance.

[39] The autonomous supervisor or supervisory board envisioned by the court will have the authority necessary to direct the administration of the plan in accordance with its terms, to communicate with the supervisory courts and to be responsible to those courts. Simply put, it cannot be the case that the "administrator", once directed by the courts to undertake a certain task, must seek the ultimate approval from Canada. The administration of the settlement will be under the direction of the courts and they will be the final authority. Otherwise, the neutrality and independence of the administrator will be suspect and the supervisory authority of the courts compromised.

[40] The foregoing are organizational issues that relate to what may be called the "executive oversight" role in the administration. There are other issues in relation to the operational framework for delivery of the benefits under the settlement, particularly with respect to the costs of administration.

[42] Absent any explanation, the current costs of the ADR program appear to be excessively disproportionate when considered against the typical costs of administering a class action settlement. This court has never approved a settlement where the costs of administration exceed the compensation available let alone where the cost excess is a factor of three. It is no answer as was suggested in argument that since Canada, as defendant, has committed to funding the administrative costs separately from the settlement funding, the court need not be concerned with the quantum of that cost. This proposition must be rejected for two reasons. First, it ignores the court's supervisory role in class actions. Secondly, it fails to recognize how the peculiar aspects of certain terms of this settlement relating to funding can impact unfairly on the class members while at the same time leaving the courts powerless to provide a remedy. This is addressed in more detail below. Thirdly, it fails to recognize that this is not a settlement where the administration is being paid out of a fixed settlement fund. The administrative costs will be paid from the general revenues of the government. This leads to a certain precariousness in respect of the administration and leads to the prospect of the ongoing administration of the settlement becoming a political issue to the potential detriment of the class members.

[44] This combination of inadequate information and absolute veto power over expenditures is unacceptable. The court cannot approve a settlement without adequate information to ensure that the class members' interests are being protected and that it will be able to maintain an effective ongoing supervisory role. As stated in *McCarthy* (No. 2474) at para. 21:

> ...a class proceeding by its very nature involves the issuance of orders or judgments that affect persons who are not before the Court. These absent class members are dependent on the Court to protect their interests. In order to do so, the Court must have all of the available information that has some bearing on the issues, whether favourable or unfavourable to the moving party.

It strikes me that an issue is being raised as to who, as between the courts and Canada, is to have ultimate control over the administration of the settlement. The settlement of this case is too important to the parties affected and is so fair and reasonable, that it is inappropriate to engage in that debate in this case. Canada has shown its good intentions in so many ways and the parties, after a lengthy and complex series of negotiations, have accepted that Canada will have the supervisory role. Issues like this one can well be left for other settings.

i) Risks of not unconditionally approving the settlement;

33 The settlement agreement provides:

> **16.01 Agreement is Conditional**
>
> This Agreement will not be effective unless and until it is approved by the Courts, and if such approvals are not granted by each of the Courts on substantially the same terms and conditions save and except for the variations in membership contemplated in Sections 4.04 and 4.07 of this Agreement, this Agreement will thereupon be terminated and none of the Parties will be liable to any of the other Parties hereunder, except that the fees and disbursements of the members of the NCC will be paid in any event.

This provision largely mirrors the condition set out in the settlement agreement referred to in *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (Ont. S.C.J.) at para. 127. However, one could argue that the four conditions referred to in Winkler J.'s judgment in the *Baxter* case are much more substantial than the two conditions imposed in *Parsons*. Winkler J. has stated in para. 36 of *Baxter*:

> [36] I turn now to the specific deficiencies that must be addressed in the proposed administrative scheme. In my view they are neither insurmountable nor do they require any material change to the settlement agreement itself.

In para. 85 of *Baxter* he also stated, "The changes that the court requires to the settlement are neither material nor substantial in the context of its scope and complexity." There is another view that is reasonably arguable, that the conditions are not "substantially the same as" the terms of the settlement agreement. If the alternative interpretation is adopted it will be open to Canada to treat the settlement agreement as terminated and 78000 Aboriginal claimants will be returned to their pre-settlement plight. Also there will be nothing to compel the parties to resume negotiation and if they do, there is a risk that they will resile from positions agreed to. In other words there is a risk that the settlement will unravel although it is in its present form well within a zone of reasonableness.

j) Conclusion.

34 Having reviewed the material that has been placed before this court I have reached the conclusion that the order of certification of a class action should be granted and the settlement should be approved unconditionally. An expectation has been created on the part of class members that they would receive payments and many have received interim payments. It would be unfortunate if this creative effort by all parties were brought to a halt and the whole settlement unravelled because of the imposition of conditions which may well have been rejected in the course of negotiations of the agreement. Negotiation involves give and take on the part of negotiating parties and the negotiation concluded with a settlement which cries out for confirmation.

Motion granted.

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2008 ONCA 587
Ontario Court of Appeal

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.

2008 CarswellOnt 4811, 2008 ONCA 587, [2008] O.J. No. 3164, 168 A.C.W.S. (3d) 698, 240 O.A.C. 245, 296 D.L.R. (4th) 135, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 92 O.R. (3d) 513

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT INVOLVING METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

THE INVESTORS REPRESENTED ON THE PAN-CANADIAN INVESTORS COMMITTEE FOR THIRD-PARTY STRUCTURED ASSET-BACKED COMMERCIAL PAPER LISTED IN SCHEDULE "B" HERETO (Applicants / Respondents in Appeal) and METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO (Respondents / Respondents in Appeal) and AIR TRANSAT A.T. INC., TRANSAT TOURS CANADA INC., THE JEAN COUTU GROUP (PJC) INC., AÉROPORTS DE MONTRÉAL INC., AÉROPORTS DE MONTRÉAL CAPITAL INC., POMERLEAU ONTARIO INC., POMERLEAU INC., LABOPHARM INC., DOMTAR INC., DOMTAR PULP AND PAPER PRODUCTS INC., GIRO INC., VÊTEMENTS DE SPORTS R.G.R. INC., 131519 CANADA INC., AIR JAZZ LP, PETRIFOND FOUNDATION COMPANY LIMITED, PETRIFOND FOUNDATION MIDWEST LIMITED, SERVICES HYPOTHÉCAIRES LA PATRIMONIALE INC., TECSYS INC. SOCIÉTÉ GÉNÉRALE DE FINANCEMENT DU QUÉBEC, VIBROSYSTM INC., INTERQUISA CANADA L.P., REDCORP VENTURES LTD., JURA ENERGY CORPORATION, IVANHOE MINES LTD., WEBTECH WIRELESS INC., WYNN CAPITAL CORPORATION INC., HY BLOOM INC., CARDACIAN MORTGAGE SERVICES, INC., WEST ENERGY LTD., SABRE ENERTY LTD., PETROLIFERA PETROLEUM LTD., VAQUERO RESOURCES LTD. and STANDARD ENERGY INC. (Respondents / Appellants)

J.I. Laskin, E.A. Cronk, R.A. Blair JJ.A.

Heard: June 25-26, 2008
Judgment: August 18, 2008 *
Docket: CA C48969

Proceedings: affirming *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269 (Ont. S.C.J. [Commercial List])

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Thomas McRae, Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al)
Howard Shapray, Q.C., Stephen Fitterman for Ivanhoe Mines Ltd.
Kevin P. McElcheran, Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia, T.D. Bank
Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada, BNY Trust Company of Canada, as Indenture Trustees
Usman Sheikh for Coventree Capital Inc.
Allan Sternberg, Sam R. Sasso for Brookfield Asset Management and Partners Ltd., Hy Bloom Inc., Cardacian Mortgage Services Inc.
Neil C. Saxe for Dominion Bond Rating Service
James A. Woods, Sebastien Richemont, Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc., Jazz Air LP
Scott A. Turner for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.
R. Graham Phoenix for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

Subject: Insolvency; Civil Practice and Procedure

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s. 92 — referred to

s. 92 ¶ 13 — referred to

Words and phrases considered:

arrangement

"Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor.

APPEAL by opponents of creditor-initiated plan from judgment reported at *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269, 47 B.L.R. (4th) 74 (Ont. S.C.J. [Commercial List]), granting application for approval of plan.

***R.A. Blair J.A.*:**

A. Introduction

1 In August 2007 a liquidity crisis suddenly threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on U.S. sub-prime mortgages. The loss of confidence placed the Canadian financial market at risk generally and was reflective of an economic volatility worldwide.

2 By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007 pending an attempt to resolve the crisis through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

3 Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. They raise an important point regarding the permissible scope of a restructuring under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

Leave to Appeal

4 Because of the particular circumstances and urgency of these proceedings, the court agreed to collapse an oral hearing for leave to appeal with the hearing of the appeal itself. At the outset of argument we encouraged counsel to combine their submissions on both matters.

5 The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and — given the expedited time-table — the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as *Cineplex Odeon Corp., Re* (2001), 24 C.B.R. (4th) 201 (Ont. C.A.), and *Country Style Food Services Inc., Re* (2002), 158 O.A.C. 30 (Ont. C.A. [In Chambers]), are met. I would grant leave to appeal.

Appeal

6 For the reasons that follow, however, I would dismiss the appeal.

B. Facts

The Parties

7 The appellants are holders of ABCP Notes who oppose the Plan. They do so principally on the basis that it requires them to grant releases to third party financial institutions against whom they say they have claims for relief arising out of their purchase of ABCP Notes. Amongst them are an airline, a tour operator, a mining company, a wireless provider, a pharmaceuticals retailer, and several holding companies and energy companies.

8 Each of the appellants has large sums invested in ABCP — in some cases, hundreds of millions of dollars. Nonetheless, the collective holdings of the appellants — slightly over $1 billion — represent only a small fraction of the more than $32 billion of ABCP involved in the restructuring.

9 The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies, and some smaller holders of ABCP product. They participated in the market in a number of different ways.

The ABCP Market

10 Asset Backed Commercial Paper is a sophisticated and hitherto well-accepted financial instrument. It is primarily a form of short-term investment — usually 30 to 90 days — typically with a low interest yield only slightly better than that available through other short-term paper from a government or bank. It is said to be "asset backed" because the cash that is used to purchase an ABCP Note is converted into a portfolio of financial assets or other asset interests that in turn provide security for the repayment of the notes.

11 ABCP was often presented by those selling it as a safe investment, somewhat like a guaranteed investment certificate.

12 The Canadian market for ABCP is significant and administratively complex. As of August 2007, investors had placed over $116 billion in Canadian ABCP. Investors range from individual pensioners to large institutional bodies. On the selling and distribution end, numerous players are involved, including chartered banks, investment houses and other financial institutions. Some of these players participated in multiple ways. The Plan in this proceeding relates to approximately $32 billion of non-bank sponsored ABCP the restructuring of which is considered essential to the preservation of the Canadian ABCP market.

13 As I understand it, prior to August 2007 when it was frozen, the ABCP market worked as follows.

14 Various corporations (the "Sponsors") would arrange for entities they control ("Conduits") to make ABCP Notes available to be sold to investors through "Dealers" (banks and other investment dealers). Typically, ABCP was issued by series and sometimes by classes within a series.

15 The cash from the purchase of the ABCP Notes was used to purchase assets which were held by trustees of the Conduits ("Issuer Trustees") and which stood as security for repayment of the notes. Financial institutions that sold or provided the Conduits with the assets that secured the ABCP are known as "Asset Providers". To help ensure that investors would be able to redeem their notes, "Liquidity Providers" agreed to provide funds that could be drawn upon to meet the demands of maturing ABCP Notes in certain circumstances. Most Asset Providers were also Liquidity Providers. Many of these banks and financial institutions were also holders of ABCP Notes ("Noteholders"). The Asset and Liquidity Providers held first charges on the assets.

16 When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

The Liquidity Crisis

17 The types of assets and asset interests acquired to "back" the ABCP Notes are varied and complex. They were generally long-term assets such as residential mortgages, credit card receivables, auto loans, cash collateralized debt obligations and derivative investments such as credit default swaps. Their particular characteristics do not matter for the purpose of this appeal, but they shared a common feature that proved to be the Achilles heel of the ABCP market: because of their long-term nature there was an inherent timing mismatch between the cash they generated and the cash needed to repay maturing ABCP Notes.

18 When uncertainty began to spread through the ABCP marketplace in the summer of 2007, investors stopped buying the ABCP product and existing Noteholders ceased to roll over their maturing notes. There was no cash to redeem those notes. Although calls were made on the Liquidity Providers for payment, most of the Liquidity Providers declined to fund the redemption of the notes, arguing that the conditions for liquidity funding had not been met in the circumstances. Hence the "liquidity crisis" in the ABCP market.

19 The crisis was fuelled largely by a lack of transparency in the ABCP scheme. Investors could not tell what assets were backing their notes — partly because the ABCP Notes were often sold before or at the same time as the assets backing them were acquired; partly because of the sheer complexity of certain of the underlying assets; and partly because of assertions of confidentiality by those involved with the assets. As fears arising from the spreading U.S. sub-prime mortgage crisis mushroomed, investors became increasingly concerned that their ABCP Notes may be supported by those crumbling assets. For the reasons outlined above, however, they were unable to redeem their maturing ABCP Notes.

The Montreal Protocol

20 The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze — the result of a standstill arrangement orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement — known as the Montréal Protocol — the parties committed to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

21 The work of implementing the restructuring fell to the Pan-Canadian Investors Committee, an applicant in the proceeding and respondent in the appeal. The Committee is composed of 17 financial and investment institutions, including chartered banks, credit unions, a pension board, a Crown corporation, and a university board of governors. All 17 members are themselves Noteholders; three of them also participated in the ABCP market in other capacities as well. Between them, they hold about two thirds of the $32 billion of ABCP sought to be restructured in these proceedings.

22 Mr. Crawford was named the Committee's chair. He thus had a unique vantage point on the work of the Committee and the restructuring process as a whole. His lengthy affidavit strongly informed the application judge's understanding of the factual context, and our own. He was not cross-examined and his evidence is unchallenged.

23 Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible, and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the other applicants sought CCAA protection for the ABCP debtors and the approval of a Plan that had been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian ABCP market.

The Plan

a) Plan Overview

24 Although the ABCP market involves many different players and kinds of assets, each with their own challenges, the committee opted for a single plan. In Mr. Crawford's words, "all of the ABCP suffers from common problems that are best addressed by a common solution." The Plan the Committee developed is highly complex and involves many parties. In its essence, the Plan would convert the Noteholders' paper — which has been frozen and therefore effectively worthless for many months — into new, long-term notes that would trade freely, but with a discounted face value. The hope is that a strong secondary market for the notes will emerge in the long run.

25 The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

26 Under the Plan, the vast majority of the assets underlying ABCP would be pooled into two master asset vehicles (MAV1 and MAV2). The pooling is designed to increase the collateral available and thus make the notes more secure.

27 The Plan does not apply to investors holding less than $1 million of notes. However, certain Dealers have agreed to buy the ABCP of those of their customers holding less than the $1-million threshold, and to extend financial assistance to these customers. Principal among these Dealers are National Bank and Canaccord, two of the respondent financial institutions the appellants most object to releasing. The application judge found that these developments appeared to be designed to secure votes in favour of the Plan by various Noteholders, and were apparently successful in doing so. If the Plan is approved, they also provide considerable relief to the many small investors who find themselves unwittingly caught in the ABDP collapse.

b) The Releases

28 This appeal focuses on one specific aspect of the Plan: the comprehensive series of releases of third parties provided for in Article 10.

29 The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers, and other market participants — in Mr. Crawford's words, "virtually all participants in the Canadian ABCP market" — from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor, acting in conflict of interest, and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

30 The application judge found that, in general, the claims for damages include the face value of the Notes, plus interest and additional penalties and damages.

31 The releases, in effect, are part of a *quid pro quo*. Generally speaking, they are designed to compensate various participants in the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:

> a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets, and provide below-cost financing for margin funding facilities that are designed to make the notes more secure;
>
> b) Sponsors — who in addition have cooperated with the Investors' Committee throughout the process, including by sharing certain proprietary information — give up their existing contracts;
>
> c) The Canadian banks provide below-cost financing for the margin funding facility and,
>
> d) Other parties make other contributions under the Plan.

32 According to Mr. Crawford's affidavit, the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation."

The CCAA Proceedings to Date

33 On March 17, 2008 the applicants sought and obtained an Initial Order under the CCAA staying any proceedings relating to the ABCP crisis and providing for a meeting of the Noteholders to vote on the proposed Plan. The meeting was held on April 25th. The vote was overwhelmingly in support of the Plan — 96% of the Noteholders voted in favour. At the instance of certain Noteholders, and as requested by the application judge (who has supervised the proceedings from the outset), the Monitor broke down the voting results according to those Noteholders who had worked on or with the Investors' Committee to develop the Plan and those Noteholders who had not. Re-calculated on this basis the results remained firmly in favour of the proposed Plan — 99% of those connected with the development of the Plan voted positively, as did 80% of those Noteholders who had not been involved in its formulation.

34 The vote thus provided the Plan with the "double majority" approval — a majority of creditors representing two-thirds in value of the claims — required under s. 6 of the CCAA.

35 Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 and 13. On May 16, the application judge issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

36 The result of this renegotiation was a "fraud carve-out" — an amendment to the Plan excluding certain fraud claims from the Plan's releases. The carve-out did not encompass all possible claims of fraud, however. It was limited in three key respects. First, it applied only to claims against ABCP Dealers. Secondly, it applied only to cases involving an express fraudulent misrepresentation made with the intention to induce purchase and in circumstances where the person making the representation knew it to be false. Thirdly, the carve-out limited available damages to the value of the notes, minus any funds distributed as part of the Plan. The appellants argue vigorously that such a limited release respecting fraud claims is unacceptable and should not have been sanctioned by the application judge.

37 A second sanction hearing — this time involving the amended Plan (with the fraud carve-out) — was held on June 3, 2008. Two days later, Campbell J. released his reasons for decision, approving and sanctioning the Plan on the basis both that he had jurisdiction to sanction a Plan calling for third-party releases and that the Plan including the third-party releases in question here was fair and reasonable.

38 The appellants attack both of these determinations.

C. Law and Analysis

39 There are two principal questions for determination on this appeal:

> 1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its directors?
>
> 2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it?

(1) Legal Authority for the Releases

40 The standard of review on this first issue — whether, as a matter of law, a CCAA plan may contain third-party releases — is correctness.

41 The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company. [1] The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

> a) on a proper interpretation, the CCAA does not permit such releases;
>
> b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;
>
> c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the *Constitution Act*, 1867;
>
> d) the releases are invalid under Quebec rules of public order; and because
>
> e) the prevailing jurisprudence supports these conclusions.

42 I would not give effect to any of these submissions.

Interpretation, "Gap Filling" and Inherent Jurisdiction

43 On a proper interpretation, in my view, the CCAA permits the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of (a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on *all* creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entrée to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

44 The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it

is that very flexibility which gives the Act its efficacy: *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]). As Farley J. noted in *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), at 111, "[t]he history of CCAA law has been an evolution of judicial interpretation."

45 Much has been said, however, about the "evolution of judicial interpretation" and there is some controversy over both the source and scope of that authority. Is the source of the court's authority statutory, discerned solely through application of the principles of statutory interpretation, for example? Or does it rest in the court's ability to "fill in the gaps" in legislation? Or in the court's inherent jurisdiction?

46 These issues have recently been canvassed by the Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters,"[2] and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools — statutory interpretation, gap-filling, discretion and inherent jurisdiction — it is not necessary in my view to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

47 The Supreme Court of Canada has affirmed generally — and in the insolvency context particularly — that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para. 21, quoting E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983); *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26.

48 More broadly, I believe that the proper approach to the judicial interpretation and application of statutes — particularly those like the CCAA that are skeletal in nature — is succinctly and accurately summarized by Jackson and Sarra in their recent article, *supra*, at p. 56:

> The exercise of a statutory authority requires the statute to be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in *Québec* as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

49 I adopt these principles.

50 The remedial purpose of the CCAA — as its title affirms — is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) at 318, Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

> Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the

> C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

51 The CCAA was enacted in 1933 and was necessary — as the then Secretary of State noted in introducing the Bill on First Reading — "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, *House of Commons Debates (Hansard)* (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.), *per* Doherty J.A. in dissent; *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 125 (Ont. Gen. Div. [Commercial List]); *Anvil Range Mining Corp., Re* (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List]).

52 In this respect, I agree with the following statement of Doherty J.A. in *Elan*, *supra*, at pp. 306-307:

> . . . [T]he Act was designed to serve a "broad constituency of investors, creditors and employees".[3] Because of that "broad constituency" the court must, when considering applications brought under the Act, *have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest.* [Emphasis added.]

Application of the Principles of Interpretation

53 An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the application judge pointed out, the restructuring underpins the financial viability of the Canadian ABCP market itself.

54 The appellants argue that the application judge erred in taking this approach and in treating the Plan and the proceedings as an attempt to restructure a financial market (the ABCP market) rather than simply the affairs between the debtor corporations who caused the ABCP Notes to be issued and their creditors. The Act is designed, they say, only to effect reorganizations between a corporate debtor and its creditors and not to attempt to restructure entire marketplaces.

55 This perspective is flawed in at least two respects, however, in my opinion. First, it reflects a view of the purpose and objects of the CCAA that is too narrow. Secondly, it overlooks the reality of the ABCP marketplace and the context of the restructuring in question here. It may be true that, in their capacity as ABCP *Dealers*, the releasee financial institutions are "third-parties" to the restructuring in the sense that they are not creditors of the debtor corporations. However, in their capacities as *Asset Providers* and *Liquidity Providers*, they are not only creditors but they are prior secured creditors to the Noteholders. Furthermore — as the application judge found — in these latter capacities they are making significant contributions to the restructuring by "foregoing immediate rights to assets and ... providing real and tangible input for the preservation and enhancement of the Notes" (para. 76). In this context, therefore, the application judge's remark at para. 50 that the restructuring "involves the commitment and participation of all parties" in the ABCP market makes sense, as do his earlier comments at paras. 48-49:

> Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.
>
> In these circumstances, *it is unduly technical to classify the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors*, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring. [Emphasis added.]

56 The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper ..." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring

as between debtor and creditors. His focus was on *the effect* of the restructuring, a perfectly permissible perspective, given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal."

57 I agree. I see no error on the part of the application judge in approaching the fairness assessment or the interpretation issue with these considerations in mind. They provide the context in which the purpose, objects and scheme of the CCAA are to be considered.

The Statutory Wording

58 Keeping in mind the interpretive principles outlined above, I turn now to a consideration of the provisions of the CCAA. Where in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases? As summarized earlier, the answer to that question, in my view, is to be found in:

> a) the skeletal nature of the CCAA;
>
> b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in
>
> c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable".

Therein lies the expression of Parliament's intention to permit the parties to negotiate and vote on, and the court to sanction, third-party releases relating to a restructuring.

59 Sections 4 and 6 of the CCAA state:

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> 6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

Compromise or Arrangement

60 While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, loose-leaf, 3rd ed., vol. 4 (Toronto: Thomson Carswell) at 10A-12.2, N§10. It has been said to be "a very wide and indefinite [word]": *Reference re Refund of Dues*

Paid under s.47 (f) of Timber Regulations in the Western Provinces, [1935] A.C. 184 (Canada P.C.) at 197, affirming S.C.C. [1933] S.C.R. 616 (S.C.C.). See also, *Guardian Assurance Co., Re*, [1917] 1 Ch. 431 (Eng. C.A.) at 448, 450; *T&N Ltd., Re* (2006), [2007] 1 All E.R. 851 (Eng. Ch. Div.).

61 The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement." I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.

62 A proposal under the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3 (the "BIA") is a contract: *Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.*, [1978] 1 S.C.R. 230 (S.C.C.) at 239; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688 (Ont. C.A.) at para. 11. In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes, and therefore is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See *Air Canada, Re* (2004), 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]) at para. 6; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at 518.

63 There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan — including the provision for releases — becomes binding on all creditors (including the dissenting minority).

64 *T&N Ltd., Re, supra*, is instructive in this regard. It is a rare example of a court focussing on and examining the meaning and breadth of the term "arrangement". T&N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies applied for protection under s. 425 of the U.K. *Companies Act 1985*, a provision virtually identical to the scheme of the CCAA — including the concepts of compromise or arrangement. [4]

65 T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the "EL claimants") would assert their claims. In return, T&N's former employees and dependants (the "EL claimants") agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

66 Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The Court rejected this argument. Richards J. adopted previous jurisprudence — cited earlier in these reasons — to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example. [5] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

> In my judgment it is not a necessary element of an arrangement for the purposes of s 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s 425. It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many years to give the term its widest meaning. *Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party.* [Emphasis added.]

67 I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in *T&N* were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial third parties are making to the ABCP restructuring. The situations are quite comparable.

The Binding Mechanism

68 Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind *all* creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes[6] *and* obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The Required Nexus

69 In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

70 The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan. This nexus exists here, in my view.

71 In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

> a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) *The claims to be released are rationally related to the purpose of the Plan and necessary for it*;
>
> c) The Plan cannot succeed without the releases;
>
> d) *The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan*; and
>
> e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

72 Here, then — as was the case in *T&N* — there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77 he said:

> [76] I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.
>
> [77] This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

73 I am satisfied that the wording of the CCAA — construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation — supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

The Jurisprudence

74 Third party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's Bench in *Canadian Airlines Corp., Re* (2000), 265 A.R. 201 (Alta. Q.B.), leave to appeal refused by (2000), 266 A.R. 131 (Alta. C.A. [In Chambers]), and (2001), 293 A.R. 351 (note) (S.C.C.). In *Muscletech Research & Development Inc., Re* (2006), 25 C.B.R. (5th) 231 (Ont. S.C.J.) Justice Ground remarked (para. 8):

> [It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

75 We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of *Canadian Airlines Corp., Re*, however, the releases in those restructurings — including *Muscletech Research & Development Inc., Re* — were not opposed. The appellants argue that those cases are wrongly decided, because the court simply does not have the authority to approve such releases.

76 In *Canadian Airlines Corp., Re* the releases in question were opposed, however. Paperny J. (as she then was) concluded the court had jurisdiction to approve them and her decision is said to be the well-spring of the trend towards third-party releases referred to above. Based on the foregoing analysis, I agree with her conclusion although for reasons that differ from those cited by her.

77 Justice Paperny began her analysis of the release issue with the observation at para. 87 that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company." It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud*,[7] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument — dealt with later in these reasons — that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92).

78 Respectfully, I would not adopt the interpretive principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

79 The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are *Steinberg Inc. c. Michaud, supra*; *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 (Ont. C.A.); *Pacific Coastal Airlines Ltd. v. Air Canada* (2001), 19 B.L.R. (3d) 286 (B.C. S.C.); and *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 (Ont. C.A.) ("*Stelco I*"). I do not think these cases assist the appellants, however. With the exception of *Steinberg Inc.*, they do not involve third party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that *Steinberg Inc.* does not express a correct view of the law, and I decline to follow it.

80 In *Pacific Coastal Airlines Ltd.*, Tysoe J. made the following comment at para. 24:

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

81 This statement must be understood in its context, however. Pacific Coastal Airlines had been a regional carrier for Canadian Airlines prior to the CCAA reorganization of the latter in 2000. In the action in question it was seeking to assert separate tort claims against Air Canada for contractual interference and inducing breach of contract in relation to certain rights it had to the use of Canadian's flight designator code prior to the CCAA proceeding. Air Canada sought to have the action dismissed on grounds of *res judicata* or issue estoppel because of the CCAA proceeding. Tysoe J. rejected the argument.

82 The facts in *Pacific Coastal Airlines Ltd.* are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian — at a contractual level — may have had some involvement with the particular dispute. Here, however, the disputes that are the subject-matter of the impugned releases are not simply "disputes between parties other than the debtor company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

83 Nor is the decision of this Court in the *NBD Bank, Canada* case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly-owned subsidiary of Dofasco. The Bank had advanced funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors." Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the Bank. On appeal, he argued that since the Bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process — in short, he was personally protected by the CCAA release.

84 Rosenberg J.A., writing for this Court, rejected this argument. The appellants here rely particularly upon his following observations at paras. 53-54:

> 53 In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 at 297, the *CCAA* is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However,

> the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.
>
> 54 In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the *CCAA* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of *The 2000 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. [Footnote omitted.]

85 Once again, this statement must be assessed in context. Whether Justice Farley had the authority in the earlier Algoma CCAA proceedings to sanction a plan that included third party releases was not under consideration at all. What the Court was determining in *NBD Bank, Canada* was whether the release extended by its terms to protect a third party. In fact, on its face, it does not appear to do so. Justice Rosenberg concluded only that not allowing Mr. Melville to rely upon the release did not subvert the purpose of the CCAA. As the application judge here observed, "there is little factual similarity in *NBD Bank, Canada* to the facts now before the Court" (para. 71). Contrary to the facts of this case, in *NBD Bank, Canada* the creditors had not agreed to grant a release to officers; they had not voted on such a release and the court had not assessed the fairness and reasonableness of such a release as a term of a complex arrangement involving significant contributions by the beneficiaries of the release — as is the situation here. Thus, *NBD Bank, Canada* is of little assistance in determining whether the court has authority to sanction a plan that calls for third party releases.

86 The appellants also rely upon the decision of this Court in *Stelco I*. There, the Court was dealing with the scope of the CCAA in connection with a dispute over what were called the "Turnover Payments". Under an inter-creditor agreement one group of creditors had subordinated their rights to another group and agreed to hold in trust and "turn over" any proceeds received from Stelco until the senior group was paid in full. On a disputed classification motion, the Subordinated Debt Holders argued that they should be in a separate class from the Senior Debt Holders. Farley J. refused to make such an order in the court below, stating:

> [Sections] 4, 5 and 6 [of the CCAA] talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves *and not directly involving the company*. [Citations omitted; emphasis added.]

See *Re Stelco Inc.* (2005), 15 C.B.R. (5th) 297 (Ont. S.C.J. [Commercial List]) at para. 7.

87 This Court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the vagaries of inter-corporate disputes. In short, the issues before the Court were quite different from those raised on this appeal.

88 Indeed, the Stelco plan, as sanctioned, included third party releases (albeit uncontested ones). This Court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and therefore that they were entitled to a separate civil action to determine their rights under the agreement: *Stelco Inc., Re* (2006), 21 C.B.R. (5th) 157 (Ont. C.A.) (*"Stelco II"*). The Court

rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The Court said (para. 11):

> In [*Stelco I*] — the classification case — the court observed that it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company ... [*H]owever, the present case is not simply an inter-creditor dispute that does not involve the debtor company; it is a dispute that is inextricably connected to the restructuring process.* [Emphasis added.]

89 The approach I would take to the disposition of this appeal is consistent with that view. As I have noted, the third party releases here are very closely connected to the ABCP restructuring process.

90 Some of the appellants — particularly those represented by Mr. Woods — rely heavily upon the decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud, supra.* They say that it is determinative of the release issue. In *Steinberg,* the Court held that the CCAA, as worded at the time, did not permit the release of directors of the debtor corporation and that third-party releases were not within the purview of the Act. Deschamps J.A. (as she then was) said (paras. 42, 54 and 58 — English translation):

> [42] Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.
>
> . . . . .
>
> [54] The Act offers the respondent a way to arrive at a compromise with is creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.
>
> . . . . .
>
> [58] The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the directors].

91 Justices Vallerand and Delisle, in separate judgments, agreed. Justice Vallerand summarized his view of the consequences of extending the scope of the CCAA to third party releases in this fashion (para. 7):

> In short, the Act will have become the Companies' *and Their Officers and Employees* Creditors Arrangement Act — an awful mess — and likely not attain its purpose, which is to enable the company to survive in the face of *its* creditors and through their will, and not in the face of the creditors of its officers. This is why I feel, just like my colleague, that such a clause is contrary to the Act's mode of operation, contrary to its purposes and, for this reason, is to be banned.

92 Justice Delisle, on the other hand, appears to have rejected the releases because of their broad nature — they released directors from all claims, including those that were altogether unrelated to their corporate duties with the debtor company — rather than because of a lack of authority to sanction under the Act. Indeed, he seems to have recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para. 90 he said:

> The CCAA is drafted in general terms. It does not specify, among other things, what must be understood by "compromise or arrangement". However, it may be inferred from the purpose of this [A]ct that these terms *encompass all that should enable the person who has recourse to it to fully dispose of his debts,* both those that exist on the date when he has recourse to the statute and *those contingent on the insolvency in which he finds himself* ... [Emphasis added.]

93 The decision of the Court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency

in which he finds himself," however. On occasion such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in *Steinberg Inc.*, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include third-party releases. In addition, the decision appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analysing the Act — an approach inconsistent with the jurisprudence referred to above.

94 Finally, the majority in *Steinberg Inc.* seems to have proceeded on the basis that the CCAA cannot interfere with civil or property rights under Quebec law. Mr. Woods advanced this argument before this Court in his factum, but did not press it in oral argument. Indeed, he conceded that if the Act encompasses the authority to sanction a plan containing third-party releases — as I have concluded it does — the provisions of the CCAA, as valid federal insolvency legislation, are paramount over provincial legislation. I shall return to the constitutional issues raised by the appellants later in these reasons.

95 Accordingly, to the extent *Steinberg Inc.* stands for the proposition that the court does not have authority under the CCAA to sanction a plan that incorporates third-party releases, I do not believe it to be a correct statement of the law and I respectfully decline to follow it. The modern approach to interpretation of the Act in accordance with its nature and purpose militates against a narrow interpretation and towards one that facilitates and encourages compromises and arrangements. Had the majority in *Steinberg Inc.* considered the broad nature of the terms "compromise" and "arrangement" and the jurisprudence I have referred to above, they might well have come to a different conclusion.

The 1997 Amendments

96 *Steinberg Inc.* led to amendments to the CCAA, however. In 1997, s. 5.1 was added, dealing specifically with releases pertaining to directors of the debtor company. It states:

> 5.1(1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> **Exception**
>
> (2) A provision for the compromise of claims against directors may not include claims that
>
> (a) relate to contractual rights of one or more creditors; or
>
> (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> **Powers of court**
>
> (3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.
>
> **Resignation or removal of directors**
>
> (4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.
>
> 1997, c. 12, s. 122.

97 Perhaps the appellants' strongest argument is that these amendments confirm a prior lack of authority in the court to sanction a plan including third party releases. If the power existed, why would Parliament feel it necessary to add an amendment specifically permitting such releases (subject to the exceptions indicated) in favour of directors? *Expressio unius est exclusio alterius*, is the Latin maxim sometimes relied on to articulate the principle of interpretation implied in that question: to express or include one thing implies the exclusion of the other.

98 The maxim is not helpful in these circumstances, however. The reality is that there *may* be another explanation why Parliament acted as it did. As one commentator has noted: [8]

> Far from being a rule, [the maxim *expressio unius*] is not even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes its does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore there is not even a mild presumption here. Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context.

99 As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in *Steinberg Inc.*. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring, rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden & Morawetz, vol.1, *supra*, at 2-144, E§11A; *Royal Penfield Inc., Re*, [2003] R.J.Q. 2157 (Que. S.C.) at paras. 44-46.

100 Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

The Deprivation of Proprietary Rights

101 Mr. Shapray very effectively led the appellants' argument that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights — including the right to bring an action — in the absence of a clear indication of legislative intention to that effect: *Halsbury's Laws of England*, 4th ed. reissue, vol. 44 (1) (London: Butterworths, 1995) at paras. 1438, 1464 and 1467; Driedger, 2nd ed., *supra*, at 183; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., (Markham: Butterworths, 2002) at 399. I accept the importance of this principle. For the reasons I have explained, however, I am satisfied that Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself. I would therefore not give effect to the appellants' submissions in this regard.

The Division of Powers and Paramountcy

102 Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the *Constitution Act, 1867*, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the *Civil Code of Quebec*.

103 I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.). As the Supreme Court confirmed in that case (p. 661), citing Viscount Cave L.C. in *Quebec (Attorney General) v. Bélanger (Trustee of)*, [1928] A.C. 187 (Canada P.C.), "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament." Chief Justice Duff elaborated:

> Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

104 That is exactly the case here. The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action — normally a matter of provincial concern — or trump Quebec rules of public order is constitutionally immaterial. The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount. Mr. Woods properly conceded this during argument.

Conclusion With Respect to Legal Authority

105 For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.

(2) The Plan is "Fair and Reasonable"

106 The second major attack on the application judge's decision is that he erred in finding that the Plan is "fair and reasonable" and in sanctioning it on that basis. This attack is centred on the nature of the third-party releases contemplated and, in particular, on the fact that they will permit the release of some claims based in fraud.

107 Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In the absence of a demonstrable error an appellate court will not interfere: see *Ravelston Corp., Re* (2007), 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]).

108 I would not interfere with the application judge's decision in this regard. While the notion of releases in favour of third parties — including leading Canadian financial institutions — that extend to claims of fraud is distasteful, there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement. The application judge had been living with and supervising the ABCP restructuring from its outset. He was intimately attuned to its dynamics. In the end he concluded that the benefits of the Plan to the creditors as a whole, and to the debtor companies, outweighed the negative aspects of compelling the unwilling appellants to execute the releases as finally put forward.

109 The application judge was concerned about the inclusion of fraud in the contemplated releases and at the May hearing adjourned the final disposition of the sanctioning hearing in an effort to encourage the parties to negotiate a resolution. The result was the "fraud carve-out" referred to earlier in these reasons.

110 The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers, (ii) limits the type of damages that may be claimed (no punitive damages, for example), (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order, and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

111 The law does not condone fraud. It is the most serious kind of civil claim. There is therefore some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: *Fotinis Restaurant Corp. v. White Spot Ltd* (1998), 38 B.L.R. (2d) 251 (B.C. S.C. [In Chambers]) at paras. 9 and 18. There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings — the claims here all being untested allegations of fraud — and to include releases of such claims as part of that settlement.

112 The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, that the need "to avoid the potential cascade of litigation that ... would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

113 At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here — with two additional findings — because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

> a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
>
> c) The Plan cannot succeed without the releases;
>
> d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
>
> e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
>
> f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
>
> g) The releases are fair and reasonable and not overly broad or offensive to public policy.

114 These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

115 The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they — as individual creditors — make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

116 All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

117 In insolvency restructuring proceedings almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices," inasmuch as everyone is adversely affected in some fashion.

118 Here, the debtor corporations being restructured represent the issuers of the more than $32 billion in non-bank sponsored ABCP Notes. The proposed compromise and arrangement affects that entire segment of the ABCP market and the financial markets as a whole. In that respect, the application judge was correct in adverting to the importance of the restructuring to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial system in Canada. He was required to consider and balance the interests of *all* Noteholders, not just the interests of the appellants, whose notes represent only about 3% of that total. That is what he did.

119 The application judge noted at para. 126 that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized at para. 134 that:

> No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity among all stakeholders.

120 In my view we ought not to interfere with his decision that the Plan is fair and reasonable in all the circumstances.

D. Disposition

121 For the foregoing reasons, I would grant leave to appeal from the decision of Justice Campbell, but dismiss the appeal.

***J.I. Laskin J.A.*:**

I agree.

***E.A. Cronk J.A.*:**

I agree.

Schedule A — Conduits

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

Schedule B — Applicants

ATB Financial

Caisse de dépôt et placement du Québec

Canaccord Capital Corporation

Canada Mortgage and Housing Corporation

Canada Post Corporation

Credit Union Central Alberta Limited

Credit Union Central of BC

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank of Canada/National Bank Financial Inc.

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

Schedule A — Counsel

1) Benjamin Zarnett and Frederick L. Myers for the Pan-Canadian Investors Committee

2) Aubrey E. Kauffman and Stuart Brotman for 4446372 Canada Inc. and 6932819 Canada Inc.

3) Peter F.C. Howard and Samaneh Hosseini for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG

4) Kenneth T. Rosenberg, Lily Harmer and Max Starnino for Jura Energy Corporation and Redcorp Ventures Ltd.

5) Craig J. Hill and Sam P. Rappos for the Monitors (ABCP Appeals)

6) Jeffrey C. Carhart and Joseph Marin for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor

7) Mario J. Forte for Caisse de Dépôt et Placement du Québec

8) John B. Laskin for National Bank Financial Inc. and National Bank of Canada

9) Thomas McRae and Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al)

10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.

11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank

12) Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees

13) Usman Sheikh for Coventree Capital Inc.

14) Allan Sternberg and Sam R. Sasso for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.

15) Neil C. Saxe for Dominion Bond Rating Service

16) James A. Woods, Sebastien Richemont and Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP

17) Scott A. Turner for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.

18) R. Graham Phoenix for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

Application granted; appeal dismissed.

Footnotes

* Leave to appeal refused at *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433 (S.C.C.).

1 Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.

2 Justice Georgina R. Jackson and Dr. Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., *Annual Review of Insolvency Law, 2007* (Vancouver: Thomson Carswell, 2007).

3 Citing Gibbs J.A. in *Chef Ready Foods*, *supra*, at pp.319-320.

4 The Legislative Debates at the time the CCAA was introduced in Parliament in April 1933 make it clear that the CCAA is patterned after the predecessor provisions of s. 425 of the *Companies Act 1985* (U.K.): see *House of Commons Debates (Hansard)*, *supra*.

5 See *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 192; *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16, s. 182.

6 A majority in number representing two-thirds in value of the creditors (s. 6)

7 *Steinberg Inc.* was originally reported in French: *Steinberg Inc. c. Michaud*, [1993] R.J.Q. 1684 (Que. C.A.). All paragraph references to *Steinberg Inc.* in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055 (Que. C.A.)

8 Reed Dickerson, *The Interpretation and Application of Statutes* (1975) at pp.234-235, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at 621.

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United States District Court,
S.D. New York.
In re IMAX Securities Litigation.

No. 06 Civ. 6128 (NRB).
June 20, 2012.

Background: Lead plaintiff in investors' consolidated class action against entertainment corporation, its officers, and accounting firm for securities fraud moved for final approval of settlement and proposed plan of allocation, final certification of the class for purposes of settlement, and award of attorneys' fees and reimbursement of expenses.

Holdings: The District Court, Naomi Reice Buchwald, J., held that:
(1) notice of settlement was adequate;
(2) commonality and typicality requirements for certification of settlement class were met;
(3) adequacy requirement was met;
(4) common questions predominated over those affecting only individual members;
(5) class action was superior to other methods of adjudicating claims;
(6) proposed settlement was procedurally fair;
(7) proposed settlement was substantively fair; and
(8) plan of allocation was fair and adequate.

Ordered accordingly.

West Headnotes

[1] Constitutional Law 92 ⇨3981

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3980 Class Actions
92k3981 k. In general. Most Cited Cases

When notice to potential class members satisfies requirements of federal class action rule, the requirements of due process are also satisfied. U.S.C.A. Const.Amend. 5; Fed.Rules Civ.Proc.Rule 23(c)(2)(B), 28 U.S.C.A.

[2] Compromise and Settlement 89 ⇨68

89 Compromise and Settlement
89II Judicial Approval
89k66 Proceedings
89k68 k. Notice and communications. Most Cited Cases

Federal Civil Procedure 170A ⇨177.1

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)2 Proceedings
170Ak177 Notice and Communications
170Ak177.1 k. In general. Most Cited Cases

In the context of a securities class action settlement, the PSLRA imposes notice requirements which must be provided to members of the class in addition to those required by federal class action rule. Private Securities Litigation Reform Act of 1995, § 101(b), 15 U.S.C.A. § 78u–4(a)(7); Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[3] Compromise and Settlement 89 ⇨68

89 Compromise and Settlement
89II Judicial Approval
89k66 Proceedings
89k68 k. Notice and communications. Most Cited Cases

Constitutional Law 92 ⇨3983

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3980 Class Actions

92k3983 k. Compromise and settlement. Most Cited Cases

Federal Civil Procedure 170A ⇐179

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)2 Proceedings
170Ak177 Notice and Communications
170Ak179 k. Sufficiency. Most Cited Cases

Notice of settlement provided to possible class members in investors' class action against entertainment corporation for securities fraud was adequate, since it satisfied requirements of class action rule, PSLRA, and due process; claims services company had been retained to supervise and administer dissemination of notice to 87,934 individuals and institutional investors by mail, and had launched a settlement website that contained notice and approved forms, and it also published notice in national editions of newspapers in both United States and Canada, and on electronic newswires. U.S.C.A. Const.Amend. 5; Private Securities Litigation Reform Act of 1995, § 101(b), 15 U.S.C.A. § 78u–4(a)(7); Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.; Securities Exchange Act of 1934, §§ 10(b), 20(a), 15 U.S.C.A. §§ 78j(b), 78t(a); 17 C.F.R. § 240.10b–5.

[4] Federal Civil Procedure 170A ⇐187

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)3 Particular Classes Represented
170Ak187 k. Stockholders, investors, and depositors. Most Cited Cases

Commonality and typicality requirements for certification of settlement class in investors' class action against entertainment corporation alleging securities fraud were met where class and lead plaintiff shared many common questions of law and fact bearing on central issues of case, including whether corporation's public statements regarding income recognition contained material misstatements or omissions and whether corporation had acted with scienter in the issuance of those statements. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b–5; Fed.Rules Civ.Proc.Rule 23(a)(3, 4), (e), 28 U.S.C.A.

[5] Federal Civil Procedure 170A ⇐187

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)3 Particular Classes Represented
170Ak187 k. Stockholders, investors, and depositors. Most Cited Cases

Adequacy requirement for certification of settlement class in investors' class action against entertainment corporation alleging securities fraud was satisfied, since lead plaintiff's interest were not antagonistic to interests of class and plaintiff's counsel had secured a well-received settlement in light of maximum potential recovery; all class members' interests centered around damages sustained as a result of corporation's alleged material misstatements or omissions, and counsel had procured a $12 million settlement which was within range of possible damages estimated to be between $5 and $91 million. Securities Exchange Act of 1934, §§ 10(b), 20(a), 15 U.S.C.A. §§ 78j(b), 78t(a); 17 C.F.R. § 240.10b–5; Fed.Rules Civ.Proc.Rule 23(a)(4), (e), 28 U.S.C.A.

[6] Federal Civil Procedure 170A ⇐187

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)3 Particular Classes Represented

170Ak187 k. Stockholders, investors, and depositors. Most Cited Cases

Common questions predominated over those affecting only individual members, as required for certification of settlement class in investors' class action against entertainment corporation alleging securities fraud, since corporation's allegedly fraudulent public statements had caused damages to all members of the settlement class by decreasing stock's price. Securities Exchange Act of 1934, §§ 10(b), 20(a), 15 U.S.C.A. §§ 78j(b), 78t(a); 17 C.F.R. § 240.10b–5; Fed.Rules Civ.Proc.Rule 23(b)(3), (e), 28 U.S.C.A.

[7] Federal Civil Procedure 170A ⇐187

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)3 Particular Classes Represented
170Ak187 k. Stockholders, investors, and depositors. Most Cited Cases

Class action was superior to other available methods for adjudicating investors' claims against entertainment corporation for securities fraud, as required for certification of settlement class; potential class included more than 87,000 individual and institutional investors of which only seven had filed requests for exclusion, and although a somewhat parallel action had been filed in a Canadian court, class action in the United States, rather than Canada, provided class members access to additional defendants, allowed for domestic interpretation of securities laws, and secured a recovery of millions of dollars, while Canadian suit was still pending. Securities Exchange Act of 1934, §§ 10(b), 20(a), 15 U.S.C.A. §§ 78j(b), 78t(a); 17 C.F.R. § 240.10b-5; Fed.Rules Civ.Proc.Rule 23(b)(3), (e), 28 U.S.C.A.

[8] Compromise and Settlement 89 ⇐65

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k65 k. Securities law actions. Most Cited Cases

Proposed settlement of $12 million in investors' class action against entertainment corporation for securities fraud was procedurally fair, as required for court's approval, where all parties were represented throughout settlement negotiations by able counsel experienced in class action and securities litigation, and settlement had been achieved only after completion of merits-related discovery and mediation conducted by retired judge. Securities Exchange Act of 1934, §§ 10(b), 20(a), 15 U.S.C.A. §§ 78j(b), 78t(a); 17 C.F.R. § 240.10b–5; Fed.Rules Civ.Proc.Rule 23(e)(2), 28 U.S.C.A.

[9] Compromise and Settlement 89 ⇐65

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k65 k. Securities law actions. Most Cited Cases

Proposed settlement of $12 million in investors' class action against entertainment corporation for securities fraud was substantively fair, as required for court's approval, where absent settlement, a complicated, expensive, and likely protracted trial would result, only one of more than 87,000 possible class members had objected to proposed settlement and only seven had opted out, extensive merits discovery had been completed over course of six years of litigation so counsel's recommendation of settlement was informed, risk of establishing scienter existed if matter went to trial, damage calculations were complicated and uncertain, settlement amount represented 13% of maximum damages conceivably possible, and although corporation could withstand a greater judgment than $12 million, that factor standing alone did not preclude finding of substantive fairness. Securities Exchange

Act of 1934, §§ 10(b), 20(a), 15 U.S.C.A. §§ 78j(b), 78t(a); Fed.Rules Civ.Proc.Rule 23(e)(2), 28 U.S.C.A.

[10] Compromise and Settlement 89 ⇐65

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k65 k. Securities law actions. Most Cited Cases

Plan of allocation in proposed settlement of investors' securities fraud class action against entertainment corporation was fair and adequate, as required for court's approval where plan reflected advice of lead plaintiff's counsel's damage expert to divide settlement class period into two parts, assign an inflation factor per share in one part to account for considerable difficulty of establishing damages, and set inflation at a constant rate in other part throughout class period. Securities Exchange Act of 1934, §§ 10(b), 20(a), 15 U.S.C.A. §§ 78j(b), 78t(a); 17 C.F.R. § 240.10b–5; Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

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MEMORANDUM AND ORDER

NAOMI REICE BUCHWALD, District Judge.

I. Introduction

On March 28, 2012, we preliminarily certified a class for the purpose of settlement and preliminarily approved an amended settlement of this long-running securities class action against defendants IMAX Corporation ("IMAX"), Richard L. Gelfond, Bradley J. Wechsler, Francis T. Joyce, Kathryn A. Gamble (the "individual defendants"), and PricewaterhouseCoopers LLP ("PwC") (collectively "defendants"). *See* Amended Order, *In re IMAX Corp. Sec. Litig.*, Master File No. 06 Civ. 6128 (S.D.N.Y. Mar. 28, 2012) (hereinafter the "Preliminary Order"). Following the provision of notice to the members of the preliminarily certified class, on June 14, 2012, we held a hearing on the motion of lead plaintiff The Merger Fund ("TMF" or "lead plaintiff") for final approval of the amended settlement and the proposed plan of allocation, final certification of the class for the purpose of settlement, and the award of attorneys' fees and reimbursement of expenses. For the reasons stated below as well as those reasons that we articulated at the hearing, which are incorporated here by reference, we (1) find that the notice provided to members of the class was adequate; (2) certify the class for the purpose of settlement; (3) approve the settlement; (4) approve the plan of allocation; and (5) reserve decision on the requested attorneys' fees and expenses pending further briefing on these issues from lead plaintiff's counsel Abbey Spanier Rodd & Abrams, LLP ("Abbey Spanier" or "lead plaintiff's counsel").

II. Background[FN1]

FN1. The facts recited here are drawn from the following sources: (1) the Stipulation and Agreement Between Settlement Class Members and IMAX Corporation, Richard L. Gelfond, Bradley J. Wechsler, Francis T. Joyce, Kathryn A. Gamble, and PricewaterhouseCoopers LLP, dated January 26, 2012 ("Settlement"); (2) the Amended Stipulation and Agreement Between Settlement Class Members and IMAX Corporation, Richard L. Gelfond, Bradley J.

Wechsler, Francis T. Joyce, Kathryn A. Gamble, and PricewaterhouseCoopers LLP, dated March 20, 2012 ("Am. Settlement"); (3) the Preliminary Order; (4) the Declaration of Arthur N. Abbey in Support of Lead Plaintiff's Motion for Final Approval of the Settlement with Defendants, etc. ("Abbey Decl."); and (5) the Affidavit of Paul Mulholland Concerning Mailing of Notice ("Mulholland Aff.").

A. The Class Action

Almost six years have passed since the eight cases that were consolidated to form this class action were originally filed with this Court. *See Kaplan v. Gelfond,* 240 F.R.D. 88, 90 (S.D.N.Y.2007). It has similarly been almost six years since the parallel class action that remains pending in Canada (the "Canadian Action") was originally filed with the Ontario Superior Court. *See* Abbey Decl. ¶ 11. FN2 During the intervening years, we have appointed three different entities as lead plaintiff, denied one motion to dismiss and two motions for class certification, and at the time that the parties entered into a memorandum of understanding ("MOU") to settle this litigation on November 2, 2011 we were preparing to decide a third motion for class certification. *See id.* at ¶¶ 10–57, 68. In the course of addressing these various issues, we have previously set out the facts underlying the allegations of securities fraud in this case in multiple decisions and will not rearticulate them in detail here. *See, e.g., In re IMAX Sec. Litig.,* 272 F.R.D. 138, 142–45 (S.D.N.Y.2010); *In re IMAX Sec. Litig.,* 587 F.Supp.2d 471, 474–78 (S.D.N.Y.2008). It is enough for our present purpose to repeat the following passages:

> FN2. The eight cases—06 Civ. 6128, 06 Civ. 6235, 06 Civ. 6313, 06 Civ. 6349, 06 Civ. 6449, 06 Civ. 6693, 06 Civ. 7057, and 06 Civ. 7162—were filed between August 11, 2006 and September 18, 2006. The Canadian Action commenced thereafter on September 20, 2006. Abbey Decl. ¶ 11.

> IMAX is an entertainment technology company specializing in digital and film-based motion picture technologies and large-format film presentations. The Company's main business is the design, ***182** manufacture, sale and lease of theater systems. As of December 31, 2006, the IMAX theater network included 284 theaters operating in 40 countries.
>
> The majority of IMAX's revenue [between February 27, 2003 and July 20, 2007] was derived from the sale and lease of theater systems to third-party owners of large-format theaters. Throughout [this time period], IMAX reported upward-trending financial results: 16 theater system installations ("installs") and $71 million revenue for fiscal year 2002; 21 installs and $75.8 million revenue for 2003; 22 installs and $86.6 million revenue for 2004; and 39 installs and $99.7 million revenue for 2005.
>
> On February 17, 2006, IMAX issued a press release announcing its 2005 financials and reporting that the Company had completed 14 [installs] during the fourth quarter of 2005. On March 9, 2006, IMAX filed its Form 10–K for fiscal year 2005 ("2005 10–K"), describing a "record" 14 [installs] and $35.1 million revenue in the fourth quarter.
>
> Five months later, on August 9, 2006, IMAX announced that it was responding to an informal inquiry from the Securities and Exchange Commission ("SEC") concerning the timing of revenue recognition and, specifically, its application of multiple element arrangement ... accounting derived from theater system sales and leases.
>
> ...
>
> In addition to disclosing the SEC investigation, the August 9th announcement stated that [IMAX]'s discussions with potential buyers and strategic partners had faltered. The following day, the price of IMAX shares fell from $9.63 to $5.73.

On March 29, 2007, IMAX announced that, based on comments it had received from the SEC and the Ontario Securities Commission, it was expanding its [internal] review [of its accounting practices], "primarily in connection with its revenue recognition for certain theater system installations in previous periods, including the fourth quarter of 2005." Because of this "expanded review," IMAX stated that it "may determine that it is necessary to restate additional items beyond the previously identified errors."

Four months later, on July 20, 2007, IMAX filed its Form 10–K for fiscal year 2006 ..., which included a restatement of its financial results for fiscal years 2002 through the first three quarters of 2006.[FN3]

> FN3. Following this restatement, the price of IMAX shares actually closed up $0.45. *See* Abbey Decl. ¶ 132.

...

As a result of the restatement of theater system revenue, 16 installation transactions representing $25.4 million in revenue shifted between quarters in their originally reported years, and 14 installation transactions representing $27.1 million in revenue shifted between fiscal years. Of the 14 transactions for which revenue shifted between fiscal years, one was originally recorded as revenue in fiscal year 2002, two were recorded in fiscal year 2004, ten in fiscal year 2005, and one in fiscal year 2006.

In re IMAX, 272 F.R.D. at 142–43 (internal footnotes omitted).

Bringing claims of securities fraud under §§ 10(b) and 20(a) of the Securities Exchange Act, 15 U.S.C. §§ 78j(b) and 78t(a), and Rule 10b–5, 17 C.F.R. § 240.10b–5, the Consolidated Class Action Complaint, which was filed on October 2, 2007, essentially alleges that (i) IMAX, (ii) the individual defendants, who were among IMAX's directors and officers, and (iii) PwC, which served as IMAX's accountant, were responsible for the issuance of materially false and misleading statements concerning IMAX's recognition of revenue from theater system installations during the period from February 27, 2003 through July 20, 2007. *See id.* at 143–44.

B. Discovery and Settlement Proceedings

In September 2008, following the denial of defendants' motions to dismiss, the parties agreed to engage in discovery on the merits as well as discovery related to the forthcoming class certification proceedings. Abbey Decl. ¶ 20. In January 2009, IMAX and the ***183** individual defendants produced approximately 150,000 pages of documents. *Id.* at ¶ 32. In February 2009, Abbey Spanier, having reviewed this production, served interrogatories on IMAX and the individual defendants to which these defendants responded in March 2009. *Id.* at ¶ 33. Also in February 2009, PwC produced another approximately 12,000 pages of documents. *Id.* at ¶ 34. It appears that defendants made further productions over the ensuing months because both Abbey Spanier and Robbins Geller Rudman & Dowd LLP ("Robbins Geller"), which served as lead plaintiff's counsel between June 2009 and December 2010, make reference in their submissions to the review of hundreds of thousands of pages of documents. *See id.* at ¶ 78 ("[l]ead [c]ounsel have reviewed and analyzed hundreds of thousands of pages of documents produced by [d]efendants"); *id.* at Ex. E ("Rudman Decl.") ¶ 15 (prior to the appointment of Robbins Geller as lead plaintiff's counsel in June 2009 "[d]efendants had previously produced approximately 500,000 pages of documents to plaintiffs"). In addition to the discovery that they obtained from defendants, it appears that both Abbey Spanier and Robbins Geller subpoenaed documents from third parties during the course of the litigation, some of which had previously expressed an interest in acquiring IMAX prior to August 2006. *See* Abbey Decl. ¶¶ 30, 45.

We understand that neither Abbey Spanier nor Robbins Geller conducted any merits depositions

during this litigation. *See* June 14, 2012 Hr'g Tr. 5:24–6:12. However, Abbey Spanier has reviewed transcripts from interviews conducted by the SEC of the individual defendants as well as eleven other persons and has also gained access to transcripts from depositions conducted by plaintiffs' counsel in the Canadian Action of eleven persons, including a member of PwC. *See* Abbey Decl. ¶¶ 11, 78; Amended Settlement ¶ EE. In addition, further confirmatory discovery was conducted in January 2012 after the parties entered into a MOU to settle on November 2, 2011. *See* Abbey Decl. ¶¶ 70, 78.

At a number of earlier points during the litigation, the parties explored settlement. Specifically, on December 2, 2008, Abbey Spanier participated in a mediation session with counsel for defendants presided over by the Honorable E. Leo Milonas (Ret.), formerly of the New York Supreme Court, Appellate Division. *Id.* at ¶ 28. As part of this mediation, the parties exchanged confidential mediation statements. *Id.* On July 16, 2010, Robbins Geller participated in a further mediation with counsel for defendants presided over by the Honorable Daniel Weinstein (Ret.), formerly of the California Superior Court. *Id.* at ¶ 44. In preparation for this mediation, Robbins Geller also prepared a mediation statement. Rudman Decl. ¶ 26. While these earlier efforts at mediation proved unsuccessful, once Abbey Spanier was reappointed lead plaintiff's counsel in April 2011, it restarted settlement discussions with counsel for defendants that involved numerous meetings which successfully culminated in the parties entering the MOU to settle on November 2, 2011. *See* Abbey Decl. ¶ 67. Following further negotiations and the production of confirmatory discovery, the parties entered into a settlement on January 26, 2012, which we preliminarily approved on February 1, 2012. *See id.* at ¶¶ 71–73. In response to proposed revisions from plaintiffs' counsel in the Canadian Action, the parties agreed to amend the notice proposed in connection with their settlement of the 26th and approved in this Court's Order of the 1st, changing the notice to provide *inter alia* fuller contact information for plaintiffs' counsel in the Canadian Action. *See id.* at ¶ 73. On March 20, 2012, the parties ultimately entered into an amended settlement, which reflected this alteration, among other changes, as well as a structural modification of the settlement terms, which is discussed immediately below. *See id.* at ¶¶ 73–74.

C. The Amended Settlement

Pursuant to the amended settlement, lead plaintiff and defendants have agreed to resolve this litigation through a cash settlement of $12,000,000. *Id.* at ¶ 1.[FN4] This cash settlement*184 lies within the range of possible damages forecast by the parties, which extended as high as $91,000,000 pursuant to lead plaintiff's estimation and as low as $5,000,000 according to defendants' calculation, assuming *arguendo* defendants' liability. *See id.* at ¶ 127. The proposed class on whose behalf lead plaintiff seeks to enter the amended settlement (the "settlement class" or "American Class") includes all investors that acquired the common shares of IMAX on the NASDAQ Stock Market (the "NASDAQ") from February 27, 2003 through July 20, 2007 (the "settlement class period" or "American Class Period"). *Id.* at ¶ 1 n. 1. The settlement class and settlement class period differ from their analogues in the Canadian Action, which is being actively litigated on behalf of all investors that acquired IMAX's common stock on the NASDAQ or Toronto Stock Exchange on or after February 17, 2006 and held some or all of those securities on August 9, 2006 (the "Canadian Class" and the "Canadian Class Period"). *See id.* at ¶ 59. In order to address the overlap between the American Class and the Canadian Class, which was previously certified in the Canadian Action on December 14, 2009, the amended settlement is conditioned on the entry of an order in the Canadian Action that excludes from the Canadian Class those investors who do not opt out of the American Class (the "Canadian Order"). *See id.* at ¶¶ 59, 75. We understand that counsel for IMAX and the individual defendants in the Canadian Action have filed a motion seeking to redefine the Canadian Class in this

manner and that oral argument on that motion is now set to begin on July 30, 2012 in the Ontario Superior Court. *See* IMAX and Individual Defs.' Letter of June 12, 2012. While the settlement contemplated entry of the Canadian Order prior to our final approval of the settlement, the amended settlement reflects a structural modification of the settlement terms insofar as it reverses this sequence of events and seeks our final approval of the settlement prior to entry of the Canadian Order. *Compare* Settlement ¶ 5 *with* Amended Settlement ¶ 5. The amended settlement, however, remains contingent on entry of the Canadian Order. *See* Amended Settlement ¶ 8. In light of this contingency, there is an unaccustomed uncertainty as to the finality of our "final" approval of the amended settlement between the parties; however, we proceed to address that settlement on the assumption that the negotiated resolution of this litigation will not be further disturbed should we approve it, as we do.

FN4. The $12,000,000 has already been deposited in an escrow account where it is earning interest. *See* Abbey Decl. ¶ 71 n. 3.

D. The Preliminary Order and the Provision of Notice

On March 28, 2012, we preliminarily certified the settlement class for the purpose of settlement, approved the amended settlement, and approved the form and content of the notice to be provided to the members of the settlement class (the "notice"). Preliminary Order 2–3. We further set out the procedures by which the notice was to be disseminated to the settlement class and the deadlines by which any members of the settlement class who wished to object to or be excluded from the amended settlement must act ahead of the hearing that we set for June 14, 2012 to finally approve the amended settlement. *Id.* at 3–12.

In accordance with our direction, lead plaintiff's counsel retained Strategic Claims Services ("SCS") to supervise and administer the dissemination of the notice pursuant to the approved notice procedure. *See* Preliminary Order ¶ 5. SCS arranged for the notice to be provided via mail to 426 individuals and organizations identified on a list of shareholders provided by IMAX. *See* Mulholland Aff. ¶¶ 4, 8, Ex. A. In addition, SCS mailed the notice to a further 1,813 banks, brokerage companies, and institutional investors, which may have traded the common shares of IMAX in their clients' or their own accounts during the settlement class period. *See id.* These initial mailings were completed by April 23, 2012. *Id.* at ¶ 4. Following receipt of the notice, the banks, brokerage companies, and institutional investors mentioned above as well other individuals requested that an additional 85,695 copies of the notice be disseminated to possible additional members of the settlement class. *Id.* at ¶ 8. Thus, in total, 87,934 copies of the notice have been mailed to possible members of the settlement class. *See id.* ¶¶ 4, 8–9. Where a mailing was returned as undeliverable, SCS has followed up where possible to *185 obtain updated addresses. *Id.* at ¶ 9. In addition to the mailing of the notice, SCS launched a settlement website that contained the notice, among other relevant documents, and further published an approved form of summary notice through the national editions of newspapers in both the United States and Canada as well as via electronic newswires. *See id.* at ¶¶ 5–6.

The hearing to address the amended settlement was held on June 14, 2012, as scheduled. No members of the settlement class appeared. As of that date, we were informed that only seven investors had sought to be excluded from the settlement class and only one investor, Mr. Skip Ames, had filed an objection to the amended settlement (the "objection"), which we discuss below. *See* June 14, 2012 Hr'g Tr. 4:22–5:8.

III. Discussion

A. Adequacy of the Notice

[1][2] Federal Rule of Civil Procedure 23(c)(2)(B) provides the notice that is required to be given to members of a class when it is certified pursuant to Federal Rule of Civil Procedure 23(b)(3), which is the case here.[FN5] Federal Rule

of Civil Procedure 23(e)(1) in turn provides the notice that is required to be given to members of a certified class in which a settlement has been proposed for court approval, which is also the case here.[FN6] "Where, as here, the parties seek simultaneously to certify a settlement class and to settle a class action, the elements of Rule 23(c) notice ... are combined with the elements of Rule 23(e) notice" and because "Rule 23(e)'s notice requirements are less specific than that of Rule 23(c)'s ... [we] will focus on Rule 23(c)'s requirements." *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 448 (S.D.N.Y.2004) (Lynch, J.). *See also* Fed.R.Civ.P. 23 advisory committee's note (emphasizing "[n]otice of a settlement binding on the class is required either when the settlement follows class certification or when the decisions on certification and settlement proceed simultaneously" before stating "[r]easonable settlement notice may require individual notice in the manner required by Rule 23(c)(2)(B) for certification notice to a Rule 23(b)(3) class"). Where there is compliance with Rule 23(c)(2)(B), the requirements of due process are satisfied. *See Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 172–174, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) (discussing incorporation of due process requirements into Rule 23(c)(2)(B)'s predecessor provision). In addition, in the context of a securities class action settlement, the Private Securities Litigation Reform Act of 1995 (the "PSLRA") imposes additional notice that must be provided to members of the class. *See* 15 U.S.C. § 78u–4(a)(7).[FN7]

FN5. Rule 23(c)(2)(B) provides:

> For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:
>
> (i) the nature of the action;
>
> (ii) the definition of the class certified;
>
> (iii) the class claims, issues, or defenses;
>
> (iv) that a class member may enter an appearance through an attorney if the member so desires;
>
> (v) that the court will exclude from the class any member who requests exclusion;
>
> (vi) the time and manner for requesting exclusion; and
>
> (vii) the binding effect of a class judgment on members under Rule 23(c)(3).
>
> FED. R. CIV. P. 23(c)(2)(B).

FN6. Rule 23(e)(1) provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." FED. R. CIV. P. 23(e)(1).

FN7. Pursuant to the PSLRA, the notice must contain the following information as well as a cover page summarizing it:

> (A) Statement of recovery—the amount of the settlement determined in the aggregate and on an average per share basis;
>
> (B) Statement of potential outcome of case—amount of damages per share recoverable if plaintiffs were to prevail on every claim. If the parties are unable to agree on damages, a statement concerning the issues on which the parties disagree;
>
> (C) Statement of attorneys' fees—statement of fees and costs to be applied for in the aggregate and on a per

share basis;

(D) Identification of lawyers' representatives—the name, telephone number, and address of counsel available to answer questions; and

(E) Reasons for settlement—a brief statement explaining the reasons why the parties are proposing the settlement.

In re Indep. Energy Holdings PLC Sec. Litig., 302 F.Supp.2d 180, 184 (S.D.N.Y.2003).

***186** [3] We have reviewed the notice in the form in which it was disseminated to members of the settlement class, *see* Mulholland Aff. Ex. A, and also considered the procedure that we earlier approved. We find that the notice provided here was the best practicable under the circumstances, that it included all of the content necessary as a matter of law, and that it was accordingly adequate under Rule 23, due process, and the PSLRA.

B. Final Certification of the Settlement Class

"Certification of a settlement class 'has been recognized throughout the country as the best, most practical way to effectuate settlements involving large numbers of claims by relatively small claimants.' " *In re Giant Interactive Group, Inc. Sec. Litig.*, 279 F.R.D. 151, 158 (S.D.N.Y.2011) (quoting *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 205 (S.D.N.Y.1995)). *See also Weinberger v. Kendrick*, 698 F.2d 61, 72 (2d Cir.1982) ("[t]emporary settlement classes have proved to be quite useful in resolving major class action disputes") (internal quotation marks omitted). "Classes certified for settlement purposes, like all other classes, must meet the requirements of Rule 23(a) and at least one of three requirements set forth in Rule 23(b)." *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 Civ. 8144(CM), 2009 WL 5178546, at *8 (S.D.N.Y. Dec. 23, 2009). Here, we find that the settlement class satisfies the requirements of Federal Rule of Civil Procedure 23(a) and (b)(3) and accordingly certify it for the purpose of settlement.

1. Federal Rule of Civil Procedure 23(a)

Pursuant to Rule 23(a), certification of a class is proper where "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a).

a. Numerosity

In a previous decision, we found that the settlement class as now constituted plainly met the numerosity requirement of Rule 23(a)(1). *See In re IMAX*, 272 F.R.D. at 146.

b. Commonality and Typicality

" 'The commonality requirement [of Rule 23(a)(2)] is met if plaintiffs' grievances share a common question of law or of fact.' " *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck–Medco Managed Care, LLC*, 504 F.3d 229, 245 (2d Cir.2007) (quoting *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir.1997) (*per curiam*)). In turn, "[t]ypicality [pursuant to Rule 23(a)(3)] 'requires that the claims of the class representatives be typical of those of the class, and is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability.' " *Id.* (quoting *Robinson v. Metro–N. Commuter R.R. Co.*, 267 F.3d 147, 155 (2d Cir.2001)). As the Supreme Court has observed, the commonality requirement "tend[s] to merge" with the typicality requirement because "[b]oth serve as guideposts for determining whether ... the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 158 n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982).

[4] Here the commonality and typicality requirements are satisfied. The settlement class, and in particular TMF as lead plaintiff, share many common questions of law and fact bearing on for example the central issues of whether defendants' public statements regarding income recognition contained material misstatements or omissions and whether defendants acted with scienter in the issuance of those statements. In a previous decision, we addressed and rejected a number of arguments against TMF's appointment as lead plaintiff on the basis of its failure to satisfy the typicality as well as adequacy requirements of Rule 23(a)(3) and (4), and we find no novel reason on the record before us to believe that TMF's claims are atypical in any manner or that it is *187 subject to unique defenses. *See In re Imax Sec. Litig.*, Master File No. 06 Civ. 6128, 2011 WL 1487090, at *3–7 (S.D.N.Y. April 14, 2011) (rejecting arguments that TMF's (i) successive reassignment of its claims and (ii) investment strategies did not give rise to unique defenses or undermine satisfaction of the typicality and adequacy requirements).

c. Adequacy

[5] "The adequacy requirement of Rule 23(a)(4) involves an inquiry as to whether: (1) the plaintiff's interests are antagonistic to the interests of the other members of the [c]lass; and (2) plaintiff's counsel are qualified, experienced, and capable of conducting the litigation." *In re Giant*, 279 F.R.D. at 159 (citing *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir.2000)). Here, there is no reason to believe that lead plaintiff's interests are in conflict with those of the other members of the settlement class whose claims share common questions of law and fact, and we find that lead plaintiff's counsel is qualified to litigate this case on behalf of the settlement class. We note that the achievement of the lead plaintiff and lead plaintiff's counsel in securing a well-received settlement that we approve below provides confirmation that they have met the adequacy requirement. *See id.* (finding satisfaction of adequacy requirement "confirmed by the lack of any opposition to this settlement (and the very small number of opt-outs), as well as the above-average recovery in this case, measured as a percentage of maximum potential recovery").

2. Federal Rule of Civil Procedure 23(b)(3)

In addition to meeting the four requirements of Rule 23(a), a class must also satisfy one out of the three sub-paragraphs to Rule 23(b). Here, lead plaintiff seeks certification of the settlement class pursuant to Rule 23(b)(3), which requires that a court find "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3).[FN8]

FN8. In undertaking these two inquiries, the following matters are among those that Rule 23(b)(3) identifies as "pertinent":

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.
>
> FED. R. CIV. P. 23(b)(3).

a. Predominance of Common Questions

[6] "Class-wide issues predominate if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Moore v. PaineWebber, Inc.*, 306 F.3d

1247, 1252 (2d Cir.2002). As the Supreme Court has observed, the requirement of predominance is "readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 625, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). Here, lead plaintiff alleges that defendants' allegedly fraudulent public statements caused damages to the settlement class, and these allegations are sufficient to establish predominance. *See In re Global Crossing,* 225 F.R.D. at 454.

b. Superiority to Other Methods of Adjudication

[7] The class action here is superior to the other available methods for adjudicating the controversy between the settlement class and defendants. "The interest of the class as a whole in litigating the many common questions substantially outweighs any interest by individual members in bringing and prosecuting separate actions," which has been evidenced from the fact that only one member of the settlement class has objected to the amended settlement and only seven members ***188** of the settlement class have sought to exclude themselves from the amended settlement. *Cromer Fin. Ltd. v. Berger,* 205 F.R.D. 113, 133 (S.D.N.Y.2001) (continuing to note that "[t]o force each investor to litigate separately would risk disparate results among those seeking redress, ... would exponentially increase the costs of litigation for all, and would be a particularly inefficient use of judicial resources").

Given the existence of the Canadian Action, it has been periodically suggested in the course of this litigation that the parallel class action proceedings to the north offer a better forum for the resolution of this general controversy. *See In re IMAX,* 272 F.R.D. at 158. Indeed, the one objection to the amended settlement alleges the comparative attractiveness of the Canadian Action. *See* Objection 2–3. We again "decline to deny certification on th[is] ground [ ] because, amongst other reasons," PwC is not a defendant in the Canadian Action, the American Class Period is significantly longer than the Canadian Class Period, and the American Class includes only purchasers on the NASDAQ whereas the Canadian Class includes purchasers on both the NASDAQ and Toronto Stock Exchange. *In re IMAX,* 272 F.R.D. at 158–59. As we previously stated:

> At bottom, a class action in a foreign jurisdiction, applying that jurisdiction's securities laws, to which a named defendant in the United States action is not a party, in which the first complaint in the foreign jurisdiction was filed after the first complaint in this case, is not a "superior" way of adjudicating plaintiffs' claims against that party for alleged violations of U.S. securities laws—claims which we already have upheld against defendants' motions to dismiss.

Id. at 159. Moreover, there is now a further factor in play that we find resolves any lingering doubt as to whether this class action is superior: the American Class has secured a certain recovery of millions of dollars against defendants through the advocacy of lead plaintiff's counsel here whereas the Canadian Class continues to litigate in the hope of securing a settlement or judgment.[FN9] It is no less true in the context of securities class action litigation that a bird in hand is worth two in the bush. Finally, to the extent that members of the American Class who are also members of the Canadian Class—it is estimated that 83.9% of the shares of IMAX involved in the Canadian Action were purchased on the NASDAQ, *see* Preliminary Order Ex. A–1 4—share the opinion conveyed in the one objection that the Canadian Action promises a superior alternative for them to recover their investment losses they would "presumably have excluded themselves from the settlement class." *In re Global Crossing,* 225 F.R.D. at 454. As noted earlier, there were only seven exclusion requests despite the extensive notice.

> FN9. The most recent development of which we are aware in the settlement negotiations in the Canadian Action is that on May 3, 2012 defendants' counsel in the Ca-

> nadian Action made an offer to plaintiffs' counsel in the Canadian Action to settle on terms roughly analogous to those on which the parties have reached agreement here. *See* Abbey Decl. Ex. A Tab 2 ¶ 29.
>
> * * *

In light of the foregoing analysis, we find that the settlement class satisfies the requirements of Federal Rule of Civil Procedure 23(a) and (b)(3) and accordingly certify it for the purpose of settlement.

C. Final Approval of the Amended Settlement

At the outset, we emphasize that that there is a "strong judicial policy in favor of settlements, particularly in the class action context." *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir.1998). Pursuant to Federal Rule of Civil Procedure 23(e) any settlement of this class action requires our approval. *See* FED. R. CIV. P. 23(e). Because the amended stipulation will bind the settlement class to its terms, we can only approve it should we find that "it is fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(2). "In undertaking this evaluation, [we] must consider 'both the [amended] settlement's terms and the negotiating process leading to settlement,' that is, [we] must review the settlement for both procedural and substantive fairness." *In re Giant*, 279 F.R.D. at 160 (quoting *Wal–Mart Stores, Inc. *189 v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir.2005)).

1. Procedural Fairness

[8] We owe a fiduciary duty to the settlement class "to ensure that the [amended] settlement is not the product of collusion." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y.1997), *aff'd*, 117 F.3d 721 (2d Cir.1997) (citing *In re Warner Commc'ns Sec. Litig.*, 798 F.2d 35, 37 (2d Cir.1986)). With that said, "a class action settlement enjoys a 'presumption of correctness' where it is the product of arm's-length negotiations conducted by experienced, capable counsel." *In re Telik, Inc. Sec. Litig.*, 576 F.Supp.2d 570, 575 (S.D.N.Y.2008) (quoting *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 718 F.Supp. 1099, 1103 (S.D.N.Y.1989)). Further, "great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation." *In re PaineWebber*, 171 F.R.D. at 125 (internal quotation marks omitted). Here, the presumption of correctness attaches because "[a]ll parties were represented throughout the [s]ettlement negotiations by able counsel experienced in class action and securities litigation." *In re Telik*, 576 F.Supp.2d at 576. This finding is further buttressed in light of the substantial merits-related discovery conducted in this case as well as the prior mediation sessions that, though unfruitful, took place before retired judges. *See In re Giant*, 279 F.R.D. at 160 (noting extent of merits-related discovery); *In re Telik*, 576 F.Supp.2d at 576 (noting involvement of retired judges). In the absence of evidence to rebut the presumption, we find that the amended settlement is procedurally fair.

2. Substantive Fairness

[9] In the Second Circuit, district courts determine whether a proposed settlement in a class action is substantively fair through analysis of the nine factors articulated in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir.1974). These factors are:

> (1) the complexity, expense and likely duration of the litigation;
>
> (2) the reaction of the class to the settlement;
>
> (3)the stage of the proceedings and the amount of discovery completed;
>
> (4) the risks of establishing liability;
>
> (5) the risks of establishing damages;
>
> (6) the risks of maintaining the class action through the trial;
>
> (7) the ability of the defendants to withstand a

greater judgment;

(8) the range of reasonableness of the settlement fund in light of the best possible recovery;

(9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Wal–Mart Stores, 396 F.3d at 117 (quoting *Grinnell,* 495 F.2d at 463). "In finding that a settlement is fair, not every factor must weigh in favor of settlement, 'rather [a] court should consider the totality of these factors in light of the particular circumstances.' " *In re Global Crossing,* 225 F.R.D. at 456 (quoting *Thompson v. Metro. Life Ins. Co.,* 216 F.R.D. 55, 61 (S.D.N.Y.2003)). Upon consideration of these factors, we find that the amended settlement is substantively fair.

a. Complexity, Expense, and Likely Duration of Litigation

"[I]n evaluating the settlement of a securities class action, federal courts, including this [c]ourt, have long recognized that such litigation is notably difficult and notoriously uncertain." *In re Sumitomo Copper Litig.,* 189 F.R.D. 274, 281 (S.D.N.Y.1999) (internal quotation marks omitted). In this case, we have from the outset acknowledged the complexity of the underlying accounting principles involved. *See In re IMAX,* 587 F.Supp.2d at 475–77. While this complexity does not appear extraordinary in the context of issues that are regularly implicated in the course of securities class action litigation, we agree with lead plaintiff's counsel that it would materially increase the challenge as well as expense of litigating this case through trial. *See* Mem. of Law in Support of Lead Plaintiff's Mot. for Final Approval of the Settlement, etc. ("Br.") 9–10; Abbey Decl. ¶ 110. Furthermore, we agree with lead plaintiff's counsel that following a renewed class certification motion, a motion for summary judgment***190** from one or more of the defendants would possibly precede a trial. *See* Abbey Decl. ¶ 9. In short, we find that the amended settlement permits the settlement class to avoid complicated, expensive, and likely protracted litigation, probably lengthened in its cost and duration due to the parties' likely efforts to coordinate proceedings with those in the Canadian Action.

b. Class Members' Reaction to the Amended Settlement

"It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *Maley v. Del Global Techs. Corp.,* 186 F.Supp.2d 358, 362 (S.D.N.Y.2002). Here, only one investor objected to the amended settlement and only seven requested to opt out of the settlement class. In light of the fact that over 87,000 notices were mailed to investors and possible members of the settlement class, this demonstration of discontent is but a whisper amidst an otherwise thundering roar of silence.

c. Stage of Proceedings and Amount of Discovery Completed

In considering this factor, "the question is whether the parties had adequate information about their claims," *In re Global Crossing,* 225 F.R.D. at 458, such that their counsel can intelligently evaluate "the merits of [p]laintiff's claims, the strengths of the defenses asserted by [d]efendants, and the value of [p]laintiffs' causes of action for purposes of settlement." *Maley,* 186 F.Supp.2d at 364. The threshold necessary to render the decisions of counsel sufficiently well informed, however, is not an overly burdensome one to achieve—indeed, formal discovery need not have necessarily been undertaken yet by the parties. *See In re Sony SXRD Rear Projection Television Class Action Litig.,* No. 06 Civ. 5173(RPP), 2008 WL 1956267, at *7 (S.D.N.Y. May 1, 2008) (stating "[a]lthough the parties did not engage in extensive formal discovery, such efforts are not required for the [s]ettlement to be adequate, so long as the parties conducted sufficient discovery to understand their claims and negotiate settlement terms" and citing cases). This case has been pending for almost six years. During that time period, substantial merits-

related discovery of both a formal and informal variety has occurred. In addition, the parties have conducted additional confirmatory discovery pending their entrance into the amended settlement. Against this history of activity, we find that lead plaintiff's counsel and defendants' counsel are both able to assess the strengths and weaknesses of their respective positions.

d. Risks of Establishing Liability

"This factor does not require [a] [c]ourt to adjudicate the disputed issues or decide unsettled questions; rather, the [c]ourt need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *In re Global Crossing,* 225 F.R.D. at 459. *See In re Austrian & German Bank Holocaust Litig.,* 80 F.Supp.2d 164, 177 (S.D.N.Y.2000) (approving proposed settlement and emphasizing "[t]he [c]ourt is impressed by the factual difficulties and legal defenses that plaintiffs face in further litigation of their claim"). We agree with lead plaintiff's counsel that significant risks would lie ahead should the litigation of this case proceed. *See* Br. 17–18. In particular, for reasons that we have previously noted, albeit in denying defendants' motion to dismiss, whether lead plaintiff could establish scienter on the part of IMAX, the individual defendants, and PwC is far from certain in this case involving accounting irregularities that implicated the recognition not creation of income. *See In re IMAX,* 587 F.Supp.2d at 481, 485 (noting the question of whether scienter was adequately pleaded as to IMAX and the individual defendants was a "close one" and observing "[i]f ... discovery reveals that P[w]C's involvement in the development of IMAX's accounting policy was not so extensive as alleged" then the "inference of scienter will weaken substantially").

e. Risks of Establishing Damages

In the context of securities class actions, "[c]alculation of damages is a 'complicated and uncertain process, typically involving conflicting expert opinion' about the difference between the purchase price and the stock's 'true' value absent the alleged fraud." ***191** *In re Global Crossing,* 225 F.R.D. at 459 (quoting *Maley,* 186 F.Supp.2d at 365). In this case, loss causation presents a stark challenge to lead plaintiff. On August 9, 2006, IMAX disclosed (i) that the SEC was investigating its accounting practices and also (ii) that a potential acquisition or strategic partnership had not come to fruition. The timing of these twin disclosures significantly complicates the question of what, if any, amount of the resulting drop in the share price is attributable to prior allegedly misrepresentative statements regarding theater system installations and resulting revenue.[FN10]

FN10. In addition, on July 20, 2007, when IMAX actually restated its financial results from multiple prior years, its share price closed up $0.45 in response to this correction. Abbey Spanier effectively now concedes that no loss to investors is attributable to the restatement, which conclusion guides its proposed plan of allocation, as discussed below. *See* Abbey Decl. ¶ 132.

f. Risks of Maintaining Class Action Through Trial

We have not yet certified a class in this case except for the purpose of settlement. Were this case to proceed in the absence of the amended settlement, even if lead plaintiff secured certification of the entire settlement class, at the next stage the possibility would remain that following additional factual development multiple sub-classes would emerge for different groups of investors. *See In re NASDAQ Market–Makers Antitrust Litig.,* 187 F.R.D. 465, 476 (S.D.N.Y.1998) (noting that "if insurmountable management problems were to develop at any point, class certification can be revisited at any time" pursuant to Federal Rule of Civil Procedure 23(c)(1)) (internal quotation marks omitted).

g. Defendants' Ability to Withstand Greater Judgment

Without question, IMAX, the individual defendants, and PwC could withstand a much greater judgment against them, and this factor weighs

against the fairness of the amended settlement. "But a defendant is not required to 'empty its coffers' before a settlement can be found adequate." *In re Sony*, 2008 WL 1956267, at *8 (quoting *McBean v. City of New York*, 233 F.R.D. 377, 388 (S.D.N.Y.2006) (Lynch, J.)). Indeed, this factor, standing alone, is not sufficient to preclude a finding of substantive fairness where the other factors weigh heavily in favor of approving a settlement. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir.2001).

h. Amended Settlement's Range of Reasonableness in Light of Possible Recovery

"The adequacy of the amount achieved in settlement may not be judged in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re Giant*, 279 F.R.D. at 162 (internal quotation marks omitted). Instead, we must examine whether the settlement amount lies within a "range of reasonableness," which range reflects "the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Wal-Mart*, 396 F.3d at 119 (internal quotation marks omitted). We have already discussed the material weaknesses in lead plaintiff's case as well as the additional risks attendant to further litigating this class action. In light of these weaknesses and risks, we find that the settlement amount here—$12,000,000, which constitutes over 13% of the maximum damages that lead plaintiff's counsel argues are conceivably possible to prove—is within the range of reasonableness. Nor is it without precedent that settlement amounts reflecting similar (or lower) percentages of possible recoveries have been approved in other recent securities class action cases. *See, e.g., In re Giant*, 279 F.R.D. at 162 (finding $13,000,000 settlement amount that reflected percentage of recovery of 16.5% was within the range of reasonableness). *See also In re China Sunergy Sec. Litig.*, No. 07 Civ. 7895(DAB), 2011 WL 1899715, at *5 (S.D.N.Y. May 13, 2011) (noting "average settlement amounts in securities fraud class actions where investors sustained losses over the past decade ... have ranged from 3% to 7% of the class members' estimated losses") (internal quotation marks omitted); *In re Union Carbide*, 718 F.Supp. *192 at 1103 (noting the Second Circuit "has held that a settlement can be approved even though the benefits amount to a small percentage of the recovery sought" and emphasizing "[t]he essence of settlement is compromise").

* * *

In light of the foregoing analysis, we find that the amended settlement is substantively fair under the factors of *Grinnell* and accordingly give it final approval.

D. Final Approval of the Plan of Allocation

" 'To warrant approval, the plan of allocation must also meet the standards by which the settlement was scrutinized—namely, it must be fair and adequate.' " *In re WorldCom, Inc. Sec. Litig.*, 388 F.Supp.2d 319, 344 (S.D.N.Y.2005) (quoting *Maley*, 186 F.Supp.2d at 367). " 'When formulated by competent and experienced counsel,' a plan for allocation of net settlement proceeds 'need have only a reasonable, rational basis.' " *In re Telik*, 576 F.Supp.2d at 580 (quoting *In re Global Crossing*, 225 F.R.D. at 462). Such "[a] reasonable plan may consider the relative strength and values of different categories of claims." *Id. See In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262(RWS), 2002 WL 31663577, at *18 (S.D.N.Y. Nov. 26, 2002) ("[c]lass action settlement benefits may be allocated by counsel in any reasonable or rational manner because allocation formulas reflect the comparative strengths and values of different categories of the claim") (internal ellipsis and quotation marks omitted).

[10] The proposed plan of allocation effectively divides the settlement class period into two parts. For common shares of IMAX purchased from February 27, 2003 through August 9, 2006, the plan of allocation assigns an inflation factor per share of $3.90, which reflects the entire drop in the share

price that occurred immediately following IMAX's disclosure on August 9th of the SEC's investigation into its accounting practices. For shares of IMAX purchased from August 10, 2006 through July 20, 2007, the plan of allocation assigns no inflation factor. *See* Preliminary Order Ex. A–1 19–20. This latter assignment of value renders worthless the claims of those members of the settlement class who purchased the common stock of IMAX after the initial disclosure. The plan of allocation reflects the advice of lead plaintiff's counsel's damages expert, who in particular "recommended that there w[ere] no damages for IMAX shareholders between the period of August 10, 2006 and July 20, 2007 (the date of the [r]estatement) because on the date of the restatement, IMAX'[s] stock closed up $0.45 from the previous day's closing." Abbey Decl. ¶ 132.

We find that the proposed plan of allocation, which was devised by experienced counsel, is fair and supported by a reasonable, rational basis. The assignment of no value to the claims of investors who purchased after August 9th not unreasonably reflects what we agree would be the considerable difficulty of establishing damages during this time period. The mere fact that the lead plaintiff selects zero as the proper correction to the share price during this period of the settlement class does not alone undermine the fairness of the plan of allocation because the selection of zero seems rational here. *See Buxbaum v. Deutsche Bank AG,* 216 F.R.D. 72, 74–76, 78–79 (S.D.N.Y.2003) (rejecting post-approval challenge to plan of allocation in securities class action premised on allegedly false denials of impending merger that assigned "$8.00 per share for those shares traded from October 26, 1998 through November 18, 1998; $3.91 per share for those shares traded on November 19, 1998; and $0.00 for [those] shares traded on November 20, 1998" and noting "[t]he deflationary effect declined to $3.91 per share on November 19 [th] and to zero on November 20[th], because by those dates there was new information in the marketplace indicating that there was to be an impending merger announcement and that information drove the price ... back to its predeflationary levels"). Furthermore, no member of the settlement class has objected to this aspect of the plan of allocation.

The one objection to the amended settlement instead criticizes the plan of allocation because it assigns a uniform inflation value to claims arising from transactions on or before ***193** August 9th. *See* Objection 1. In particular, the objection argues that the value of common shares prior to 2005 was less inflated, citing the opinion of an expert submitted in the Canadian Action. *See id.;* Abbey Decl. Ex. B Tab 2 ("Torchio Aff."). While we have no reason to doubt that the expert retained by plaintiffs' counsel in the Canadian Action is as qualified to opine on this topic as the expert retained by Abbey Spanier here and moreover that his rationale for further segmenting the share price inflation in the plan of allocation is not unreasonable, *see* Torchio Aff. ¶¶ 18–20, it is well established that damages calculations in securities class actions often descend into a battle of experts. *See In re Marsh,* 2009 WL 5178546, at *6 ("[o]n damages, this case would have ended up as a classic 'battle of the experts' "). In the context of settlement approval, however, the rationale here for setting inflation at a constant rate throughout the entire portion of the settlement class period that preceded the initial corrective disclosure and that was covered by subsequently restated financial results need not overwhelm in our estimation all competing theories of damages. Instead, the rationale need only be reasonable and rational, which it is.

E. The Requested Attorneys' Fees and Expenses

In connection with its motion for final approval of the amended settlement, Abbey Spanier also seeks an award of attorneys' fees of $3,000,000, representing 25% of the settlement amount, as well as reimbursement of expenses totaling $1,677,838.02. *See* Br. 33–42. Adding these attorney's fees and expenses, the total of $4,677,838.02 reflects almost 39% of the settlement amount. While this figure alone gives us pause, as we ex-

plained at the hearing on June 14, 2012, we are concerned about the attorneys' hours expended and expert fees incurred by Abbey Spanier and in particular Robbins Geller given the evidentiary challenges that were obviously involved in bringing this case from the outset. In addition, we find particularly troubling the failure of Robbins Geller to address in its application the circumstances of its prior removal as lead plaintiff's counsel, which circumstances drew into question the candor and good faith of its representations to this Court. *See In re IMAX,* 272 F.R.D. at 155–57, 160; *In re IMAX,* 2011 WL 1487090, at *9. In light of these concerns, we agreed with Abbey Spanier at the hearing on the 14th that further briefing on the issue of the requested attorneys' and expenses is appropriate. Accordingly, we reserve decision on the award of fees and reimbursement of expenses.

IV. Conclusion

For the reasons stated above as well as those reasons that we articulated at the hearing, which are incorporated here by reference, we (1) find that notice provided to members of the was adequate; (2) certify the class for purpose of settlement; (3) approve the settlement; (4) approve the plan of allocation; and (5) reserve decision on the requested attorneys' fees and expenses pending further briefing on these issues from lead plaintiff's counsel.

S.D.N.Y.,2012.
In re IMAX Securities Litigation
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551 U.S. 308, 127 S.Ct. 2499, 168 L.Ed.2d 179, 75 USLW 4462, Fed. Sec. L. Rep. P 94,335, 07 Cal. Daily Op. Serv. 7139, 2007 Daily Journal D.A.R. 9258, 20 Fla. L. Weekly Fed. S 374
(Cite as: 551 U.S. 308, 127 S.Ct. 2499)

Supreme Court of the United States
TELLABS, INC., et al., Petitioners,
v.
MAKOR ISSUES & RIGHTS, LTD., et al.

No. 06–484.
Argued March 28, 2007.
Decided June 21, 2007.

Background: Investors brought securities fraud class action against corporation and its chief executive officer (CEO). The United States District Court for the Northern District of Illinois, Amy J. St. Eve, J., dismissed action. Investors appealed. The United States Court of Appeals for the Seventh Circuit, 437 F.3d 588, reversed. Certiorari was granted.

Holdings: The Supreme Court, Justice Ginsburg, held that:
(1) in determining whether securities fraud complaint gives rise to "strong inference" of scienter, within meaning of Private Securities Litigation Reform Act (PSLRA), court must consider competing inferences, and
(2) plaintiff alleging fraud in § 10(b) action must plead facts rendering inference of scienter at least as likely as any plausible opposing inference.

Vacated and remanded.

Justices Scalia and Alito filed opinions concurring in the judgment.

Justice Stevens filed dissenting opinion.

West Headnotes

[1] Securities Regulation 349B ⇐60.45(1)

349B Securities Regulation
349BI Federal Regulation
349BI(C) Trading and Markets
349BI(C)7 Fraud and Manipulation
349Bk60.43 Grounds of and Defenses to Liability
349Bk60.45 Scienter, Intent, Knowledge, Negligence or Recklessness
349Bk60.45(1) k. In general. Most Cited Cases

To establish liability under § 10(b) and Rule 10b–5, private plaintiff must prove that defendant acted with scienter, a mental state embracing intent to deceive, manipulate, or defraud. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b–5.

[2] Federal Civil Procedure 170A ⇐1835

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1827 Determination
170Ak1835 k. Matters deemed admitted; acceptance as true of allegations in complaint. Most Cited Cases

On motion to dismiss § 10(b) action for failure to state claim on which relief can be granted, court must accept all factual allegations in complaint as true. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[3] Federal Civil Procedure 170A ⇐1832

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1827 Determination
170Ak1832 k. Matters considered in general. Most Cited Cases

On motion to dismiss § 10(b) action for failure to state claim on which relief can be granted, court

must consider complaint in its entirety, as well as other sources courts ordinarily examine when ruling on such motions, in particular, documents incorporated into complaint by reference, and matters of which court may take judicial notice; inquiry is whether all of the facts alleged, taken collectively, give rise to strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[4] Securities Regulation 349B ⟹60.51(2)

349B Securities Regulation
349BI Federal Regulation
349BI(C) Trading and Markets
349BI(C)7 Fraud and Manipulation
349Bk60.50 Pleading
349Bk60.51 In General
349Bk60.51(2) k. Scienter. Most Cited Cases
(Formerly 349Bk60.51)

In determining whether securities fraud complaint gives rise to "strong inference" of scienter, within meaning of Private Securities Litigation Reform Act (PSLRA), court must consider competing inferences; to determine whether plaintiff has alleged facts that give rise to requisite "strong inference" of scienter, court must consider plausible nonculpable explanations for defendant's conduct, as well as inferences favoring plaintiff. Private Securities Litigation Reform Act of 1995, § 101(b), 15 U.S.C.A. § 78u–4(b)(2).

[5] Securities Regulation 349B ⟹60.51(2)

349B Securities Regulation
349BI Federal Regulation
349BI(C) Trading and Markets
349BI(C)7 Fraud and Manipulation
349Bk60.50 Pleading
349Bk60.51 In General
349Bk60.51(2) k. Scienter. Most Cited Cases
(Formerly 349Bk60.51)

Inference of scienter in securities fraud complaint must be more than merely "reasonable" or "permissible" to satisfy Private Securities Litigation Reform Act (PSLRA); it must be cogent and compelling, thus strong in light of other explanations, and complaint will survive only if reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged. Private Securities Litigation Reform Act of 1995, § 101(b), 15 U.S.C.A. § 78u–4(b)(2).

[6] Securities Regulation 349B ⟹60.51(2)

349B Securities Regulation
349BI Federal Regulation
349BI(C) Trading and Markets
349BI(C)7 Fraud and Manipulation
349Bk60.50 Pleading
349Bk60.51 In General
349Bk60.51(2) k. Scienter. Most Cited Cases
(Formerly 349Bk60.51)

While motive can be relevant consideration, and personal financial gain may weigh heavily in favor of finding that securities fraud complaint gives rise to "strong inference" of scienter, within meaning of Private Securities Litigation Reform Act (PSLRA), absence of motive allegation is not fatal. Private Securities Litigation Reform Act of 1995, § 101(b), 15 U.S.C.A. § 78u–4(b)(2).

[7] Jury 230 ⟹34(1)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k34 Restriction or Invasion of Functions of Jury
230k34(1) k. In general. Most Cited Cases

In determining whether securities fraud complaint gives rise to "strong inference" of scienter,

within meaning of Private Securities Litigation Reform Act (PSLRA), court's comparative assessment of plausible inferences, while constantly assuming plaintiff's allegations to be true, does not impinge upon Seventh Amendment right to jury trial. U.S.C.A. Const.Amend. 7; Private Securities Litigation Reform Act of 1995, § 101(b), 15 U.S.C.A. § 78u–4(b)(2).

***2501 *308 Syllabus** FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

As a check against abusive litigation in private securities fraud actions, the Private Securities Litigation Reform Act of 1995 (PSLRA) includes exacting pleading requirements. The PSLRA requires plaintiffs to state with particularity both the facts constituting the alleged violation, and the facts evidencing scienter, *i.e.*, the defendant's intention "to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194, and n. 12, 96 S.Ct. 1375, 47 L.Ed.2d 668. As set out in § 21D(b)(2), plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u–4(b)(2). Congress left the key term "strong inference" undefined.

Petitioner Tellabs, Inc., manufactures specialized equipment for fiber optic networks. Respondents (Shareholders) purchased Tellabs stock between December 11, 2000, and June 19, 2001. They filed a class action, alleging that Tellabs and petitioner Notebaert, then Tellabs' chief executive officer and president, had engaged in securities fraud in violation of § 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b–5, and that Notebaert was a "controlling person" under the 1934 Act, and therefore derivatively liable for the company's fraudulent acts. Tellabs moved to dismiss the complaint on the ground that the Shareholders had failed to plead their case with the particularity the PSLRA requires. The District Court agreed, dismissing the complaint without prejudice. The Shareholders then amended their complaint, adding references to 27 confidential sources and making further, more specific, allegations concerning Notebaert's mental state. The District Court again dismissed, this time with prejudice. The Shareholders had sufficiently pleaded that Notebaert's statements were misleading, the court determined, but they had insufficiently alleged that he acted with scienter. The Seventh Circuit reversed in relevant part. Like the District Court, it found that the Shareholders had pleaded the misleading character of Notebaert's statements with sufficient particularity. Unlike the District Court, however, it concluded that the Shareholders had sufficiently alleged that Notebaert *309 acted with the requisite state of mind. In evaluating whether the PSLRA's pleading standard is met, the Circuit said, courts should examine all of the complaint's allegations to decide whether collectively they establish an inference of scienter; the complaint would **2502 survive, the court stated, if a reasonable person could infer from the complaint's allegations that the defendant acted with the requisite state of mind.

Held: To qualify as "strong" within the intendment of § 21D(b)(2), an inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent. Pp. 2506 – 2513.

(a) Setting a uniform pleading standard for § 10(b) actions was among Congress' objectives in enacting the PSLRA. Designed to curb perceived abuses of the § 10(b) private action, the PSLRA installed both substantive and procedural controls. As relevant here, § 21D(b) of the PSLRA "impose[d] heightened pleading requirements in [§ 10(b) and Rule 10b–5] actions." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81, 126

S.Ct. 1503. In the instant case, the District Court and the Seventh Circuit agreed that the complaint sufficiently specified Notebaert's alleged misleading statements and the reasons why the statements were misleading. But those courts disagreed on whether the Shareholders, as required by § 21D(b)(2), "state[d] with particularity facts giving rise to a strong inference that [Notebaert] acted with [scienter]," § 78u–4(b)(2). Congress did not shed much light on what facts would create a strong inference or how courts could determine the existence of the requisite inference. With no clear guide from Congress other than its "inten[tion] to strengthen existing pleading requirements," H.R. Conf. Rep. No. 104–369, p. 41, Courts of Appeals have diverged in construing the term "strong inference." Among the uncertainties, should courts consider competing inferences in determining whether an inference of scienter is "strong"? This Court's task is to prescribe a workable construction of the "strong inference" standard, a reading geared to the PSLRA's twin goals: to curb frivolous, lawyer-driven litigation, while preserving investors' ability to recover on meritorious claims. Pp. 2506 – 2509.

(b) The Court establishes the following prescriptions: *First,* faced with a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss a § 10(b) action, courts must, as with any motion to dismiss for failure to plead a claim on which relief can be granted, accept all factual allegations in the complaint as true. See *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L.Ed.2d 517. *Second,* ***310** courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions. The inquiry is whether *all* of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard. *Third,* in determining whether the pleaded facts give rise to a "strong" inference of scienter, the court must take into account plausible opposing inferences. The Seventh Circuit expressly declined to engage in such a comparative inquiry. But in § 21D(b)(2), Congress did not merely require plaintiffs to allege facts from which an inference of scienter rationally *could* be drawn. Instead, Congress required plaintiffs to plead with particularity facts that give rise to a "strong"— *i.e.,* a powerful or cogent—inference. To determine whether the plaintiff has alleged facts giving rise to the requisite "strong inference," a court must consider plausible, nonculpable explanations for the defendant's conduct, as well as inferences favoring the plaintiff. The inference that the defendant acted with scienter need not be irrefutable, but it must be more than merely "reasonable" or "permissible"—it must be cogent and compelling, thus strong in light of other explanations. A ****2503** complaint will survive only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any plausible opposing inference one could draw from the facts alleged. Pp. 2509 – 2510.

(c) Tellabs contends that when competing inferences are considered, Notebaert's evident lack of pecuniary motive will be dispositive. The Court agrees that motive can be a relevant consideration, and personal financial gain may weigh heavily in favor of a scienter inference. The absence of a motive allegation, however, is not fatal for allegations must be considered collectively; the significance that can be ascribed to an allegation of motive, or lack thereof, depends on the complaint's entirety. Tellabs also maintains that several of the Shareholders' allegations are too vague or ambiguous to contribute to a strong inference of scienter. While omissions and ambiguities count against inferring scienter, the court's job is not to scrutinize each allegation in isolation but to assess all the allegations holistically. Pp. 2511 – 2512.

(d) The Seventh Circuit was unduly concerned that a court's comparative assessment of plausible inferences would impinge upon the Seventh Amendment right to jury trial. Congress, as creator of federal statutory claims, has power to prescribe what must be pleaded to state the claim, just as it

has power to determine what must be proved to prevail on the merits. It is the federal lawmaker's prerogative, therefore, to allow, disallow, or shape the contours of—including the pleading and *311 proof requirements for— § 10(b) private actions. This Court has never questioned that authority in general, or suggested, in particular, that the Seventh Amendment inhibits Congress from establishing whatever pleading requirements it finds appropriate for federal statutory claims. Provided that the Shareholders have satisfied the congressionally "prescribe[d] ... means of making an issue," *Fidelity & Deposit Co. of Md. v. United States,* 187 U.S. 315, 320, 23 S.Ct. 120, 47 L.Ed. 194, the case will fall within the jury's authority to assess the credibility of witnesses, resolve genuine issues of fact, and make the ultimate determination whether Notebaert and, by imputation, Tellabs acted with scienter. Under this Court's construction of the "strong inference" standard, a plaintiff is not forced to plead more than she would be required to prove at trial. A plaintiff alleging fraud under § 10(b) must plead facts rendering an inference of scienter *at least as likely as* any plausible opposing inference. At trial, she must then prove her case by a "preponderance of the evidence." Pp. 2511 – 2513.

(e) Neither the District Court nor the Court of Appeals had the opportunity to consider whether the Shareholders' allegations warrant "a strong inference that [Notebaert and Tellabs] acted with the required state of mind," 15 U.S.C. § 78u–4(b)(2), in light of the prescriptions announced today. Thus, the case is remanded for a determination under this Court's construction of § 21D(b)(2). P. 2513.

437 F.3d 588, vacated and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, SOUTER, THOMAS, and BREYER, JJ., joined. SCALIA, J., *post,* p. 2513, and ALITO, J., p. 2515, filed opinions concurring in the judgment. STEVENS, J., filed a dissenting opinion, *post,* p. 2516.

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For U.S. Supreme Court Briefs, see:2007 WL 432763 (Pet.Brief)2007 WL 760412 (Resp.Brief)2007 WL 835317 (Reply.Brief)

Justice GINSBURG delivered the opinion of the Court.

*313 This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC). See, *e.g., Dura Pharmaceuticals, Inc. v. Broudo,* 544 U.S. 336, 345, 125 S.Ct. 1627, 161

L.Ed.2d 577 (2005); *J.I. Case Co. v. Borak*, 377 U.S. 426, 432, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964). Private securities fraud actions, however, if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law. See *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81, 126 S.Ct. 1503, 164 L.Ed.2d 179 (2006). As a check against abusive litigation by private parties, Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA), 109 Stat. 737.

Exacting pleading requirements are among the control measures Congress included in the PSLRA. The PSLRA requires plaintiffs to state with particularity both the facts constituting the alleged violation, and the facts evidencing scienter, *i.e.*, the defendant's intention "to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194, and n. 12, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976); see 15 U.S.C. § 78u–4(b)(1), (2). *314 This case concerns the latter requirement. As set out in § 21D(b)(2) of the PSLRA, plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u–4(b)(2).

Congress left the key term "strong inference" undefined, and Courts of Appeals have divided on its meaning. In the case before us, the Court of Appeals for the Seventh Circuit held that the "strong inference" standard would be met if the complaint "allege[d] facts from which, if true, a reasonable person could infer that the defendant acted with the required intent." 437 F.3d 588, 602 (2006). That formulation, we conclude, does not capture the stricter demand Congress sought to convey in § 21D(b)(2). It does not suffice that a reasonable factfinder plausibly could infer from the complaint's allegations the requisite state of mind. Rather, to determine whether a complaint's scienter allegations can survive threshold inspection for sufficiency, a court governed by § 21D(b)(2) must engage in a comparative evaluation; it must consider, not only inferences urged by the plaintiff, as the Seventh Circuit did, but also competing inferences rationally drawn from the facts alleged. An inference of fraudulent intent may be plausible, yet less cogent than other, nonculpable explanations for the defendant's conduct. To qualify as "strong" within the intendment of § 21D(b)(2), we hold, an inference of scienter must be **2505 more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent.

I

Petitioner Tellabs, Inc., manufactures specialized equipment used in fiber optic networks. During the time period relevant to this case, petitioner Richard Notebaert was Tellabs' chief executive officer and president. Respondents (Shareholders) are persons who purchased Tellabs stock between December 11, 2000, and June 19, 2001. They accuse *315 Tellabs and Notebaert (as well as several other Tellabs executives) of engaging in a scheme to deceive the investing public about the true value of Tellabs' stock. See 437 F.3d, at 591; App. 94–98. FN1

FN1. The Shareholders brought suit against Tellabs executives other than Notebaert, including Richard Birck, Tellabs' chairman and former chief executive officer. Because the claims against the other executives, many of which have been dismissed, are not before us, we focus on the allegations as they relate to Notebaert. We refer to the defendant-petitioners collectively as "Tellabs."

Beginning on December 11, 2000, the Shareholders allege, Notebaert (and by imputation Tellabs) "falsely reassured public investors, in a series of statements ... that Tellabs was continuing to enjoy strong demand for its products and earning record revenues," when, in fact, Notebaert knew the opposite was true. *Id.*, at 94–95, 98. From December 2000 until the spring of 2001, the Shareholders claim, Notebaert knowingly misled the public in

four ways. 437 F.3d, at 596. First, he made statements indicating that demand for Tellabs' flagship networking device, the TITAN 5500, was continuing to grow, when, in fact, demand for that product was waning. *Id.*, at 596, 597. Second, Notebaert made statements indicating that the TITAN 6500, Tellabs' next-generation networking device, was available for delivery, and that demand for that product was strong and growing, when in truth the product was not ready for delivery and demand was weak. *Id.*, at 596, 597–598. Third, he falsely represented Tellabs' financial results for the fourth quarter of 2000 (and, in connection with those results, condoned the practice of "channel stuffing," under which Tellabs flooded its customers with unwanted products). *Id.*, at 596, 598. Fourth, Notebaert made a series of overstated revenue projections, when demand for the TITAN 5500 was drying up and production of the TITAN 6500 was behind schedule. *Id.*, at 596, 598–599. Based on Notebaert's sunny assessments, the *316 Shareholders contend, market analysts recommended that investors buy Tellabs' stock. See *id.*, at 592.

The first public glimmer that business was not so healthy came in March 2001 when Tellabs modestly reduced its first quarter sales projections. *Ibid.* In the next months, Tellabs made progressively more cautious statements about its projected sales. On June 19, 2001, the last day of the class period, Tellabs disclosed that demand for the TITAN 5500 had significantly dropped. *Id.*, at 593. Simultaneously, the company substantially lowered its revenue projections for the second quarter of 2001. The next day, the price of Tellabs stock, which had reached a high of $67 during the period, plunged to a low of $15.87. *Ibid.*

On December 3, 2002, the Shareholders filed a class action in the District Court for the Northern District of Illinois. *Ibid.* Their complaint stated, *inter alia,* that Tellabs and Notebaert had engaged in securities fraud in violation of § 10(b) of the Securities Exchange Act of 1934, 48 Stat. **2506 891, 15 U.S.C. § 78j(b), and SEC Rule 10b–5, 17 CFR § 240.10b–5 (2006), also that Notebaert was a "controlling person" under § 20(a) of the 1934 Act, 15 U.S.C. § 78t(a), and therefore derivatively liable for the company's fraudulent acts. See App. 98–101, 167–171. Tellabs moved to dismiss the complaint on the ground that the Shareholders had failed to plead their case with the particularity the PSLRA requires. The District Court agreed, and therefore dismissed the complaint without prejudice. App. to Pet. for Cert. 80a–117a; see *Johnson v. Tellabs, Inc.*, 303 F.Supp.2d 941, 945 (N.D.Ill.2004).

The Shareholders then amended their complaint, adding references to 27 confidential sources and making further, more specific, allegations concerning Notebaert's mental state. See 437 F.3d, at 594; App. 91–93, 152–160. The District Court again dismissed, this time with prejudice. 303 F.Supp.2d, at 971. The Shareholders had sufficiently pleaded that Notebaert's statements were misleading, the *317 court determined, *id.*, at 955–961, but they had insufficiently alleged that he acted with scienter, *id.*, at 954–955, 961–969.

The Court of Appeals for the Seventh Circuit reversed in relevant part. 437 F.3d, at 591. Like the District Court, the Court of Appeals found that the Shareholders had pleaded the misleading character of Notebaert's statements with sufficient particularity. *Id.*, at 595–600. Unlike the District Court, however, the Seventh Circuit concluded that the Shareholders had sufficiently alleged that Notebaert acted with the requisite state of mind. *Id.*, at 603–605.

The Court of Appeals recognized that the PSLRA "unequivocally raise[d] the bar for pleading scienter" by requiring plaintiffs to "plea[d] sufficient facts to create a strong inference of scienter." *Id.*, at 601 (internal quotation marks omitted). In evaluating whether that pleading standard is met, the Seventh Circuit said, "courts [should] examine all of the allegations in the complaint and then ... decide whether collectively they establish such an inference." *Ibid.* "[W]e will allow the complaint to

survive," the court next and critically stated, "if it alleges facts from which, if true, a reasonable person could infer that the defendant acted with the required intent .... If a reasonable person could not draw such an inference from the alleged facts, the defendants are entitled to dismissal." *Id.*, at 602.

In adopting its standard for the survival of a complaint, the Seventh Circuit explicitly rejected a stiffer standard adopted by the Sixth Circuit, *i.e.*, that "plaintiffs are entitled only to the most plausible of competing inferences." *Id.*, at 601, 602 (quoting *Fidel v. Farley*, 392 F.3d 220, 227 (2004)). The Sixth Circuit's standard, the court observed, because it involved an assessment of competing inferences, "could potentially infringe upon plaintiffs' Seventh Amendment rights." 437 F.3d, at 602. We granted certiorari to resolve the disagreement among the Circuits on whether, and to what extent, a court must consider competing inferences in determining whether a securities fraud complaint *318 gives rise to a "strong inference" of scienter.[FN2] 549 U.S. 1105, 127 S.Ct. 853, 166 L.Ed.2d 681 (2007).

FN2. See, *e.g.*, 437 F.3d 588, 602 (C.A.7 2006) (decision below); *Brown v. Credit Suisse First Boston Corp.*, 431 F.3d 36, 49, 51 (C.A.1 2005); *Ottmann v. Hanger Orthopedic Group, Inc.*, 353 F.3d 338, 347–349 (C.A.4 2003); *Pirraglia v. Novell, Inc.*, 339 F.3d 1182, 1187–1188 (C.A.10 2003); *Gompper v. VISX, Inc.*, 298 F.3d 893, 896–897 (C.A.9 2002); *Helwig v. Vencor, Inc.*, 251 F.3d 540, 553 (C.A.6 2001) (en banc).

**2507 II

[1] Section 10(b) of the Securities Exchange Act of 1934 forbids the "use or employ, in connection with the purchase or sale of any security ..., [of] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78j(b). SEC Rule 10b–5 implements § 10(b) by declaring it unlawful:

"(a) To employ any device, scheme, or artifice to defraud,

"(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made ... not misleading, or

"(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 CFR § 240.10b–5.

Section 10(b), this Court has implied from the statute's text and purpose, affords a right of action to purchasers or sellers of securities injured by its violation. See, *e.g.*, *Dura Pharmaceuticals*, 544 U.S., at 341, 125 S.Ct. 1627. See also *id.*, at 345, 125 S.Ct. 1627 ("The securities statutes seek to maintain public confidence in the marketplace ... by deterring fraud, in part, through the availability of private securities fraud actions."); *Borak*, 377 U.S., at 432, 84 S.Ct. 1555 (private securities fraud actions provide "a most effective weapon in the enforcement" of securities laws and *319 are "a necessary supplement to Commission action"). To establish liability under § 10(b) and Rule 10b–5, a private plaintiff must prove that the defendant acted with scienter, "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst*, 425 U.S., at 193–194, and n. 12, 96 S.Ct. 1375.[FN3]

FN3. We have previously reserved the question whether reckless behavior is sufficient for civil liability under § 10(b) and Rule 10b–5. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194, n. 12, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976). Every Court of Appeals that has considered the issue has held that a plaintiff may meet the scienter requirement by showing that the defendant acted intentionally or recklessly, though the Circuits differ on the degree of

recklessness required. See *Ottmann,* 353 F.3d, at 343 (collecting cases). The question whether and when recklessness satisfies the scienter requirement is not presented in this case.

In an ordinary civil action, the Federal Rules of Civil Procedure require only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2). Although the rule encourages brevity, the complaint must say enough to give the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Dura Pharmaceuticals,* 544 U.S., at 346, 125 S.Ct. 1627 (internal quotation marks omitted). Prior to the enactment of the PSLRA, the sufficiency of a complaint for securities fraud was governed not by Rule 8, but by the heightened pleading standard set forth in Rule 9(b). See *Greenstone v. Cambex Corp.,* 975 F.2d 22, 25 (C.A.1 1992) (Breyer, J.) (collecting cases). Rule 9(b) applies to "all averments of fraud or mistake"; it requires that "the circumstances constituting fraud ... be stated with particularity" but provides that "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally."

Courts of Appeals diverged on the character of the Rule 9(b) inquiry in § 10(b) cases: Could securities fraud plaintiffs allege the requisite mental state "simply by saying that scienter existed," *In re GlenFed, Inc. Securities Litigation,* 42 F.3d **2508 1541, 1546–1547 (C.A.9 1994) (en banc), or were they required to allege with particularity facts giving rise to an *320 inference of scienter? Compare *id.,* at 1546 ("We are not permitted to add new requirements to Rule 9(b) simply because we like the effects of doing so."), with, *e.g., Greenstone,* 975 F.2d, at 25 (were the law to permit a securities fraud complaint simply to allege scienter without supporting facts, "a complaint could evade too easily the 'particularity' requirement in Rule 9(b)'s first sentence"). Circuits requiring plaintiffs to allege specific facts indicating scienter expressed that requirement variously. See 5A C. Wright & A. Miller, Federal Practice and Procedure § 1301.1, pp. 300–302 (3d ed.2004) (hereinafter Wright & Miller). The Second Circuit's formulation was the most stringent. Securities fraud plaintiffs in that Circuit were required to "specifically plead those [facts] which they assert give rise to a *strong inference* that the defendants had" the requisite state of mind. *Ross v. A.H. Robins Co.,* 607 F.2d 545, 558 (1979) (emphasis added). The "strong inference" formulation was appropriate, the Second Circuit said, to ward off allegations of "fraud by hindsight." See, *e.g., Shields v. Citytrust Bancorp, Inc.,* 25 F.3d 1124, 1129 (1994) (quoting *Denny v. Barber,* 576 F.2d 465, 470 (C.A.2 1978) (Friendly, J.)).

Setting a uniform pleading standard for § 10(b) actions was among Congress' objectives when it enacted the PSLRA. Designed to curb perceived abuses of the § 10(b) private action—"nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests and manipulation by class action lawyers," *Dabit,* 547 U.S., at 81, 126 S.Ct. 1503 (quoting H.R. Conf. Rep. No. 104–369, p. 31 (1995), U.S.Code Cong. & Admin.News 1995, p. 730 (hereinafter H.R. Conf. Rep.))—the PSLRA installed both substantive and procedural controls.[FN4] Notably, Congress prescribed new procedures *321 for the appointment of lead plaintiffs and lead counsel. This innovation aimed to increase the likelihood that institutional investors—parties more likely to balance the interests of the class with the long-term interests of the company—would serve as lead plaintiffs. See *id.,* at 33–34; S.Rep. No. 104–98, p. 11 (1995), U.S.Code Cong. & Admin.News 1995, pp. 679, 690. Congress also "limit[ed] recoverable damages and attorney's fees, provide[d] a 'safe harbor' for forward-looking statements, ... mandate[d] imposition of sanctions for frivolous litigation, and authorize[d] a stay of discovery pending resolution of any motion to dismiss." *Dabit,* 547 U.S., at 81, 126 S.Ct. 1503. And in § 21D(b) of the PSLRA, Congress "impose[d] heightened pleading requirements in actions brought pursuant to § 10(b) and Rule 10b–5." *Ibid.*

> FN4. Nothing in the PSLRA, we have previously noted, casts doubt on the conclusion "that private securities litigation [i]s an indispensable tool with which defrauded investors can recover their losses"—a matter crucial to the integrity of domestic capital markets. See *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81, 126 S.Ct. 1503, 164 L.Ed.2d 179 (2006) (internal quotation marks omitted).

Under the PSLRA's heightened pleading instructions, any private securities complaint alleging that the defendant made a false or misleading statement must: (1) "specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading," 15 U.S.C. § 78u–4(b)(1); and (2) "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind," § 78u–4(b)(2). In the instant case, as earlier stated, see *supra,* at 2506, the District Court and the Seventh Circuit agreed that the Shareholders met the first of the two requirements: The complaint sufficiently ****2509** specified Notebaert's alleged misleading statements and the reasons why the statements were misleading. 303 F.Supp.2d, at 955–961, 437 F.3d, at 596–600. But those courts disagreed on whether the Shareholders, as required by § 21D(b)(2), "state[d] with particularity facts giving rise to a strong inference that [Notebaert] acted with [scienter]," § 78u–4(b)(2). See *supra,* at 2506.

The "strong inference" standard "unequivocally raise[d] the bar for pleading scienter," 437 F.3d, at 601, and signaled Congress' purpose to promote greater uniformity among the Circuits, see H.R. Conf. Rep., p. 41. But "Congress did not ... throw much light on what facts ... suffice to create ***322** [a strong] inference," or on what "degree of imagination courts can use in divining whether" the requisite inference exists. 437 F.3d, at 601. While adopting the Second Circuit's "strong inference" standard, Congress did not codify that Circuit's case law interpreting the standard. See § 78u–4(b)(2). See also Brief for United States as *Amicus Curiae* 18. With no clear guide from Congress other than its "inten[tion] to strengthen existing pleading requirements," H.R. Conf. Rep., p. 41, Courts of Appeals have diverged again, this time in construing the term "strong inference." Among the uncertainties, should courts consider competing inferences in determining whether an inference of scienter is "strong"? See 437 F.3d, at 601–602 (collecting cases). Our task is to prescribe a workable construction of the "strong inference" standard, a reading geared to the PSLRA's twin goals: to curb frivolous, lawyer-driven litigation, while preserving investors' ability to recover on meritorious claims.

III

A

[2] We establish the following prescriptions: *First,* faced with a Rule 12(b)(6) motion to dismiss a § 10(b) action, courts must, as with any motion to dismiss for failure to plead a claim on which relief can be granted, accept all factual allegations in the complaint as true. See *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). On this point, the parties agree. See Reply Brief 8; Brief for Respondents 26; Brief for United States as *Amicus Curiae* 8, 20, 21.

[3] *Second,* courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice. See 5B Wright & Miller § 1357 (3d ed.2004 and Supp.2007). The inquiry, as several Courts of Appeals have recognized, is ***323** whether *all* of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard. See, *e.g., Abrams v. Baker Hughes Inc.,* 292 F.3d 424, 431 (C.A.5 2002); *Gompper v.*

VISX, Inc., 298 F.3d 893, 897 (C.A.9 2002). See also Brief for United States as *Amicus Curiae* 25.

[4] *Third*, in determining whether the pleaded facts give rise to a "strong" inference of scienter, the court must take into account plausible opposing inferences. The Seventh Circuit expressly declined to engage in such a comparative inquiry. A complaint could survive, that court said, as long as it "alleges facts from which, if true, a reasonable person could infer that the defendant acted with the required intent"; in other words, only "[i]f a reasonable person could not draw such an inference from ****2510** the alleged facts" would the defendant prevail on a motion to dismiss. 437 F.3d, at 602. But in § 21D(b)(2), Congress did not merely require plaintiffs to "provide a factual basis for [their] scienter allegations," *ibid.* (quoting *In re Cerner Corp. Securities Litigation*, 425 F.3d 1079, 1084, 1085 (C.A.8 2005)), *i.e.*, to allege facts from which an inference of scienter rationally *could* be drawn. Instead, Congress required plaintiffs to plead with particularity facts that give rise to a "strong"—*i.e.*, a powerful or cogent—inference. See American Heritage Dictionary 1717 (4th ed.2000) (defining "strong" as "[p]ersuasive, effective, and cogent"); 16 Oxford English Dictionary 949 (2d ed.1989) (defining "strong" as "[p]owerful to demonstrate or convince" (definition 16b)); cf. 7 *id.*, at 924 (defining "inference" as "a conclusion [drawn] from known or assumed facts or statements"; "reasoning from something known or assumed to something else which follows from it").

[5] The strength of an inference cannot be decided in a vacuum. The inquiry is inherently comparative: How likely is it that one conclusion, as compared to others, follows from the underlying facts? To determine whether the plaintiff *324 has alleged facts that give rise to the requisite "strong inference" of scienter, a court must consider plausible, nonculpable explanations for the defendant's conduct, as well as inferences favoring the plaintiff. The inference that the defendant acted with scienter need not be irrefutable, *i.e.*, of the "smoking-gun" genre, or even the "most plausible of competing inferences," *Fidel*, 392 F.3d, at 227 (quoting *Helwig v. Vencor, Inc.*, 251 F.3d 540, 553 (C.A.6 2001) (en banc)). Recall in this regard that § 21D(b)'s pleading requirements are but one constraint among many the PSLRA installed to screen out frivolous suits, while allowing meritorious actions to move forward. See *supra*, at 2508, and n. 4. Yet the inference of scienter must be more than merely "reasonable" or "permissible"—it must be cogent and compelling, thus strong in light of other explanations. A complaint will survive, we hold, only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged.[FN5]

FN5. Justice SCALIA objects to this standard on the ground that "[i]f a jade falcon were stolen from a room to which only A and B had access," it could not "*possibly* be said there was a 'strong inference' that B was the thief." *Post*, at 2513 (opinion concurring in judgment) (emphasis in original). We suspect, however, that law enforcement officials as well as the owner of the precious falcon would find the inference of guilt as to B quite strong—certainly strong enough to warrant further investigation. Indeed, an inference at least as likely as competing inferences can, in some cases, warrant recovery. See *Summers v. Tice*, 33 Cal.2d 80, 84–87, 199 P.2d 1, 3–5 (1948) (plaintiff wounded by gunshot could recover from two defendants, even though the most he could prove was that each defendant was at least as likely to have injured him as the other); Restatement (Third) of Torts § 28(b), Comment *e*, p. 504 (Proposed Final Draft No. 1, Apr. 6, 2005) ("Since the publication of the Second Restatement in 1965, courts have generally accepted the alternative-liability principle of [*Summers v. Tice*, adopted in] § 433B(3), while fleshing out

its limits."). In any event, we disagree with Justice SCALIA that the hardly stock term "strong inference" has only one invariably right ("natural" or "normal") reading—his. See *post,* at 2514 – 2515.

Justice ALITO agrees with Justice SCALIA, and would transpose to the pleading stage "the test that is used at the summary-judgment and judgment-as-a-matter-of-law stages." *Post,* at 2516 (opinion concurring in judgment). But the test at each stage is measured against a different backdrop. It is improbable that Congress, without so stating, intended courts to test pleadings, unaided by discovery, to determine whether there is "no genuine issue as to any material fact." See Fed. Rule Civ. Proc. 56(c). And judgment as a matter of law is a post-trial device, turning on the question whether a party has produced evidence "legally sufficient" to warrant a jury determination in that party's favor. See Rule 50(a)(1).

**2511 *325 B

[6] Tellabs contends that when competing inferences are considered, Notebaert's evident lack of pecuniary motive will be dispositive. The Shareholders, Tellabs stresses, did not allege that Notebaert sold any shares during the class period. See Brief for Petitioners 50 ("The absence of any allegations of motive color all the other allegations putatively giving rise to an inference of scienter."). While it is true that motive can be a relevant consideration, and personal financial gain may weigh heavily in favor of a scienter inference, we agree with the Seventh Circuit that the absence of a motive allegation is not fatal. See 437 F.3d, at 601. As earlier stated, *supra,* at 2509 – 2510, allegations must be considered collectively; the significance that can be ascribed to an allegation of motive, or lack thereof, depends on the entirety of the complaint.

Tellabs also maintains that several of the Shareholders' allegations are too vague or ambiguous to contribute to a strong inference of scienter. For example, the Shareholders alleged that Tellabs flooded its customers with unwanted products, a practice known as "channel stuffing." See *supra,* at 2505. But they failed, Tellabs argues, to specify whether the channel stuffing allegedly known to Notebaert was the illegitimate kind (*e.g.,* writing orders for products customers had not requested) or the legitimate kind (*e.g.,* offering customers discounts as an incentive to buy). Brief for Petitioners 44–46; Reply Brief 8. See also *id.,* at 8–9 (complaint lacks precise dates of reports critical to distinguish legitimate conduct from culpable conduct). But see 437 F.3d, at 598, 603–604 (pointing to multiple particulars *326 alleged by the Shareholders, including specifications as to timing). We agree that omissions and ambiguities count against inferring scienter, for plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." § 78u–4(b)(2). We reiterate, however, that the court's job is not to scrutinize each allegation in isolation but to assess all the allegations holistically. See *supra,* at 2509 – 2510; 437 F.3d, at 601. In sum, the reviewing court must ask: When the allegations are accepted as true and taken collectively, would a reasonable person deem the inference of scienter at least as strong as any opposing inference? FN6

FN6. The Seventh Circuit held that allegations of scienter made against one defendant cannot be imputed to all other individual defendants. 437 F.3d, at 602–603. See also *id.,* at 603 (to proceed beyond the pleading stage, the plaintiff must allege as to each defendant facts sufficient to demonstrate a culpable state of mind regarding his or her violations (citing *Phillips v. Scientific-Atlanta, Inc.,* 374 F.3d 1015, 1018 (C.A.11 2004))). Though there is disagreement among the Circuits as to whether the group pleading doctrine sur-

vived the PSLRA, see, *e.g.*,*Southland Securities Corp. v. INSpire Ins. Solutions Inc.*, 365 F.3d 353, 364 (C.A.5 2004), the Shareholders do not contest the Seventh Circuit's determination, and we do not disturb it.

IV

[7] Accounting for its construction of § 21D(b)(2), the Seventh Circuit explained that the court "th[ought] it wis[e] to adopt an approach that [could not] be misunderstood as a usurpation of the jury's role." 437 F.3d, at 602. In our view, the Seventh Circuit's concern was undue.[FN7] A court's **2512 comparative assessment of plausible inferences, while constantly assuming*327 the plaintiff's allegations to be true, we think it plain, does not impinge upon the Seventh Amendment right to jury trial.[FN8]

FN7. The Seventh Circuit raised the possibility of a Seventh Amendment problem on its own initiative. The Shareholders did not contend below that dismissal of their complaint under § 21D(b)(2) would violate their right to trial by jury. Cf. *Monroe Employees Retirement System v. Bridgestone Corp.*, 399 F.3d 651, 683, n. 25 (C.A.6 2005) (noting possible Seventh Amendment argument but declining to address it when not raised by plaintiffs).

FN8. In numerous contexts, gatekeeping judicial determinations prevent submission of claims to a jury's judgment without violating the Seventh Amendment. See, *e.g.*, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (expert testimony can be excluded based on judicial determination of reliability); *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 321, 87 S.Ct. 1072, 18 L.Ed.2d 75 (1967) (judgment as a matter of law); *Pease v. Rathbun–Jones Engineering Co.*, 243 U.S. 273, 278, 37 S.Ct. 283, 61 L.Ed. 715 (1917) (summary judgment).

Congress, as creator of federal statutory claims, has power to prescribe what must be pleaded to state the claim, just as it has power to determine what must be proved to prevail on the merits. It is the federal lawmaker's prerogative, therefore, to allow, disallow, or shape the contours of—including the pleading and proof requirements for— § 10(b) private actions. No decision of this Court questions that authority in general, or suggests, in particular, that the Seventh Amendment inhibits Congress from establishing whatever pleading requirements it finds appropriate for federal statutory claims. Cf. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512–513, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); *Leatherman*, 507 U.S., at 168, 113 S.Ct. 1160 (both recognizing that heightened pleading requirements can be established by Federal Rule, citing Fed. Rule Civ. Proc. 9(b), which requires that fraud or mistake be pleaded with particularity).[FN9]

FN9. Any heightened pleading rule, including Fed. Rule Civ. Proc. 9(b), could have the effect of preventing a plaintiff from getting discovery on a claim that might have gone to a jury, had discovery occurred and yielded substantial evidence. In recognizing Congress' or the Federal Rule makers' authority to adopt special pleading rules, we have detected no Seventh Amendment impediment.

Our decision in *Fidelity & Deposit Co. of Md. v. United States*, 187 U.S. 315, 23 S.Ct. 120, 47 L.Ed. 194 (1902), is instructive. That case concerned a rule adopted by the Supreme Court of the District of Columbia in 1879 pursuant to rulemaking power delegated by Congress. The rule required defendants, in certain contract*328 actions, to file an affidavit "specifically stating ..., in precise and distinct terms, the grounds of his defen[s]e." *Id.*, at 318, 23 S.Ct. 120 (internal quotation marks omitted). The defendant's affidavit was found insufficient, and judgment was entered for the plaintiff, whose declaration and supporting affidavit had

been found satisfactory. *Ibid.* This Court upheld the District's rule against the contention that it violated the Seventh Amendment. *Id.*, at 320, 23 S.Ct. 120. Just as the purpose of § 21D(b) is to screen out frivolous complaints, the purpose of the prescription at issue in *Fidelity & Deposit Co.* was to "preserve the court from frivolous defen[s]es," *ibid.* Explaining why the Seventh Amendment was not implicated, this Court said that the heightened pleading rule simply "prescribes the means of making an issue," and that, when "[t]he issue [was] made as prescribed, the right of trial by jury accrues." *Ibid.*; accord *Ex parte Peterson*, 253 U.S. 300, 310, 40 S.Ct. 543, 64 L.Ed. 919 (1920) (Brandeis, J.) (citing *Fidelity & Deposit Co.*, and reiterating: "It does not infringe the constitutional right to a trial by jury [in a civil case], to require, with a view to formulating the issues, an oath by each party to the facts relied upon."). See also *Walker v. New Mexico & Southern Pacific R. Co.*, 165 **2513 U.S. 593, 596, 17 S.Ct. 421, 41 L.Ed. 837 (1897) (Seventh Amendment "does not attempt to regulate matters of pleading").

In the instant case, provided that the Shareholders have satisfied the congressionally "prescribe[d] ... means of making an issue," *Fidelity & Deposit Co.*, 187 U.S., at 320, 23 S.Ct. 120, the case will fall within the jury's authority to assess the credibility of witnesses, resolve any genuine issues of fact, and make the ultimate determination whether Notebaert and, by imputation, Tellabs acted with scienter. We emphasize, as well, that under our construction of the "strong inference" standard, a plaintiff is not forced to plead more than she would be required to prove at trial. A plaintiff alleging fraud in a § 10(b) action, we hold today, must plead facts rendering an inference of scienter *at least as likely as* any plausible opposing inference. At trial, she must then prove her *329 case by a "preponderance of the evidence." Stated otherwise, she must demonstrate that it is *more likely* than not that the defendant acted with scienter. See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983).

* * *

While we reject the Seventh Circuit's approach to § 21D(b)(2), we do not decide whether, under the standard we have described, see *supra*, at 2509 – 2511, the Shareholders' allegations warrant "a strong inference that [Notebaert and Tellabs] acted with the required state of mind," 15 U.S.C. § 78u–4(b)(2). Neither the District Court nor the Court of Appeals had the opportunity to consider the matter in light of the prescriptions we announce today. We therefore vacate the Seventh Circuit's judgment so that the case may be reexamined in accord with our construction of § 21D(b)(2).

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, concurring in the judgment.

I fail to see how an inference that is merely "at least as compelling as any opposing inference," *ante*, at 2505, can conceivably be called what the statute here at issue requires: a "strong inference," 15 U.S.C. § 78u–4(b)(2). If a jade falcon were stolen from a room to which only A and B had access, could it *possibly* be said there was a "strong inference" that B was the thief? I think not, and I therefore think that the Court's test must fail. In my view, the test should be whether the inference of scienter (if any) is *more plausible* than the inference of innocence.FN*

FN* The Court suggests that "the owner of the precious falcon would find the inference of guilt as to B quite strong." *Ante*, at 2510, n. 5. If he should draw such an inference, it would only prove the wisdom of the ancient maxim "*aliquis non debet esse Judex in propria causa*"—no man ought to be a judge of his own cause. *Dr. Bonham's Case*, 8 Co.Rep. 107a, 114a, 118a, 77 Eng. Rep. 638, 646, 652 (C.P. 1610). For it is quite clear (from the dispassionate perspective of one who does not own a jade

> falcon) that a *possibility*, even a strong possibility, that B is responsible is not a strong *inference* that B is responsible. "Inference" connotes "belief" in what is inferred, and it would be impossible to form a strong belief that it was B and not A, or A and not B.

***330** The Court's explicit rejection of this reading, *ante*, at 2510, rests on two assertions. The first (doubtless true) is that the statute does not require that "[t]he inference that the defendant acted with scienter ... be irrefutable, *i.e.*, of the 'smoking-gun' genre," *ibid.* It is up to Congress, ****2514** however, and not to us, to determine what pleading standard would avoid those extremities while yet effectively deterring baseless actions. Congress has expressed its determination in the phrase "strong inference"; it is our job to give that phrase its normal meaning. And if we are to abandon text in favor of unexpressed purpose, as the Court does, it is inconceivable that Congress's enactment of stringent pleading requirements in the Private Securities Litigation Reform Act of 1995 somehow manifests the purpose of giving plaintiffs the edge in close cases.

The Court's second assertion (also true) is that "an inference at least as likely as competing inferences can, in some cases, warrant recovery." *Ante*, at 2510, n. 5 (citing *Summers v. Tice*, 33 Cal.2d 80, 84–87, 199 P.2d 1, 3–5 (1948)). *Summers* is a famous case, however, because it sticks out of the ordinary body of tort law like a sore thumb. It represented "a relaxation" of "such proof as is ordinarily required" to succeed in a negligence action. *Id.*, at 86, 199 P.2d, at 4 (internal quotation marks omitted). There is no indication that the statute at issue here was meant to relax the ordinary rule under which a tie goes to the defendant. To the contrary, it explicitly strengthens that rule by extending it to the pleading stage of a case.

***331** One of petitioners' *amici* suggests that my reading of the statute would transform the text from requiring a "strong" inference to requiring the "strongest" inference. See Brief for American Association for Justice as *Amicus Curiae* 27. The point might have some force if Congress could have more clearly adopted my standard by using the word "strongest" instead of the word "strong." But the use of the superlative would not have made any sense given the provision's structure: What does it mean to require a plaintiff to plead "facts giving rise to *the strongest* inference that the defendant acted with the required state of mind"? It is certainly true that, if Congress had wanted to adopt my standard with even greater clarity, it could have restructured the entire provision—to require, for example, that the plaintiff plead "facts giving rise to *an inference of scienter that is more compelling than the inference that the defendant acted with a nonculpable state of mind.*" But if one is to consider the possibility of total restructuring, it is equally true that, to express the Court's standard, Congress could have demanded "*an inference of scienter that is at least as compelling as the inference that the defendant acted with a nonculpable state of mind.*" Argument from the possibility of saying it differently is clearly a draw. We must be content to give "strong inference" its normal meaning. I hasten to add that, while precision of interpretation should always be pursued for its own sake, I doubt that in this instance what I deem to be the correct test will produce results much different from the Court's. How often is it that inferences are precisely in equipoise? All the more reason, I think, to read the language for what it says.

The Court and the dissent criticize me for suggesting that there is only one reading of the text. *Ante*, at 2510 – 2511, n. 5; *post*, at 2517, n. 1 (STEVENS, J., dissenting). They are both mistaken. I assert only that mine is the natural reading of the statute (*i.e.*, the normal reading), not that it is the only ***332** conceivable one. The Court has no standing to object to this approach, since it concludes that, in another respect, the statute admits of only one natural reading, namely, that competing inferences must be weighed because the strong-inference requirement "is inherently comparative," *ante*, at 2510. As for the dissent, it asserts that the

statute cannot possibly have a natural and discernible **2515 meaning, since "Courts of Appeals" and "Members of this Court" "have divided" over the question. *Post*, at 2517, n. 1. It was just weeks ago, however, that the author of the dissent, joined by the author of today's opinion for the Court, concluded that a statute's meaning was "plain," *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 479, 127 S.Ct. 1397, 167 L.Ed.2d 190 (2007) (STEVENS, J., dissenting), even though the Courts of Appeals and Members of this Court divided over the question, *id.*, at 470, n. 5, 127 S.Ct. 1397. Was plain meaning then, as the dissent claims it is today, *post*, at 2517, n. 1, "in the eye of the beholder"?

It is unremarkable that various Justices in this case reach different conclusions about the correct interpretation of the statutory text. It is remarkable, however, that the dissent believes that Congress "implicitly delegated significant lawmaking authority to the Judiciary in determining how th[e] [strong-inference] standard should operate in practice." *Post*, at 2516 – 2517. This is language usually employed to describe the discretion conferred upon administrative agencies, which need not adopt what courts would consider the interpretation most faithful to the text of the statute, but may choose some other interpretation, so long as it is within the bounds of the reasonable, and may later change to some *other* interpretation that is within the bounds of the reasonable. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Courts, by contrast, *must* give the statute its single, most plausible, reading. To describe this as an exercise of "delegated lawmaking authority" seems to me peculiar—unless one believes in lawmakers who have no discretion. Courts must apply judgment, to be sure. But judgment is not discretion.

*333 Even if I agreed with the Court's interpretation of "strong inference," I would not join the Court's opinion because of its frequent indulgence in the last remaining legal fiction of the West: that the report of a single committee of a single House expresses the will of Congress. The Court says, for example, that "Congress'[s] purpose" was "to promote greater uniformity among the Circuits," *ante*, at 2509, relying for that certitude upon the statement of managers accompanying a House Conference Committee Report whose text was never adopted by the House, much less by the Senate, and as far as we know was read by almost no one. The Court is sure that Congress " 'inten [ded] to strengthen existing pleading requirements,' " *ante*, at 2509, because—again—the statement of managers said so. I come to the same conclusion for the much safer reason that the law which Congress adopted (and which the Members of both Houses actually *voted* on) so indicates. And had the legislation not done so, the statement of managers assuredly could not have remedied the deficiency.

With the above exceptions, I am generally in agreement with the Court's analysis, and so concur in its judgment.

Justice ALITO, concurring in the judgment.

I agree with the Court that the Seventh Circuit used an erroneously low standard for determining whether the plaintiffs in this case satisfied their burden of pleading "with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u–4(b)(2). I further agree that the case should be remanded to allow the lower courts to decide in the first instance whether the allegations survive under the correct standard. In two respects, however, I disagree with the opinion of the Court. First, the best interpretation of the statute is that only those facts that are **2516 alleged "with particularity" may properly be considered in determining whether the allegations of scienter are sufficient. Second, I agree with Justice SCALIA that a "strong inference" of scienter, *334 in the present context, means an inference that is more likely than not correct.

I

On the first point, the statutory language is quite clear. Section 78u–4(b)(2) states that "the

complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." Thus, "a strong inference" of scienter must arise from those facts that are stated "with particularity." It follows that facts not stated with the requisite particularity cannot be considered in determining whether the strong-inference test is met.

In dicta, however, the Court states that "omissions and ambiguities" merely "count against" inferring scienter, and that a court should consider all allegations of scienter, even nonparticularized ones, when considering whether a complaint meets the "strong inference" requirement. *Ante,* at 2511. Not only does this interpretation contradict the clear statutory language on this point, but it undermines the particularity requirement's purpose of preventing a plaintiff from using vague or general allegations in order to get by a motion to dismiss for failure to state a claim. Allowing a plaintiff to derive benefit from such allegations would permit him to circumvent this important provision.

Furthermore, the Court's interpretation of the particularity requirement in no way distinguishes it from normal pleading review, under which a court naturally gives less weight to allegations containing "omissions and ambiguities" and more weight to allegations stating particularized facts. The particularity requirement is thus stripped of all meaning.

Questions certainly may arise as to whether certain allegations meet the statutory particularity requirement, but where that requirement is violated, the offending allegations cannot be taken into account.

*335 II

I would also hold that a "strong inference that the defendant acted with the required state of mind" is an inference that is stronger than the inference that the defendant lacked the required state of mind. Congress has provided very little guidance regarding the meaning of "strong inference," and the difference between the Court's interpretation (the inference of scienter must be at least as strong as the inference of no scienter) and Justice SCALIA's (the inference of scienter must be at least marginally stronger than the inference of no scienter) is unlikely to make any practical difference. The two approaches are similar in that they both regard the critical question as posing a binary choice (either the facts give rise to a "strong inference" of scienter or they do not). But Justice SCALIA's interpretation would align the pleading test under § 78u–4(b)(2) with the test that is used at the summary-judgment and judgment-as-a-matter-of-law stages, whereas the Court's test would introduce a test previously unknown in civil litigation. It seems more likely that Congress meant to adopt a known quantity and thus to adopt Justice SCALIA's approach.

Justice STEVENS, dissenting.

As the Court explains, when Congress enacted a heightened pleading requirement for private actions to enforce the federal securities laws, it "left the key term 'strong inference' undefined." *Ante,* **2517 at 2504 – 2505. It thus implicitly delegated significant lawmaking authority to the Judiciary in determining how that standard should operate in practice. Today the majority crafts a perfectly workable definition of the term, but I am persuaded that a different interpretation would be both easier to apply and more consistent with the statute.

The basic purpose of the heightened pleading requirement in the context of securities fraud litigation is to protect defendants from the costs of discovery and trial in unmeritorious*336 cases. Because of its intrusive nature, discovery may also invade the privacy interests of the defendants and their executives. Like citizens suspected of having engaged in criminal activity, those defendants should not be required to produce their private effects unless there is probable cause to believe them guilty of misconduct. Admittedly, the probable-cause standard is not capable of precise measure-

ment, but it is a concept that is familiar to judges. As a matter of normal English usage, its meaning is roughly the same as "strong inference." Moreover, it is most unlikely that Congress intended us to adopt a standard that makes it more difficult to commence a civil case than a criminal case.[FN1]

> FN1. The meaning of a statute can only be determined on a case-by-case basis and will, in each case, turn differently on the clarity of the statutory language, its context, and the intent of its drafters. Here, in my judgment, a probable-cause standard is more faithful to the intent of Congress, as expressed in both the specific pleading requirement and the statute as a whole, than the more defendant-friendly interpretation that Justice SCALIA prefers. He is clearly wrong in concluding that in divining the meaning of this term, we can merely "read the language for what it says," and that it is susceptible to only one reading. *Ante,* at 2514 (opinion concurring in judgment). He argues that we "must be content to give 'strong inference' its normal meaning," *ibid.,* and yet the "normal meaning" of a term such as "strong inference" is surely in the eye of the beholder. As the Court's opinion points out, Courts of Appeals have divided on the meaning of the standard, see *ante,* at 2504 – 2505, 2508 – 2509, and today, the Members of this Court have done the same. Although Justice SCALIA may disagree with the Court's reading of the term, he should at least acknowledge that, in this case, the term itself is open to interpretation.

In addition to the benefit of its grounding in an already familiar legal concept, using a probable-cause standard would avoid the unnecessary conclusion that "in determining whether the pleaded facts give rise to a 'strong' inference of scienter, the court *must* take into account plausible opposing inferences." *Ante,* at 2509 (emphasis added). There are times when an inference can easily be deemed strong without any need to weigh competing inferences. For example, if a known drug dealer exits a building immediately after a *337 confirmed drug transaction, carrying a suspicious looking package, a judge could draw a strong inference that the individual was involved in the aforementioned drug transaction without debating whether the suspect might have been leaving the building at that exact time for another unrelated reason.

If, using that same methodology, we assume (as we must, see *ante,* at 2509 – 2510, 2511) the truth of the detailed factual allegations attributed to 27 different confidential informants described in the complaint, App. 91–93, and view those allegations collectively, I think it clear that they establish probable cause to believe that Tellabs' chief executive officer "acted with the required intent," as the Seventh Circuit held.[FN2] 437 F.3d 588, 602 (2006).

> FN2. The "channel stuffing" allegations in ¶¶ 62–72 of the amended complaint, App. 110–113, are particularly persuasive. Contrary to petitioners' arguments that respondents' allegations of channel stuffing "are too vague or ambiguous to contribute to a strong inference of scienter," *ante,* at 2511, this portion of the complaint clearly alleges that Notebaert himself had specific knowledge of illegitimate channel stuffing during the relevant time period, see, *e.g.,* App. 111, ¶ 67 ("Defendant Notebaert worked directly with Tellabs' sales personnel to channel stuff SBC"); *id.,* at 110–112 (alleging, in describing such channel stuffing, that Tellabs took "extraordinary" steps that amounted to "an abnormal practice in the industry"; that "distributors were upset and later returned the inventory" (and, in the case of Verizon's chairman, called Tellabs to complain); that customers "did not want" products that Tellabs sent and that Tellabs employees wrote purchase or-

> ders for; that "returns were so heavy during January and February 2001 that Tellabs had to lease extra storage space to accommodate all the returns"; and that Tellabs "backdat[ed] sales" that actually took place in 2001 to appear as having occurred in 2000). If these allegations are actually taken as true and viewed in the collective, it is hard to imagine what competing inference could effectively counteract the inference that Notebaert and Tellabs " 'acted with the required state of mind.' " *Ante,* at 2513 (opinion of the Court) (quoting 15 U.S.C. § 78u–4(b)(2)).

**2518 Accordingly, I would affirm the judgment of the Court of Appeals.

U.S.,2007.
Tellabs, Inc. v. Makor Issues & Rights, Ltd.
551 U.S. 308, 127 S.Ct. 2499, 168 L.Ed.2d 179, 75 USLW 4462, Fed. Sec. L. Rep. P 94,335, 07 Cal. Daily Op. Serv. 7139, 2007 Daily Journal D.A.R. 9258, 20 Fla. L. Weekly Fed. S 374

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United States Court of Appeals,
Second Circuit.
Richard L. KALNIT, Plaintiff–Appellant,
v.
Frank M. EICHLER, Robert L. Crandall, Charles P. Russ, III, Pierson M. Grieve, Louis A. Simpson, Allan D. Gilmour, Charles M. Lillis, Grant A. Dove, John Slevin, Kathleen A. Cote, Daniel W. Yohannes and Mediaone Group, Inc., Defendants–Appellees.

Docket No. 00–7487.
Argued: Dec. 12, 2000.
Decided: Sept. 5, 2001.

Investor brought uncertified securities fraud class action against corporation and its directors, alleging that defendants fraudulently failed to disclose circumstances related to proposed acquisition of corporation, which artificially depressed selling price of corporation's shares. The United States District Court for the Southern District of New York, 99 F.Supp.2d 327,Shira A. Scheindlin, J., dismissed complaint without leave to amend, and investor appealed. The Court of Appeals, F.I. Parker, Circuit Judge, held that: (1) investor's allegations of officers' motive to defraud failed to establish scienter required under the Private Securities Litigation Reform Act (PSLRA); (2) any intent on officers' part to defraud proposed acquiring corporation could not be conflated with an intent to defraud investors; (3) investor could not establish scienter by combining inadequate allegations of motive with inadequate allegations of recklessness; and (4) defendants' failure to disclose was not conscious misbehavior or recklessness.

Affirmed.

West Headnotes

[1] Federal Courts 170B ⇐3587(1)

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)2 Standard of Review
170Bk3576 Procedural Matters
170Bk3587 Pleading
170Bk3587(1) k. In general. Most Cited Cases
(Formerly 170Bk776)

Federal Courts 170B ⇐3667

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)3 Presumptions
170Bk3664 Pleadings; Dismissal
170Bk3667 k. Dismissal for failure to state a claim. Most Cited Cases
(Formerly 170Bk794)

Courts of Appeals review de novo a district court's dismissal of a complaint pursuant to a motion to dismiss for failure to state a claim upon which relief can be granted, accepting all factual allegations in the complaint as true and drawing all reasonable inferences in the plaintiff's favor. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[2] Federal Courts 170B ⇐3578

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)2 Standard of Review
170Bk3576 Procedural Matters
170Bk3578 k. Dismissal or nonsuit in general. Most Cited Cases
(Formerly 170Bk763.1)

A dismissal is upheld on review only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

[3] Securities Regulation 349B ⇐60.18

349B Securities Regulation
349BI Federal Regulation
349BI(C) Trading and Markets
349BI(C)7 Fraud and Manipulation
349Bk60.17 Manipulative, Deceptive or Fraudulent Conduct
349Bk60.18 k. In general. Most Cited Cases

To state a cause of action for securities fraud under section 10(b) and Rule 10b–5, a plaintiff must plead that the defendant made a false statement or omitted a material fact, with scienter, and that plaintiff's reliance on defendant's action caused plaintiff injury. Securities Exchange Act of 1934, § 10(b), as amended, 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b–5.

[4] Securities Regulation 349B ⇐60.45(1)

349B Securities Regulation
349BI Federal Regulation
349BI(C) Trading and Markets
349BI(C)7 Fraud and Manipulation
349Bk60.43 Grounds of and Defenses to Liability
349Bk60.45 Scienter, Intent, Knowledge, Negligence or Recklessness
349Bk60.45(1) k. In general. Most Cited Cases

To establish the requisite state of mind, or scienter, in a securities fraud action under section 10(b) and Rule 10b–5, the plaintiff must allege an intent to deceive, manipulate, or defraud. Securities Exchange Act of 1934, § 10(b), as amended, 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b–5.

[5] Securities Regulation 349B ⇐60.51(1)

349B Securities Regulation
349BI Federal Regulation
349BI(C) Trading and Markets
349BI(C)7 Fraud and Manipulation
349Bk60.50 Pleading
349Bk60.51 In General
349Bk60.51(1) k. In general. Most Cited Cases
(Formerly 349Bk60.51)

A complaint asserting securities fraud must satisfy the heightened pleading requirement of rule requiring fraud to be alleged with particularity. Securities Exchange Act of 1934, § 10(b), as amended, 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b–5; Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[6] Securities Regulation 349B ⇐60.45(1)

349B Securities Regulation
349BI Federal Regulation
349BI(C) Trading and Markets
349BI(C)7 Fraud and Manipulation
349Bk60.43 Grounds of and Defenses to Liability
349Bk60.45 Scienter, Intent, Knowledge, Negligence or Recklessness
349Bk60.45(1) k. In general. Most Cited Cases

A securities fraud plaintiff can establish scienter sufficient to give rise to a strong inference of fraudulent intent, under the Private Securities Litigation Reform Act (PSLRA), either by alleging: (1) facts to show that defendants had both motive and opportunity to commit fraud, or (2) facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness. Securities Exchange Act of 1934, §§ 10(b), 21D, as amended, 15 U.S.C.A. §§ 78j(b), 78u–4(b)(2); 17 C.F.R. § 240.10b–5; Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[7] Securities Regulation 349B ⇐60.51(2)

349B Securities Regulation
349BI Federal Regulation
349BI(C) Trading and Markets
349BI(C)7 Fraud and Manipulation
349Bk60.50 Pleading
349Bk60.51 In General

349Bk60.51(2) k. Scienter. Most Cited Cases
(Formerly 349Bk60.51)

For purposes of pleading scienter in securities fraud under the Private Securities Litigation Reform Act (PSLRA), sufficient motive allegations entail concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged. Securities Exchange Act of 1934, §§ 10(b), 21D, as amended, 15 U.S.C.A. §§ 78j(b), 78u–4(b)(2); 17 C.F.R. § 240.10b–5; Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[8] Securities Regulation 349B ⇐60.45(1)

349B Securities Regulation
349BI Federal Regulation
349BI(C) Trading and Markets
349BI(C)7 Fraud and Manipulation
349Bk60.43 Grounds of and Defenses to Liability
349Bk60.45 Scienter, Intent, Knowledge, Negligence or Recklessness
349Bk60.45(1) k. In general. Most Cited Cases

Allegations of motives that are generally possessed by most corporate directors and officers do not suffice to plead scienter under the Private Securities Litigation Reform Act (PSLRA) in a securities fraud case; instead, plaintiffs must assert a concrete and personal benefit to the individual defendants resulting from the fraud. Securities Exchange Act of 1934, §§ 10(b), 21D, as amended, 15 U.S.C.A. §§ 78j(b), 78u–4(b)(2); 17 C.F.R. § 240.10b–5; Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[9] Securities Regulation 349B ⇐60.45(1)

349B Securities Regulation
349BI Federal Regulation
349BI(C) Trading and Markets
349BI(C)7 Fraud and Manipulation
349Bk60.43 Grounds of and Defenses to Liability
349Bk60.45 Scienter, Intent, Knowledge, Negligence or Recklessness
349Bk60.45(1) k. In general. Most Cited Cases

To allege a motive sufficient under the Private Securities Litigation Reform Act (PSLRA) to support the inference of fraudulent intent, for purposes of a securities fraud case, a plaintiff must do more than merely charge that executives aim to prolong the benefits of the positions they hold. Securities Exchange Act of 1934, §§ 10(b), 21D, as amended, 15 U.S.C.A. §§ 78j(b), 78u–4(b)(2); 17 C.F.R. § 240.10b–5; Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[10] Securities Regulation 349B ⇐60.45(1)

349B Securities Regulation
349BI Federal Regulation
349BI(C) Trading and Markets
349BI(C)7 Fraud and Manipulation
349Bk60.43 Grounds of and Defenses to Liability
349Bk60.45 Scienter, Intent, Knowledge, Negligence or Recklessness
349Bk60.45(1) k. In general. Most Cited Cases

Investor's allegations of corporate officers' motive to defraud failed to establish scienter required under the Private Securities Litigation Reform Act (PSLRA), in uncertified securities fraud class action against corporation and its officers, alleging that defendants fraudulently failed to disclose circumstances related to proposed merger, where allegations that officers' motive was to protect their lucrative compensation could have been imputed to all corporate officers, that it was to avoid personal liability was too speculative since there was no reason to expect proposed acquiring corporation to sue officers individually, and that it was to ensure that a more lucrative offer was obtained was nonsensical since investors would also benefit from a superior offer. Securities Exchange

Act of 1934, §§ 10(b), 21D, as amended, 15 U.S.C.A. §§ 78j(b), 78u–4(b)(2); 17 C.F.R. § 240.10b–5; Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[11] Securities Regulation 349B ⚿60.45(1)

349B Securities Regulation
349BI Federal Regulation
349BI(C) Trading and Markets
349BI(C)7 Fraud and Manipulation
349Bk60.43 Grounds of and Defenses to Liability
349Bk60.45 Scienter, Intent, Knowledge, Negligence or Recklessness
349Bk60.45(1) k. In general. Most Cited Cases

Allegation that corporate officers' avoidance of personal liability provided motive for their alleged fraudulent acts is too speculative and conclusory to support scienter required under the Private Securities Litigation Reform Act (PSLRA) in a securities fraud case. Securities Exchange Act of 1934, §§ 10(b), 21D, as amended, 15 U.S.C.A. §§ 78j(b), 78u–4(b)(2); 17 C.F.R. § 240.10b–5; Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[12] Securities Regulation 349B ⚿60.45(1)

349B Securities Regulation
349BI Federal Regulation
349BI(C) Trading and Markets
349BI(C)7 Fraud and Manipulation
349Bk60.43 Grounds of and Defenses to Liability
349Bk60.45 Scienter, Intent, Knowledge, Negligence or Recklessness
349Bk60.45(1) k. In general. Most Cited Cases

Any intent on corporate officers' part to defraud proposed acquiring corporation could not be conflated with an intent to defraud shareholders of corporation to be acquired, for purposes of establishing motive to defraud sufficient to establish scienter required under the Private Securities Litigation Reform Act (PSLRA) in investor's uncertified securities fraud class action against corporation and its officers, because achieving superior merger benefitted all investors, and desire to achieve most lucrative acquisition proposal could be attributed to every corporation seeking to be acquired. Securities Exchange Act of 1934, §§ 10(b), 21D, as amended, 15 U.S.C.A. §§ 78j(b), 78u–4(b)(2); 17 C.F.R. § 240.10b–5; Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[13] Securities Regulation 349B ⚿60.51(2)

349B Securities Regulation
349BI Federal Regulation
349BI(C) Trading and Markets
349BI(C)7 Fraud and Manipulation
349Bk60.50 Pleading
349Bk60.51 In General
349Bk60.51(2) k. Scienter. Most Cited Cases
(Formerly 349Bk60.51)

Investor could not show motive to defraud on part of corporation's officers sufficient to establish scienter, as required under the Private Securities Litigation Reform Act (PSLRA) in a securities fraud case, by merely combining inadequate allegations of motive with inadequate allegations of recklessness. Securities Exchange Act of 1934, §§ 10(b), 21D, as amended, 15 U.S.C.A. §§ 78j(b), 78u–4(b)(2); 17 C.F.R. § 240.10b–5; Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[14] Securities Regulation 349B ⚿60.51(1)

349B Securities Regulation
349BI Federal Regulation
349BI(C) Trading and Markets
349BI(C)7 Fraud and Manipulation
349Bk60.50 Pleading
349Bk60.51 In General
349Bk60.51(1) k. In general. Most Cited Cases
(Formerly 349Bk60.51)

A plaintiff cannot base securities fraud claims on speculation and conclusory allegations. Securities Exchange Act of 1934, § 10(b), as amended, 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b–5.

[15] Securities Regulation 349B ⟹60.51(2)

349B Securities Regulation
349BI Federal Regulation
349BI(C) Trading and Markets
349BI(C)7 Fraud and Manipulation
349Bk60.50 Pleading
349Bk60.51 In General
349Bk60.51(2) k. Scienter. Most Cited Cases
(Formerly 349Bk60.51)

Where motive is not apparent, it is still possible to plead scienter under the Private Securities Litigation Reform Act (PSLRA) in a securities fraud case by identifying circumstances indicating conscious behavior by the defendant, though the strength of the circumstantial allegations must be correspondingly greater. Securities Exchange Act of 1934, §§ 10(b), 21D, as amended, 15 U.S.C.A. §§ 78j(b), 78u–4(b)(2); 17 C.F.R. § 240.10b–5; Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[16] Securities Regulation 349B ⟹60.45(1)

349B Securities Regulation
349BI Federal Regulation
349BI(C) Trading and Markets
349BI(C)7 Fraud and Manipulation
349Bk60.43 Grounds of and Defenses to Liability
349Bk60.45 Scienter, Intent, Knowledge, Negligence or Recklessness
349Bk60.45(1) k. In general. Most Cited Cases

To survive dismissal under the "conscious misbehavior" theory, the plaintiffs in a securities fraud case must show that they alleged reckless conduct by the defendants, which is at the least conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it. Securities Exchange Act of 1934, § 10(b), as amended, 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b–5.

[17] Securities Regulation 349B ⟹60.45(1)

349B Securities Regulation
349BI Federal Regulation
349BI(C) Trading and Markets
349BI(C)7 Fraud and Manipulation
349Bk60.43 Grounds of and Defenses to Liability
349Bk60.45 Scienter, Intent, Knowledge, Negligence or Recklessness
349Bk60.45(1) k. In general. Most Cited Cases

Corporation's duty to disclose that its largest shareholder had been released from standstill agreement so that he could attempt to obtain more lucrative merger offer was not so clear as to render corporation and its officers' failure to disclose reckless, as would establish scienter required under the Private Securities Litigation Reform Act (PSLRA) in investor's uncertified securities fraud class action against corporation and its officers, where public was aware that corporation could accept a superior proposal, and defendants made no affirmative misstatements regarding ongoing merger discussions. Securities Exchange Act of 1934, §§ 10(b), 21D, as amended, 15 U.S.C.A. §§ 78j(b), 78u–4(b)(2); 17 C.F.R. § 240.10b–5; Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

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Dennis J. Block, Cadwalader, Wickersham & Taft, New York, N.Y. (Jason M. Halper, Jennifer L. Hurley, on the brief) for Defendants–Appellees.

Before: FEINBERG, CARDAMONE, and F.I.

PARKER, Circuit Judges.

F.I. PARKER, Circuit Judge:

In this uncertified securities fraud class action, plaintiff Richard L. Kalnit, on behalf of himself and all others similarly situated, alleges that defendants violated section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1994) ("section 10(b)") and Rule 10b–5 promulgated thereunder, 17 C.F.R. § 240.10b–5 (2001) ("Rule 10b–5"), by fraudulently failing*135 to disclose material information in connection with a proposed merger between MediaOne Group, Inc. ("MediaOne") and Comcast Corporation ("Comcast"). Kalnit and the purported class members sold shares of MediaOne stock during the period from March 31, 1999 through April 22, 1999, inclusive, at an allegedly artificially deflated price due to defendants' alleged fraud.

The United States District Court for the Southern District of New York (Shira A. Scheindlin, *Judge*) dismissed plaintiff's amended complaint for failure to allege the element of scienter with adequate particularity. *See Kalnit v. Eichler,* 99 F.Supp.2d 327, 344 (S.D.N.Y.2000) ("*Kalnit II* "). The district court dismissed plaintiff's first complaint for the same reason, but granted plaintiff leave to amend. *See Kalnit v. Eichler,* 85 F.Supp.2d 232, 245–46 (S.D.N.Y.1999) ("*Kalnit I* "). Plaintiff appeals the district court's second dismissal, contending that his amended complaint adequately set forth scienter allegations.

For the reasons set forth below, we affirm the decision of the district court to dismiss plaintiff's complaint without leave to amend.

I. BACKGROUND

A. *Factual Background*

Mindful that we are reviewing a dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6), the following facts are contained in the plaintiff's amended complaint and are assumed to be true. *See Press v. Chem. Inv. Servs.,* 166 F.3d 529, 534 (2d Cir.1999).

Plaintiff-appellant Richard Kalnit was an investor in MediaOne, who sold 1,820 shares of MediaOne stock on April 16, 1999. He purports to represent a class comprised of those who sold shares of MediaOne stock during the period between March 31, 1999 and April 22, 1999.[FN1]

> FN1. The district court did not certify the class under Fed.R.Civ.P. 23. Therefore, this opinion pertains only to Kalnit for res judicata purposes. *See Press,* 166 F.3d at 532 n. 1.

Defendant-appellee, MediaOne, is a Delaware corporation with its principal place of business in Colorado. MediaOne provides telecommunications services, including local, long distance and cellular telephone services. The 11 individual defendants-appellees were, at the time relevant to this action, MediaOne officers or members of MediaOne's board of directors. Defendant Lillis was the Chairman of the Board, President and Chief Executive Officer, and a director. Defendant Eichler was MediaOne's Executive Vice President, General Counsel and Secretary.

In 1996, MediaOne acquired a company called Continental Cablevision ("Continental"). As part of this acquisition, MediaOne entered into a publicly-disclosed shareholder's agreement with Amos Hostetter, Continental's co-founder. This agreement included a "standstill" provision which limited Hostetter's ability to propose mergers, directly or indirectly, involving MediaOne (the "standstill restriction"). At all times relevant to this suit, Hostetter owned 56.3 million shares, or approximately 9.3% of all outstanding MediaOne shares, and was MediaOne's largest shareholder. Hostetter also possessed considerable clout in the telecommunications industry.

On March 22, 1999, MediaOne announced that it had entered into a "definitive Merger Agreement" with Comcast, whereby Comcast would acquire

MediaOne for approximately $48 billion. Pursuant to this agreement, each MediaOne shareholder would receive 1.1 shares of Comcast common stock for each share of MediaOne *136 common stock. The agreement allowed MediaOne forty-five days to accept a superior proposal, subject to payment of a $1.5 billion termination fee to Comcast. This agreement also contained a provision that prohibited defendants from directly or indirectly soliciting acquisition proposals that would compete with the Comcast proposal. This provision, section 6.03 of the agreement, also referred to as the "No Shop" provision, stated:

> From the date hereof until the termination hereof, MediaOne will not, and will cause the MediaOne Subsidiaries and the officers, directors, employees ... or advisors of MediaOne and the MediaOne Subsidiaries not to, directly or indirectly: (i) take any action to solicit, initiate, facilitate or encourage the submission of any Acquisition Proposal; and (ii) other than in the ordinary course of business and not related to an Acquisition Proposal, engage in any discussions or negotiations with, or disclose any non-public information relating to MediaOne or any MediaOne Subsidiary or afford access to the properties, books or records of MediaOne or any MediaOne Subsidiary to, any Person who is known by MediaOne to be considering making or has made, an Acquisition Proposal.

Section 10.1 of the agreement provided that Comcast could terminate if MediaOne breached its "no shop" obligation. In short, MediaOne could accept a superior offer within forty-five days, but could not directly or indirectly solicit such offers.

On March 25, 1999, Hostetter sent a letter to the defendants, expressing his dissatisfaction with the terms of the Comcast Agreement, and seeking to be released from the 1996 standstill restriction to permit him to develop a superior proposal. On March 31, 1999, defendant Eichler, on behalf of all defendants, wrote to Hostetter and agreed to waive the 1996 standstill restriction. Eichler informed Hostetter that MediaOne had "no objection to [his] speaking with third parties about participating in any Superior Proposal." Additionally, Eichler confirmed an agreement of March 30, 1999, between MediaOne and Hostetter that Hostetter would not "make any public announcement of [his] efforts to develop a Superior Proposal without the Board's written consent, and to respond with 'no comment' if a press inquiry is made."

In the meantime, on March 30, 1999, MediaOne filed its Annual Report (Form 10K) with the Securities & Exchange Commission ("SEC") for the fiscal year ending December 31, 1998. This report included information about the Comcast Agreement, similar to the information previously released to the public, but did not disclose the Hostetter letter or defendants' response.

On April 5, 1999, MediaOne filed a Proxy Statement pursuant to section 14(a) of the Securities Exchange Act, 15 U.S.C. § 78n(a) (1994 & Supp. V 1999), informing shareholders that a special meeting regarding the proposed Comcast merger would likely occur. This statement did not disclose any of the communications between Hostetter and MediaOne's Board of Directors.

On April 16, 1999, plaintiff-appellant Kalnit sold 1,820 shares of MediaOne stock at approximately $65.44 per share, with no knowledge about Hostetter's release from the 1996 standstill restriction or about his desire to seek a superior proposal.

On April 22, 1999, AT & T Corporation ("AT & T") publicly proposed to acquire MediaOne in a transaction valued at $58 billion, approximately $9 billion more than the value of the Comcast proposal. Also on April 22, Hostetter filed a Schedule 13D with the SEC, disclosing, for the first time, *137 MediaOne's waiver of the 1996 standstill restriction. The Schedule 13D also revealed that Hostetter had discussed with AT & T, among others, the possibility of a superior proposal for MediaOne and that AT & T's current proposal resulted from these discussions.

On April 23, 1999, MediaOne's stock opened at $79 per share and closed at $77.375 per share, up from a value of $69.50 per share on April 22, 1999. Four days later, MediaOne's stock closed at $81.8125 per share.

On May 1, 1999, MediaOne's Board voted unanimously in favor of terminating the Comcast agreement in order to accept AT & T's proposal. A few days later, AT & T and Comcast negotiated a transaction where Comcast would not interfere with AT & T efforts to acquire MediaOne, and AT & T and Comcast would exchange certain cable properties resulting in a net increase in Comcast's cable subscribers.

On May 6, 1999, MediaOne officially terminated the Comcast agreement. Appellant filed his complaint that same day.

B. *Proceedings Below*

Kalnit filed this complaint as a class action, purporting to represent himself and all others who sold MediaOne securities during the period from March 31, 1999 through April 22, 1999 inclusive. He asserted claims under sections 10(b) and 20(a) of the Exchange Act, 15 U.S.C. §§ 78j(b), 78t(a), alleging that defendants fraudulently failed to disclose Hostetter's March 25, 1999 letter and their subsequent decision to release Hostetter from the 1996 standstill restriction.

On December 22, 1999, the district court granted defendants' motion to dismiss the original complaint, concluding that the complaint failed to plead scienter adequately. *See Kalnit I,* 85 F.Supp.2d at 242. The court granted plaintiff leave to amend his complaint to cure the noted deficiency. *See id.* at 246.[FN2]

> FN2. The district court also dismissed plaintiff's section 20(a) claims that sought to hold defendants liable as 'control persons' for alleged omissions and misrepresentations, noting that, under plaintiff's theory, defendants would actually be liable (if at all) as primary violators rather than as control persons. *Kalnit I,* 85 F.Supp.2d at 246. Plaintiff does not raise any section 20(a) issues on appeal.

On January 2, 2000, Kalnit filed an amended complaint, containing added scienter allegations. Defendants again moved to dismiss this complaint, contending that the amended complaint failed to cure the defects noted in the original complaint. The district court agreed and concluded that the amended complaint still failed to "give rise to a 'strong inference' of defendants' intent to deceive, manipulate or defraud MediaOne shareholders." *Kalnit II,* 99 F.Supp.2d at 336. The district court also declined, on futility grounds, to give plaintiff leave to amend the complaint a second time. *See id.* at 344.

Judgment was entered on April 11, 2000, and plaintiff's appeal followed.

II. DISCUSSION

Kalnit argues on appeal that the district court's dismissal was in error because his complaint adequately alleged scienter.[FN3]

> FN3. We note that Kalnit does not contend on appeal that the district court abused its discretion in denying him leave to amend his complaint.

A. *Standard of Review*

[1][2] "We review de novo a district court's dismissal of a complaint pursuant to Rule 12(b)(6), accepting all factual allegations*138 in the complaint as true and drawing all reasonable inferences in the plaintiff's favor." *Ganino v. Citizens Utilities Co.,* 228 F.3d 154, 161 (2d Cir.2000). A dismissal is upheld only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (citation omitted).

B. *Scienter*

[3][4] "To state a cause of action under section

10(b) and Rule 10b–5, a plaintiff must plead that the defendant made a false statement or omitted a material fact, with scienter, and that plaintiff's reliance on defendant's action caused plaintiff injury." *San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos.*, 75 F.3d 801, 808 (2d Cir.1996) (citing *In re Time Warner Inc. Secs. Litig.*, 9 F.3d 259, 264 (2d Cir.1993)). [FN4] The requisite state of mind, or scienter, in an action under section 10(b) and Rule 10b–5, that the plaintiff must allege is " 'an intent to deceive, manipulate or defraud.' " *Ganino*, 228 F.3d at 168 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n. 12, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976)).

FN4. Congress's amendments to section 10, passed in 2000, do not affect the merits of this appeal. *See* Consolidated Appropriations–FY 2001 (2000), Pub.L. No. 106–554, Appendix E H.R. 5660, 114 Stat. 2763, 2763A–365 (2000).

[5] A complaint asserting securities fraud must also satisfy the heightened pleading requirement of Federal Rule of Civil Procedure 9(b), which requires fraud to be alleged with particularity. *Ganino*, 228 F.3d at 168; *see also* Fed.R.Civ.P. 9(b) ("In all averments of fraud ..., the circumstances constituting fraud ... shall be stated with particularity."). Additionally under Rule 9(b), however, "[m]alice, intent, knowledge and other condition of mind of a person may be averred generally." Fed.R.Civ.P. 9(b).

In 1995, Congress enacted the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), Pub.L. No. 104–67, 109 Stat. 737, which, among other things, imposed heightened pleading requirements for plaintiffs in securities fraud actions. The PSLRA's scienter provision provides:

> In any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

15 U.S.C. § 78u–4(b)(2) (1994 & Supp. V 1999) (codifying PSLRA § 101(b), 109 Stat. at 747).

[6] The PSLRA's language echoed this Court's scienter standard. Before the PSLRA's enactment, we held that, to be adequate, scienter allegations must "give rise to a strong inference of fraudulent intent." *Novak v. Kasaks*, 216 F.3d 300, 307 (2d Cir.2000). A plaintiff can establish this intent " 'either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness.' " *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 52 (2d Cir.1995) (quoting *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir.1994)).

In *Novak*, we concluded that the PSLRA "did not change the basic pleading standard for scienter in this circuit." *Novak*, 216 F.3d at 310. Thus, both options for demonstrating scienter, either with motive and opportunity allegations or with allegations constituting strong circumstantial*139 evidence of conscious misbehavior or recklessness, survive the PSLRA. *See Ganino*, 228 F.3d at 169–70. We therefore examine Kalnit's complaint under both methods of establishing scienter.

1. *Motive and Opportunity*

As the district court noted, "it is undisputed that the individual defendants, as Directors of MediaOne, had the opportunity to commit fraudulent acts." *Kalnit II*, 99 F.Supp.2d at 335. The central issue, therefore, is whether plaintiff has sufficiently alleged motive.

Plaintiff points to several allegations in the complaint in his attempt to demonstrate defendants' motive to defraud the MediaOne shareholders. First, plaintiff contends that, by failing to disclose

the Hostetter release, defendants (1) were allowed to obtain another $12.00 per share when MediaOne entered into the agreement with AT & T, Appellant's Br. at 16; (2) "protected the significant change of control payments that would be jeopardized if it became known that Defendants violated" the Comcast Agreement, Appellant's Br. at 17; and (3) protected defendants Lillis and Eichler specifically, because they had lucrative provisions in the Comcast Agreement, including a large lump sum payment and vested pension benefits, Appellant's Br. at 17–18. Second, plaintiff asserts that defendants were motivated by a desire to avoid personal liability for the breach of the Comcast Agreement. Finally, plaintiff alleges that defendants were motivated by a desire to ensure that Hostetter would be able to obtain a superior proposal, because disclosure of the Hostetter release would jeopardize this possibility.

[7][8] Sufficient motive allegations " 'entail concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged.' " *Novak,* 216 F.3d at 307 (quoting *Shields,* 25 F.3d at 1130). Motives that are generally possessed by most corporate directors and officers do not suffice; instead, plaintiffs must assert a concrete and personal benefit to the individual defendants resulting from the fraud. *Novak,* 216 F.3d at 307–08. Insufficient motives, we have held, can include (1) the desire for the corporation to appear profitable and (2) the desire to keep stock prices high to increase officer compensation. *Id.* (citing cases). On the other hand, we have held motive sufficiently pleaded where plaintiff alleged that defendants misrepresented corporate performance to inflate stock prices while they sold their own shares. *Id.* (citing cases).

[9] "To allege a motive sufficient to support the inference [of fraudulent intent], a plaintiff must do more than merely charge that executives aim to prolong the benefits of the positions they hold." *Shields,* 25 F.3d at 1130. Noting the absence of insider trading allegations, in *Shields,* we rejected as insufficient plaintiffs' allegations that the defendants concealed and misrepresented the corporation's financial condition to inflate the price of the common stock and to maintain artificially high prices in order to protect their executive positions and compensation. *Id.* Such motive allegations, we observed, were common to all corporate executives and, thus, too generalized to demonstrate scienter. *Id.*

Likewise, in *Acito v. IMCERA Group, Inc.,* 47 F.3d 47, 54 (2d Cir.1995), we rejected as insufficient motive allegations plaintiff's assertion that the officers were motivated to inflate the value of stock to increase their executive compensation. We concluded:

> Plaintiffs' allegation that defendants were motivated to defraud the public *140 because an inflated stock price would increase their compensation is without merit. If scienter could be pleaded on that basis alone, virtually every company in the United States that experiences a downturn in stock price could be forced to defend securities fraud actions. "[I]ncentive compensation can hardly be the basis on which an allegation of fraud is predicated."

Id. (alteration in original) (quoting *Ferber v. Travelers Corp.,* 785 F.Supp. 1101, 1107 (D.Conn.1991)). Again, plaintiffs' motive allegations were too generalized to demonstrate defendants' "concrete and personal benefit" from the alleged fraud.

In *Chill v. General Electric Co.,* 101 F.3d 263, 267 (2d Cir.1996), plaintiffs alleged that "GE's interest in justifying to its shareholders its over $1 billion investment in [its subsidiary] gave GE a motive to willfully blind itself to facts casting doubt on [the subsidiary's] purported profitability." We held that this allegation did not sufficiently demonstrate GE's motive to defraud shareholders. *Id.* at 268. We stated that "such a generalized motive, one which could be imputed to any publicly-owned, for-profit endeavor, is not sufficiently

concrete for purposes of inferring scienter." *Id.; see also San Leandro,* 75 F.3d at 814 (company's desire to maintain a high bond or credit rating does not qualify as sufficient motive, because this desire can be imputed to all companies). Other courts have rejected similar generalized motives in other cases. *See, e.g., Phillips v. LCI Int'l, Inc.,* 190 F.3d 609, 622 (4th Cir.1999) (in.merger context, plaintiffs' allegations that director sought to depress the stock price to assure the success of a merger to retain a position on the board and obtain a higher price for his stock did not constitute an adequate motive); *Leventhal v. Tow,* 48 F.Supp.2d 104, 115 (D.Conn.1999) (plaintiff's allegations that defendants had a motive to artificially inflate stock price to get more favorable terms in stock-for-stock transactions and debentures are too generalized to establish scienter).

[10][11] These cases lead us to agree with the district court's conclusion that plaintiff's motive allegations are insufficient. First, plaintiff's allegation that defendants were motivated to conceal the Hostetter communications to protect the lucrative compensation provisions in the Comcast agreement are too generalized to support scienter adequately. As we made clear in *Acito,* an allegation that defendants were motivated by a desire to maintain or increase executive compensation is insufficient because such a desire can be imputed to all corporate officers. *Acito,* 47 F.3d at 54. Second, the avoidance of personal liability motive is too speculative and conclusory to support scienter. *See San Leandro,* 75 F.3d at 813 ("Plaintiffs do not ... enjoy a license to base claims of fraud on speculation and conclusory allegations."). As the district court explained, there is no reason to expect that Comcast would sue MediaOne's directors individually for breach of the No Shop provision. *Kalnit II,* 99 F.Supp.2d at 341. Third, plaintiff's allegation that defendants were motivated to conceal the Hostetter release to ensure that Hostetter would be able to obtain the AT & T agreement is not only conclusory and speculative, but nonsensical as well. Achieving a superior agreement with AT & T does not demonstrate defendants' intent to benefit themselves at the expense of the shareholders because the shareholders themselves would benefit from a superior transaction. It is also for this reason that plaintiff's argument that the defendants wanted to depress MediaOne's stock price to make the AT & T agreement "appear more valuable" likewise makes no sense and is similarly insufficient. Where " 'plaintiff's view of the facts defies economic reason, ... [it] does *141 not yield a reasonable inference of fraudulent intent.' " *Shields,* 25 F.3d at 1130 (quoting *Alt. Gypsum Co. v. Lloyds Int'l Corp.,* 753 F.Supp. 505, 514 (S.D.N.Y.1990)).

[12] Plaintiff also argues that, because the district court stated that the motive allegations were sufficient to show that the defendants had "defrauded Comcast," the allegations sufficiently demonstrate an intent to defraud the shareholders, because "just as Comcast would want to know the information which Defendants concealed, investors would also want to know the same information". Appellant's Br. at 33 (citing *Kalnit II,* 99 F.Supp.2d at 339). We disagree. We note that this Court has ruled that stock price manipulation in the acquisition context may be sufficient to establish scienter, and has rejected the proposition that "the desire to consummate any corporate transaction cannot ever be a motive for securities fraud." *Rothman v. Gregor,* 220 F.3d 81, 93–94 (2d Cir.2000) (citing *Time Warner,* 9 F.3d at 270). In this situation, however, any intent to defraud Comcast cannot be conflated with an intent to defraud the shareholders. As we noted earlier, achieving a superior merger benefitted all shareholders, including the defendants. Additionally, the desire to achieve the most lucrative acquisition proposal can be attributed to virtually every company seeking to be acquired. Such generalized desires do not establish scienter. *See, e.g., San Leandro,* 75 F.3d at 814.

[13] Plaintiff acknowledges that mere ownership of stock or protection of executive compensation are insufficient to establish motive, but argues that *Acito,* which held that "the existence, *without*

more, of executive compensation dependent upon stock value does not give rise to a strong inference of scienter," 47 F.3d at 54 (emphasis added), supports the sufficiency of his scienter allegations. Plaintiff contends that his scienter allegations are "strong" because defendants had actual knowledge of the Hostetter letter and release, and thus his allegations amount to more than mere protection of executive compensation. Plaintiff misunderstands what "more," under *Acito*, is required to allege motive adequately. Here, plaintiff seeks to combine inadequate allegations of motive with inadequate allegations of recklessness, as described *infra*, to demonstrate scienter. Plaintiff offers no support for his approach, and we decline to accept it.[FN5]

> FN5. To the extent that plaintiff argues that our decision in *Novak*, 216 F.3d at 311, created a third method of demonstrating scienter, we reject such a contention. Instead, what plaintiff contends is a third method, showing that defendants had actual knowledge of facts contradicting their public statements, is part of the second method of demonstrating scienter, by setting forth allegations that demonstrate strong circumstantial evidence of conscious misbehavior or recklessness.

Our prior cases holding scienter allegations to give rise to a strong inference of fraudulent intent illuminate what is necessary. In *Time Warner*, 9 F.3d at 269, we held sufficient plaintiffs' allegations that "defendants were motivated to misrepresent the status of ... alliance negotiations to avoid jeopardizing talks with prospective partners, and to withhold disclosure of consideration of the rights offering to maintain a high stock price prior to announcement of the new rights offering in order to lessen the dilutive effect." In *Stevelman v. Alias Research, Inc.*, 174 F.3d 79, 85 (2d Cir.1999), we held that plaintiff sufficiently pleaded motive where the defendants' misrepresentations were accompanied by insider trading, because "[t]he allegation supports the inference that [defendant] withheld disclosures that would depress his stock until he had profitably sold his shares." Similarly, in *Hollin v. Scholastic Corp. (In re Scholastic Corp. *142 Securities Litigation)*, 252 F.3d 63, 74–75 (2d Cir.2001), we concluded that plaintiff sufficiently alleged motive where the allegedly fraudulent statements were quickly followed by defendant's sale of 80% of his holdings for a substantial profit.

[14] Here, by contrast, plaintiffs have not pointed to any specific benefit that would inure to the defendants that would not be either generalized to all corporate directors or beneficial to all shareholders, not just the defendant directors specifically. Additionally, plaintiff's motive allegations regarding avoidance of personal liability and ensuring Hostetter's ability to obtain that AT & T agreement are too conclusory to support scienter. A plaintiff cannot base securities fraud claims on speculation and conclusory allegations. *Chill*, 101 F.3d at 267. Thus, we affirm the district court's conclusion that Kalnit did not sufficiently allege motive.

2. *Circumstantial Evidence of Conscious Misbehavior or Recklessness*

[15][16] Having concluded that Kalnit failed to allege scienter adequately by demonstrating motive and opportunity to defraud, we next turn to whether Kalnit's allegations demonstrate "strong circumstantial evidence" of defendants' "conscious misbehavior or recklessness." *Shields*, 25 F.3d at 1128. "Where motive is not apparent, it is still possible to plead scienter by identifying circumstances indicating conscious behavior by the defendant, though the strength of the circumstantial allegations must be correspondingly greater." *Beck v. Mfrs. Hanover Trust Co.*, 820 F.2d 46, 50 (2d Cir.1987) (citations omitted), *overruled on other grounds by United States v. Indelicato*, 865 F.2d 1370 (2d Cir.1989) (en banc).

To survive dismissal under the "conscious misbehavior" theory, the appellants must show that they alleged reckless conduct by the appellees, which is "at the least, conduct which is highly unreasonable and which represents an extreme

> departure from the standards of ordinary care to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it."

Honeyman v. Hoyt (In Re Carter–Wallace, Inc. Secs. Litig.), 220 F.3d 36, 39 (2d Cir.2000) (citation omitted). Although this is a highly fact-based inquiry, generalities can be drawn.

> [S]ecurities fraud claims typically have sufficed to state a claim based on recklessness when they have specifically alleged defendants' knowledge of facts or access to information contradicting their public statements. Under such circumstances, defendants knew or, more importantly, should have known that they were misrepresenting material facts related to the corporation.

Novak, 216 F.3d at 308.

Plaintiff argues that defendants' knowledge of, but failure to disclose, the Hostetter release suffices to show conscious misbehavior or recklessness. He cites to our decision in *Novak*, 216 F.3d at 311–12, for support. In that case, shareholders claimed that defendants had "knowingly and intentionally ... overstated [AnnTaylor, Inc.'s] financial condition by accounting for inventory that they knew to be obsolete and nearly worthless at inflated values and by deliberately failing to adhere to the Company's publicly stated markdown policy." *Novak*, 216 F.3d at 304. We concluded that plaintiffs' scienter allegation was adequate, emphasizing that plaintiffs alleged also that the defendants had, after discussion, made a conscious decision not to mark down inventory specifically because of the effect on AnnTaylor Stores Corporation. *Id.* at 311–12. In making this decision, defendants "knowingly sanctioned procedures that violated *143 the Company's own markdown policy, as stated in the Company's public filings ... [and] caused those filings to be materially misleading in that the disclosed policy no longer reflected actual practice." *Id.* at 311.

Plaintiff also relies on our decision in *Rothman*, 220 F.3d at 90–91. In *Rothman*, we found allegations that defendant had, for a full year, failed to expense royalty advances for poorly selling products when the defendant knew (because of quarterly assessments) that these products were selling poorly to be sufficient recklessness allegations. The *Rothman* plaintiffs had pointed to defendants' pleadings in other lawsuits which sought to recover royalty payments as evidence of defendants' knowledge that these products were not selling. *Id.* at 91. We noted that the large size of the eventual write-off taken by defendants "renders less credible the proposition that ... [defendant] believed it likely that it could recover those royalty advances." *Id.* at 92.

[17] The nondisclosure allegations here do not rise to the level of recklessness as did those in *Novak* or *Rothman*. In those cases, the defendants' duty to disclose the concealed information was not seriously disputed. Both cases involved a corporation's financial statements and its publicly known accounting policies. Thus, that the *Novak* or *Rothman* defendants were reckless (or consciously misbehaving) in not disclosing their inventory losses was more clear and this failure to disclose amounted to, at the least, reckless behavior. As the district court here pointed out, the duty to disclose the Hostetter letter was not so clear, especially given that the public was aware that MediaOne could accept a superior proposal within forty-five days. *Kalnit I*, 85 F.Supp.2d at 245. Therefore, defendants' recklessness cannot be inferred from the failure to disclose. Further, because plaintiff has failed to demonstrate that defendants had a motive to defraud the shareholders, he must produce a stronger inference of recklessness. *Beck*, 820 F.2d at 50. This he has not done.

Plaintiff cites two district court cases involving merger negotiations as support. The first, *Buxbaum v. Deutsche Bank, A.G.*, 2000 U.S. Dist. LEXIS 5838, at *42 (S.D.N.Y. March 7, 2000), involved public statements by a chairman of the acquiring bank denying the existence of takeover discussions, where less than a month later, defendants an-

nounced a merger. In the interim, the price of the target bank's stock was depressed. Plaintiffs, shareholders who had sold the target bank's stock following defendants' statement, alleged that the merger talks had been going on prior to the public interview and claimed that the statement denying these discussions was false when made. *Id.* at *42–*46. The court found that plaintiffs sufficiently alleged scienter, noting that the facts alleged "clearly suggest that takeover talks were well under way ..., that [defendant] was personally involved in those talks, and that he falsely and knowingly denied the existence of those talks." *Id.* at *51.

The second case, *In re MCI Worldcom, Inc. Securities Litigation,* 93 F.Supp.2d 276 (E.D.N.Y.2000), involved similar facts. Sellers of the target corporation's shares who sold during the three day period between the date of a misleading statement by defendants (asserting that its registration of an internet domain name matching the name of the target company was not an indication of an intention to acquire the company) and the date of the merger announcement, brought suit alleging securities fraud. *Id.* at 279–80. The court found that the plaintiffs' allegations sufficed to plead conscious misbehavior or recklessness, noting that the statement in controversy had also affirmatively misrepresented*144 that the domain name registration was the product of one employee acting alone, but plaintiffs offered a New York Times article indicating that the company itself registered the domain. *Id.* at 285.

These cases are distinguishable from this case. First, both *Buxbaum* and *MCI* involve affirmative misstatements, not merely a failure to disclose merger discussions. There can be no question that a corporation's public statements must be truthful. Here, however, plaintiff's claim lies in nondisclosure. Because, as discussed earlier, this case does not present facts indicating a clear duty to disclose, plaintiff's scienter allegations do not provide *strong* evidence of conscious misbehavior or recklessness. Also, both *Buxbaum* and *MCI* involve misstatements about merger discussions that were ongoing, where the allegations here concern MediaOne's failure to disclose its waiver of a then three year old standstill provision. The recklessness of this behavior is not apparent from the facts alleged by plaintiff. We therefore conclude that plaintiff's allegations are inadequate to demonstrate strong circumstantial evidence of defendants' conscious misbehavior or recklessness.

Plaintiff has failed to allege scienter adequately, through either method. Accordingly, plaintiff's complaint fails to assert a securities fraud claim properly.

C. *Alternative Grounds for Dismissal*

We agree with the district court's conclusion that plaintiff has failed to plead scienter adequately, and we affirm the district court's dismissal on that ground. We, therefore, need not and do not reach defendants' arguments alleging other deficiencies in the plaintiff's complaint. Specifically, we do not reach whether plaintiff sufficiently pleaded materiality, defendants' duty to disclose, or reliance.

III. CONCLUSION

For the reasons outlined above, plaintiff has failed to include in his complaint allegations giving rise to a strong inference of fraudulent intent. We therefore affirm the district court's dismissal of plaintiff's complaint.

C.A.2 (N.Y.),2001.
Kalnit v. Eichler
264 F.3d 131

END OF DOCUMENT

Only the Westlaw citation is currently available.

United States District Court,
E.D. Pennsylvania.
In re AMERICAN BUSINESS FINANCIAL SERVICES INC. NOTEHOLDERS LITIGATION
This Document Relates To All Actions

No. 05–232.
Nov. 21, 2008.

MEMORANDUM

ONEILL, J.

*1 This consolidated class action brought against defendants Anthony J. Santilli, Leonard Becker, Michael DeLuca, Harold Sussman, Albert W. Mandia, Jerome Miller, Warren E. Palitz and Jeffrey S. Steinberg has been filed on behalf of all persons who suffered damages as a result of their purchase of Notes from American Business Financial Services, Inc. ("ABFS") during the class period.[FN1] Plaintiffs allege that registration statements that became effective in 2001, 2002 and 2003 were illegally issued without the use of broker/dealers, contained untrue statements of material fact and omitted material facts. Plaintiffs sought damages for violations of Sections 5, 11, 12(a)(1), 12(a)(2) and 15 of the Securities Act of 1933 ("1933 Act") and Sections 20 and 29(b) of the Securities Exchange Act of 1934 ("1934 Act"). Plaintiffs have reached a settlement of their claims against defendants in the amount of $16,767,500. Before this Court are plaintiffs' motion for final approval of settlement including the proposed plan of allocation and reimbursement of out-of-pocket expenses[FN2] incurred by lead plaintiffs and plaintiffs' motion for award of attorneys' fees and costs.

FN1. ABFS is not a defendant in this case because it filed for protection under Chapter 11 of the Bankruptcy Code on January 21, 2005.

FN2. While lead plaintiffs' state that their request is for expenses, it seeks mainly compensation for time at an hourly rate plus minimal costs.

BACKGROUND

A. *General Background*

ABFS was a diversified financial services organization that sold and serviced business purpose home equity loans through its subsidiaries. ABFS also purebased home equity loans from financial institutions. Plaintiffs allege that the typical customers of ABFS and its subsidiaries were credit-impaired or high-risk borrowers who could not obtain traditional financing from banks or savings and loan associations. During the class period, defendant Santilli served as ABFS's chairman, chief executive officer, chief operating officer, and director, defendant Mandia was ABFS's chief financial officer, and defendants Becker, DeLuca, Sussman, Miller, Palitz, and Steinberg were all directors of ABFS.

Plaintiffs allege that to raise capital ABFS used a financing technique known as securitization. In its Form 10–K filed with the Securities and Exchange Commission ("SEC") on October 10, 2000, ABFS noted that "[t]he ongoing securitization of our loans is a central part of our current business strategy." In each of its securitizations, ABFS transferred a pool of mortgage loans to a trust in exchange for certificates, notes or other securities issued by the trust that were then sold to investors for cash. Plaintiffs allege that ABFS would often retain the rights to service the loans for a fee and would retain an interest in the cash flows generated by the securitized loans, called an "interest-only strip" ("IO strip").

ABFS was able to securitize most of its mortgages from January 2002 through March 2003. In June 2003, however, ABFS was forced to change its business plan because investment banks refused to securitize pools of ABFS mortgages. ABFS began selling the mortgages it originated on a whole loan basis for cash, which was much less profitable than securitization. In 2003 and 2004, ABFS conducted exchange offers which allowed noteholders to exchange their notes for a combination of preferred stock and collateralized notes.

*2 ABFS borrowed directly from financial institutions to fund its mortgages. These financial institutions required ABFS to maintain a specific financial condition. If ABFS's financial condition fell below the specified level, all outstanding loans from the banks would become due.

According to plaintiffs, ABFS pressured its mortgage originators to create as many loans as possible. Under this policy, ABFS mortgage originators frequently sold mortgages to people who could not afford the mortgage payments. One former employee noted that approximately ten percent of loan customers defaulted on their first payment.

ABFS also funded its operation through the sale of notes. ABFS sold these notes through newspaper advertisements, direct mail and sales calls without the involvement of underwriters or brokers. Plaintiffs assert that ABFS generally did not include a copy of a prospectus in its solicitations. The notes offered interest rates well above the prime rate. They were for varying terms with maturity rates from a few months to as mueh as ten years. A buyer could choose either to receive interest during the term of each note or to have the interest reinvested in new notes. The notes were not transferrable and noteholders could only cash in the notes upon their maturity. ABFS rolled over a note if the noteholder did not request his money back within a few days of the note's maturity date.

For most of the class period, when a note was coming due, ABFS called or sent notice to the noteholder. In October or November 2004, ABFS stopped sending these notices. ABFS also hegan rolling over notes instead of paying noteholders even if a noteholder requested payment.

B. *Litigation Background*

Plaintiffs filed complaints on January 18, 2005 and January 25, 2005 which were consolidated in this action. On January 21, 2005, ABFS filed a petition for reorganization pursuant to Chapter 11 of the Bankruptcy Code, Title 11 of the United States Code, in the United States Bankruptcy Court for the District of Delaware in Wilmington, Delaware. *In re ABFS, Inc., et al.,* (No. 05–10203) (MFW). Pursuant to Section 362 of the Bankruptcy Code, ABFS' bankruptcy filing automatically stayed this action. On May 17, 2005, the company's Chapter 11 bankruptcy proceeding was converted to a Chapter 7 liquidation.

I designated John A. Malack, Virgil Magnon, Micheal Rosati, S.S. Rajarain, M.D. (Hayward Pediatrics, Inc.) and Sabina Langdon as lead plaintiffs and Berger & Montague, P.C. as Lead Counsel. The lead plaintiffs filed an amended complaint on November 16, 2005.

Defendants filed a motion to dismiss and a motion for judgment on the pleadings which I denied in part and granted in part on January 9, 2007 and July 25, 2007, respectively. I granted plaintiffs' unopposed amended motion for class certification on October 3, 2007 which created a elass of all persons who purchased or rolled over notes between January 18, 2002 and January 21, 2005.

*3 Litigation is also occurring in related cases. Lead plaintiffs sued BDO Seidman LLP, ABFS's outside auditor during the class period, on February 15, 2008 in this Court and the trustee has filed suit against directors and officers of ABFS and other defendants in the Philadelphia Court of Common Pleas.

The parties attended mediation on June 10 and 11, 2008 involving the class, the trustee, the former directors and officers of ABFS and the directors' and offieers' insurers. Lead plaintiffs, on behalf of the class, signed the settlement agreement on September 15, 2008. I granted a motion for preliminary approval of the settlement on September 19, 2008. A final hearing was held on November 3, 2008.

C. *Settlement Terms*

The settlement agreement outlines the details of the settlement. The parties reaehed a settlement agreement whereby the class and the trustee would each be paid $16,767,500 to settle their cases against the officers and directors. This amount was derived from the insurer paying $33.5 million, the Estate of Anthony Santilli paying $25,000 and Albert Mandia paying $10,000.

The settlement agreement's plan of allocation provides that each class member who sends in an acceptable "Proof of Claim" ("authorized claimant") will get his, her or its pro rata share of the net settlement amount. This share provides approximately 2.5% of the value of the original notes. The recognized loss for each authorized claimant will be based on the total amount ABFS owed the authorized claimant at the time of the bankruptcy for notes bought or rolled over after January 18, 2002. The plan does not provide consideration or recognize loss for preferred stock owned by the holders of collateralized notes because all notes are treated the same. The plan acknowledges that those class members who received payment shortly before ABFS's bankruptcy and had to remit that payment to the trustee will have that amount added to their recognized loss. The plan does not pay any claims for less than $10.00. The plan of allocation has all noteholders receiving their proportionate share. The agreement also obligated defendants to cooperate with the class and the Trustee in furtherance of their pending cases. Upon consideration of the pending cases, the class and trustee created a "D & Os' Future Defense Fund" of $880,000 with the insurers paying $540,000 and the class and trustee contributing $170,000 each. If this holdback is not used up before the termination of the trustee action, the trustee and class will get back equal shares of the remaining amount up to $170,000 each.

The settlement agreement requests that the Court award the following lead plaintiffs' "expenses": John Malack $4,794.00, Michael Rosati $6,600.00, Virgil Magnon $10,170.00. Henry Munster $304.00, and S.S. Rajaram and Hayward Pediatries, Inc. $16,000.00. This total is $37,868.00.

The settlement amount was deposited in an interest-hearing account by October 3, 2008.

D. *Fairness Hearing*

*4 On November 3, 2008, I held a hearing to determine the fairness of the proposed settlement and the motion for award of attorneys' fees and costs. Approximately thirty class members attended the hearing.[FN3] Prior to the hearing, lead counsel addressed the class members to explain the settlement and answer their questions. Of the class members in attendance, seven wanted to raise their objections or questions with the Court. Lead counsel and I addressed each objection or question.

FN3. The following individuals attended the hearing: Mary Nociforo, Jose Pawang, Ed and Rose Spector, Samuel C. Dove Sr and Esther Dove, Sergio Gallina, John J. Trolio, Huyen Ngoe Vu, Phoung Vu, Nickolai Brandt, Patty Brandt, Dick Nugent, William C. Robinson, Olivia D. Robinson, Verena Lokey, Carol J. Sondej, Ella Green, O'Donald Green, Chas Ruppert, Beverly T. Volk, Michael Rosati, Elaine Brown, Herbert Brown, Helen Cortez, Robert Hopely, Holly Barette and Alfred Teah.

First, Patty Brandt spoke about how she lost all of her husband's IRA money which was meant to be used to send her children to college. I explained to the hearing attendees that there needed to be additional money available from the defendants to support not approving the settlement and it has not been shown that such funds are available. Lead counsel also explained the allocation plan and how lead plaintiffs and the trustee are still pursuing claims against other defendants that may provide additional relief for the class.

John Trolio admitted that he did not think he would ever see any recovery and that the questions he came to the hearing with had all been answered. Mr. Trolio had previously filed written objections that raised issue with the fact that senior collateralized and preferred stock noteholders, like himself, were told by ABFS they were assured recovery. He had also raised questions in his written objections with how to calculate his distribution, when he would receive his claim, what he was agreeing to and how to complete the forms. He stated these questions were no longer at issue.

Mary Nociforo stated how upset she was that she lost all of the money she worked hard to save and invested, especially when ABFS assured her that everything was okay. She stated that she hoped the court would be able to do more for the class.

Sergio Gallina objected to the senior collateralized noteholders not receiving more in the settlement than other noteholders. Lead counsel explained that the plan of allocation was the fairest and most straight forward approach because the collateralized noteholders would likely have priority in bankruptcy and using other plans would increase administrative fees which would further deplete the available settlement funds.

Helen Cortez requested that I consider that her relief should differ from other noteholders because she gave her IRA to ABFS under custodial care. Lead counsel explained that its proposal does not give preferential treatment to any noteholders because, if it did, there would be many claims for such treatment. In addition to claims by those who invested their IRAs, there have been claims for preferential treatment by noteholders who complained before ABFS filed bankruptcy and those who had their notes rolled over against-their will. Lead counsel stated that the rationale behind the plan of allocation is that the entire class was hurt by the same behavior and thus there should be no distinctions. Ms. Cortez also questioned how the 2.5% was determined as this seemed too little for the great loss that was suffered by the noteholders. Lead counsel had previously explained this.

*5 Elaine Brown then spoke about the fraud perpetrated by the defendants. She brought a portion of the mail sent to her to get her to turn her notes into preferred stock. She also took issue with her preferred stock not taking priority in the settlement when she was told it was more valuable and that she would be paid first. It was explained that the priority would be an issue in the bankruptcy proceeding.

Finally, Chas Ruppert asked where the money from collection of ABFS's outstanding loans is going. Lead counsel explained that the proceeds of the loans owed to ABFS would be paid to the bankruptcy estate and the trustee would distribute these proceeds according to bankruptcy law. It was explained that this was a possible way that additional money would be available for the noteholders but that there was no way to get this money for the class in this action because the loans are to be paid to the bankruptcy estate.

After the attendees who wished to speak had their opportunity, defense counsel Mare Sonnenfeld explained that the defendants' individual net worth was also tied up in ABFS, and therefore they did not have any additional money to contribute. He stated that the defense costs come out of the insurance policy so litigating this matter further would only decrease the amount of funds available for the class. The insurance policy has already been depleted significantly hy defense costs because the defendants were simultaneously litigating other claims which fall under the same policy. Additionally, the insurance had eight levels which complicated the process. Mr. Sonnenfeld complimented plaintiffs' counsel on their performance in the action which made it possible to achieve settlement.

DISCUSSION

I. *Proposed Settlement*

Rule 23 class action settlements must be approved by the court. *See* Fed.R.Civ.P. 23(e). The Court of Appeals favor settlements of disputed claims especially in complex class action litigation. *See In re Prudential Ins. Co. Am. Sales Practice Litig.*, 148 F.3d 283, 317 (3d Cir.1998); *Krangel v. Golden Rule Resources, Inc.*, 194 F.R.D. 501, 504 (E.D.Pa.2000). In *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir.1975), the Court of Appeals set forth nine factors that should be considered in connection with a class action settlement's fairness, reasonableness, and adequacy. *In re Cendant Corp. Litigation*, 264 F.3d 286, 300 (3d Cir.2001). The nine *Girsh* factors are: (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; [FN4] (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *In re Cendant Corp. Litigation*, 264 F.3d at 300. "These factors are a guide and the ahsence of one or more does not automatically render the settlement unfair. Rather, the court must look at all the circumstances

of the case and determine whether the settlement is within the range of reasonableness under *Girsh." O'Keefe v. Mereedes–Benz USA, LLC,* 214 F.R.D. 266, 293–304 (E.D.Pa.2003), *quoting In re Orthopedic Bone Screw Prods. Liah. Litig.,* 176 F.R.D. 158, 184 (E.D.Pa.1997). Additional factors relevant to this case are whether the settlement was the product of an arm's length negotiation between experienced counsel, whether the allocation plan is fair, adequate and reasonable, *Smith v. Dominion Bridge Corp.,* 2007 WL 1101272, at *3 (E.D.Pa.2007), and whether the notice provided to class members was adequate. *In re Actua Inc. See. Litig.,* 2001 WL 20928, at *4 (E.D.Pa. Jan. 4, 2001), *citing In re General Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768, 784 (3d Cir.1995).

> FN4. The Court of Appeals stated that consideration of this factor appears perfunctory in 'settlement-only' class actions following the Supreme Court's decision in *Amchem* because "the district court always possesses the authority to decertify or modify a class that proves unmanageable." *In re Prudential,* 148 F.3d at 321.

A. *The Complexity, Expense and Likely Duration of the Litigation*

*6 This factor is intended to capture "the probable costs, in both time and money, of continued litigation." *In re General Motors Corp. Pick–Up Truck Fuel Tank Products Liab. Litig.,* 55 F.3d 768, 812 (3d Cir.1995). Consideration of the costs of continuing on the adversarial path allows me to gauge the benefit of settling the claim amicably. *Id.*

This case is in the early stages of litigation despite its filing more than three and a half years ago. While class discovery, certification and notice requirements, witness interviews and document discovery have been completed, more litigation remains before this case would be resolved. If litigation were to continue it is likely there would be merits depositions, expert discovery, motions for summary judgment, *Daubert* motions and other pre-trial motions. In addition, there would likely be a long jury trial due to the complex issues involved and the presentation of the varying fact patterns of the class members' investments, post-trial motions and an appeal.

Settlement avoids the substantial delay in recovery and expense that would accompany further pursuit of tbis litigation. Avoiding both of these outcomes is particularly important in this litigation when delay in recovery would greatly harm many of the class members who are elderly and without substantial resources due to loss of their investments. The additional expenses will only erode the available insurance proceeds which are a wasting asset as $5 million has already been consumed for defense costs in this action and the trustee action. Thus, this factor weighs in favor of approving the settlement.

B. *The Reaction of the Class to the Settlement*

The classes' reaction "is perhaps the most significant factor to be weighed in considering [the Settlement's] adequacy." *Sala v. National R.R. Passenger Corp.,* 721 F.Supp. 80, 83 (E.D.Pa.1989). This factor looks at the "number and vociferousness of the objectors" to help gauge whether the class members support the settlement. *In re GM Truck,* 55 F.3d at 812.

Notice was sent to over 29,000 class members explaining their right to opt-out of or object to the settlement. As of October 23, 2008, 5,372 proof of claim forms were received. Lead counsel advises that many class members contacted them to ask questions or praise the settlement, including Fred R. Hunter. As of October 27, 2008, 80 class members opted out of the settlement. Lead counsel states that two of these individuals have stated they would like to rescind their opt-out request.

There were 32 written objections to the proposed settlement and 7 verbal comments and/or objections at the November 3rd hearing. Most of the objectors, like Gary Ford, Abraham V. Abraham,[FN5] Mary Jane Fodor, Gobind and Meera Kanal, Brook, Robert Favela, Jon Gaboriault, Keen–Mills, Malkait Mannan, Margaret Schwartz, Mireille Tinawy, John Troilio, Nicky Yu, Patty Brandt and Mary Nociforo, raised concern over the amount the noteholders lost, the amount they will receive in the settlement, how much the wrongdoers should have to pay and tbe seriousness of the wrongdo-

ing. These objections do not provide any suggestion as to how to enhance the value of the settlement. It has been explained to the objectors why the available funds are so low and the potential for additional relief in other pending litigation. It was also explained to the objectors that failure to settle this litigation will lead to less availability of money for the class, not more.

> FN5. Lead counsel states that Mr. Ahraham withdrew his objection.

*7 Furthermore, the settlement is not intended to compensate each and every aggrieved individual fully for his loss, but instead represents a reasonable amount of relief for the settlement class, given the risks inherent in further litigation. The notice expressly states that the class will receive at least 2.5% of their recognized elaims. I recognize that this settlement is not nearly enough to compensate the losses of the class members, and I acknowledge their frustration and despair over tbe loss of their savings. The objeetors should feel confident that if a larger settlement seemed possible or a larger recovery with the ability to collect existed if the case proeeeded to trial, I would not approve this settlement. In this ease, proeeeding to trial would merely reduce the available funds for the class. However, each individual receiving the notice has the right to exclude himself from the settlement and retain any right he may have to sue defendants on his own.

Additionally, a few objectors, like Robert C. Carver, Joan Bryan, Dorothy Kleinworth, Gohind and Meera Kanal, Nicky Yu, and Elaine Brown, requested criminal prosecution of the defendants for the harm they caused the noteholders. This is not a matter for me to decide.

The deadline for exclusion or objections was October 20, 2008, and the responses received weigh in favor of settlement.

C. *Stage of the Proceedings and the Amount of Discovery Completed*

This "captures the degree of case development that class counsel have accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Cendant,* 264 F.3d at 235.

Lead plaintiffs conducted extensive discovery prior to settlement negotiations. They secured and analyzed large quantities of documents from the trustee, BDO Siedman LLP which served as ABFS's former auditor and Ernst & Young which briefly accepted ABFS as an audit client in 2001 and ahruptly resigned. These documents and documents from public filings were reviewed. Lead plaintiffs conducted investigations of key former employees and officers and directors. They consulted with forensic aecounting experts to evaluate ABFS's financial statements. Lead plaintiffs prepared for and attended depositions with regards to class certification. No merit depositions occurred but the relevant documents have already been analyzed. The case was pending for over three years before negotiations began in June 2008. The parties had ample time to familiarize themselves with the facts of the case and determine their positions with regard to the risks and rewards trial may bring .[FN6]

> FN6. This factor overlaps with Rule 23(a)(4)'s requirement that the plaintiff adequately represents the class. Both inquiries are directed to the question of the ability of the class counsel. I am satisfied that class counsel has adequately represented the class throughout the proceedings and the settlement negotiations.

A substantial amount of work remains in this litigation for both parties including merits depositions, expert witnesses, motions for summary judgment, other pretrial motions, trial and appeals. However, the question of defendants' liability was thoroughly investigated in advance of the negotiations. Beyond expert witnesses, it is unclear how further discovery would have added anything to the consideration of defendant' liability. Lead plaintiffs were able to form an "adequate appreciation of the merits of the case" before negotiating." *In re GM Trucks,* 55 F .3d at 813. Thus, this factor weighs strongly in favor of approving the Settlement.

D. *Risks of Establishing Liability and Damages*

*8 "A court considers this factor in order to 'examine what the potential rewards (or downside) of

litigation might have been had the class counsel decided to litigate the claims rather than settle them." ' *In re Cendant,* 264 F.3d at 237, *quoting In re GM Truck,* 55 F.3d at 814. On this issue, conducting a mini-trial analyzing actual liability should be avoided and credence must be given "to a certain extent ... to the estimation of the probability of success proffered by class counsel, who are experienced with the underlying case, and the possible defenses which may be raised to their causes of action." *In re IKON,* 209 F.R.D. 94, 105–06 (E.D.Pa.2002), *quoting Lacbance v. Harrington,* 965 F.Supp. 630, 638 (E.D.Pa.1997).

Lead counsel discussed the risks for the class of continuing to trial. While lead counsel state review of the numerous documents at issue uncovered false statements and omissions, they acknowledge the risk of presenting the complex accounting issues involved to a jury. They also acknowledge that conflicting expert opinions likely will be presented whieh creates a significant risk in a jury trial. Lead counsel addressed defendants' affirmative defense of loss causation, believing that the defendants likely would claim relianee on the assuranees of others and would argue that other factors like the subprime crisis, not their alleged misrepresentations and omissions, caused the classes' barm. Finally, lead eounsel thought it likely that defendants would argue that almost all of the lead plaintiffs knew the risk they were taking when they bought their notes and some jurors may not sympathize with the elass if this is argued. The risks of establishing liability and damages weigh in favor of approving the settlement.

E. *Ability of the Defendants to Withstand a Greater Judgment*

The defendant's ability to withstand a greater judgment is only relevant when a reasonable estimate of a judgment would move the defendant towards a critical financial threshold, i.e. forcing the defendant to file bankruptcy. This faetor seems appropriate in either limited fund class actions under Rule 23(b)(1)(B) or when the defendant faces large verdicts in multiple cases.

In this case, the action against ABFS was stayed because it went into bankruptcy immediately following the filing of this lawsuit. Although the settlement of $16,676,500 is a small amount relative to the noteholders' losses of over $500 million, I can estimate that a greater judgment would move the individual defendants towards bankruptcy. The settlement and the trustee's settlement consumed virtually all the available directors and officers' insurance. It has been represented and confirmed through interviews and financial disclosures that the individual defendants, Santilli's estate and Mandia, have very few reachable assets to supplement the Settlement more than the $25,000 and $10,000 paid, respectively, from their own pockets. It was represented at the hearing that the individual defendants also had their net worth in these notes. Nothing shows that further proceedings would result in a larger recovery for the class. Multiple cases are still pending involving the issues in this matter. Continuing to trial in the hopes of ohtaining a higher penalty would merely deplete the insurance policy proceeds and increase the risk that the proceeds will further deplete due to the litigation eosts of the other pending cases, leaving the class, if successful, with a lesser judgment, not a greater one. This factor weighs heavily in favor of settlement.

F. *The Range of Reasonahleness Factors*

*9 "The last two *Girsh* factors ask whether the settlement is reasonable in light of the hest possible recovery and the risks the parties would face if the case went to trial." *In re Prudential,* 148 F.3d at 322. The settlement should represent a discount from the hest possible judgment because the class is avoiding litigation risks. *Id.* The starting point for this analysis is the "economic valuation of the proposed settlement." *See In re Aetna Sec. Litig.,* 2001 WL 20928, at *11 (E.D.Pa.Jan.4, 2001). The value of the settlement to each class member represents a reasonable discount from the best possible judgment if they were to prevail after a trial.

Although the losses the noteholders incurred are significant and a verdict may therefore have represented an amount greatly higher than the settlement amount, the greater amount would be uncollectible. The insurance carrier provided almost the entire amount of the policy to the class and trustee, and this amount will only decrease if litigation continues. Weighing this factor in favor of the settlement stems from providing the most

money possible to the class as soon as possible without the risk of recovering less.

G. *Arm's Length Negotiations and Experienced Counsel*

A court should give significant weight to the opinion of experienced counsel that the settlement is in the best interests of the class. *See, e.g., Austin v. Pa. Dep't of Corrections,* 876 F.Supp. 1437, 1472 (E.D.Pa.1995); *Dominion Bridge Corp.,* 2007 WL 1101272, at *6-7. The biographies of the lawyers and firms representing the class show extensive experience in complex securities law class actions. This experience weighs in favor of finding that the proposed settlement was entered into in good faith and at arm's length and should be approved.

II. *Plan of Allocation*

"Approval of a plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate." *In re Ikon,* 194 F.R.D. at 184 (citation omitted); *Dominion Bridge Corp.,* 2007 WL 1101272, at *7. "In general, a plan of allocation that reimburses class members based on the type and extent of their injuries is reasonable ." *Id.* The plan of allocation in this case is that claimants are to receive his, her or its *pro rata* share of the not settlement amount based on the total amount ABFS owed them at the time of bankruptcy for notes hought or rolled over after January 18, 2002.

Class members objected to the plan of allocation. Class members, like Peter Mathus,[FN7] Thelma M. Boucher, Joan Bryan, John Trolio, Mireille Tinawy, David Banach, Gerhard and Laurel Hoffman, Deborah Schulte, Charles and Lillian Menige, Michael Mezey, Moses Walker, Sergio Gallina, Helen Cortez, Raymond D. Benson and Elaine Brown, think that notes should reecive preferential treatment if they are preferred stock or collateralized, a timely redemption was requested, they were the result of the exchange offers, they were IRA funds or they matured prior to bankruptcy. One objector proposed that every class member get a flat percentage of the settlement. Other objectors, namely Vineta Sylvester, Moss Walker and Panna, Rajendra, Saurin, and Jyoti Shah, objected to not paying persons who purchased notes prior to the class period which were not rolled over during the class period and to the limitation of not paying claims less than $10. The harm to the noteholders resulted from the same purehasing of notes pursuant to the registration statements at issue. It would be unjust to other noteholders who were similarly harmed to give preferential treatment to the above requests for the same harm. Some of the preferential treatment requested may be addressed in bankruptey law, but here it is fair and reasonable to avoid distinctions amongst noteholders. Moreover, the class period cannot extend earlier than January 2002 because of the statute of repose, and for administrative reasons it does not make sense to cut checks for less than $10. Thus, the plan is fair, reasonable and adequate.

FN7. Mr. Mathus also complains about inaccuracies in his Form 1099 for 2004 which caused him loss. This settlement involves securities law violations in Registration Statements, not 1099 Forms.

I. *Adequacy of the Notice*

***10** The due proeess demands of the Fifth Amendment and the Federal Rules of Civil Procedure require adequate notice to class members of a proposed settlement. *In re Aetna,* 2001 WL 20928, at *5. "In the class action context, the district court obtains personal jurisdiction over the absentee class members by providing proper notice of the impending class action and providing the absentecs with the opportunity to be heard or the opportunity to exclude themselves from the class." *In re Prudential,* 148 F.3d at 306. The due process requirements of the Fifth Amendment are satisfied by the "combination of reasonable notice, the opportunity to be heard and the opportunity to withdraw from the class." *Id.* The notice must be " 'reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." ' *Lachance v. Harrington,* 965 F.Supp. 630, 636 (E.D.Pa.1997), *quoting Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950).

Moreover, "in a settlement class maintained under Rule 23(b)(3), class notice must meet the requirements of both Federal Rules of Civil Procedure 23(c)(2) and

23(e)." *Bradburn Parent Teacher Store, Inc. v. 3M (Minn. Mining and Mfg. Co.)*, 513 F.Supp.2d 322, 328 (E.D.Pa.2007). Rule 23(e)(2) provides that class members must receive the "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed.R.Civ.P. 23(c)(2)(B). Rule 23(c)(2) also requires that "the notice indicate an opportunity to opt out, that the judgment will bind all class members who do not opt out and that any member who does not opt out may appear through counsel." *Bradburn Parent Teacher Store*, 513 F.Supp.2d at 328, *citing* Fed.R.Civ.P. 23(c)(2).

In addition to the requirements of Rule 23(c)(2), Rule 23(e) "requires that notice of a proposed settlement must inform class members: (1) of the nature of the pending litigation; (2) of the settlement's general terms; (3) that complete information is available from the court files; and (4) that any class member may appear and be heard at the Fairness Hearing." *Id.* I should consider both "the mode of dissemination and its content to assess whether notice was sufficient." *Id.* Although the "notice need not he unduly specific ... the notice document must describe, in detail, the nature of the proposed settlement, the circumstances justifying it, and the consequences of accepting and opting out of it." *Id., citing In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prod. Liab. Litig.*, 369 F.3d 293, 308–10 (3d Cir.2004).

I find that the notice provided in this case satisfies the requirements of due process and the Federal Rules of Civil Procedure. Pursuant to the settlement agreement and my September 26, 2008 order, the Certified Public Accounting firm of Heffler, Radetich & Saitta L.L.P. arranged for the mailing of the "Notice of Proposed Settlement of Class Action, Motion for Attorneys' Fees and Costs and Hearing on November 3, 2008" with an attached "Proof of Claim and Release Form and Substitute Form W–9." The mailing list was an updated version of the list used to send the "Notice of Pendency of Class Action" which corrected, if possible after Heffler's research, any addresses returned as undeliverable. The mailing list also included all persons or entities who contacted lead counsel after the initiation of litigation.

*11 Additionally, lead counsel had Heffler publish the "Summary Notice of Proposed Class Action Settlement and Settlement Hearing" on October 2, 2008 in USA Today and the PR Newswire. The trustee also included information concerning the Settlement in this litigation on his website www.abfsonline.com. As a result of these efforts, Heffler sent 29,190 copies of this notice to persons identified as class members. I find that these efforts to disseminate notice were the best practicable. *See Zimmer Paper Prods., Inc. v. Berger & Montague*, 758 F.2d 86, 90 (3d Cir.1985), noting that "in the usual situation first-class mail and publication in press fully satisfy the notice requirements of both Fed.R.Civ.P. 23 and the due process clause."

I also find the content of the notice to be adequate under the due process clause and Rule 23. The notice describes the nature and background of this action and defines the class, class claims and the affect on legal rights for responding or not responding. It summarizes the terms of the settlement including information relating to the settlement amount, the release provisions, and the attorneys' fees, expenses and lead plaintiffs' expenses. The notice also described the settlement in the bankruptcy proceedings and states the hope that there will be additional recoveries against other defendants. The notice explains why plaintiffs believe this is a good settlement. The notice also describes the proposed plan of allocation. The notice informed the class members of the time and date of the hearing, and advised them of their right to object to the settlement and appear at the hearing to voice those objections. The notice includes the contact information of the claims administrator. The notice also provided the "Proof of Claim and Release Form and Substitute Form W–9." After reviewing the notice, I conclude that the substance, like the method of dissemination, is sufficient to satisfy the concerns of due process and Rule 23. *See In re Prudential*, 148 F.3d at 328.

The *Girsh* factors favor approving the settlement. The settlement agreement and the proposed plan of allocation will be approved because it is adequate, fair

and reasonable for all class members. Additionally, the notice was adequate.

II. MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS

Federal Rule of Civil Procedure 23(h) provides that "[i]n an action certified as a class action, the court may award reasonable attorneys fees and nontaxable costs authorized by law or by agreement of the parties...." Fed.R.Civ.P. 23(h). Lead counsel requests an award of attorneys' fees in the amount of $4,898,866 which is 30% of the settlement fund less the holdback and costs totaling $16,329,553. Lead plaintiffs request reimbursement of $267,946.73 for litigation costs and $37,868.00 for lead plaintiffs' "expenses." Lead counsel requests interest on the attorneys' fees and litigation costs at the same rate earned by the settlement fund. A.

Attorneys' fees

*12 The Supreme Court explained the basis of counsels' right to move for an award of attorneys' fees from a common fund in *Boeing Co. v.. Van Gemert,* 444 U.S. 472 (1980):

> A litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole. The common-fond doctrine reflects the traditional practice in courts of equity, and it stands as a well-recognized exception to the general principle that requires every litigant to bear his own attorney's fees. The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this incquity by assessing attorney's fees against the cntire fund, thus spreading fees proportionately among those benefitted by the suit.
>
> *Id.* at 478.

"Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process." Fed.R.Civ.P. 23(h), advisory committee's note. In ruling on a motion for award of attorneys' fees, I have two goals. First, I seek to protect the interests of class members by "acting as a fiduciary for the class." *In re Rite Aid Corp. See, Litig.,* 396 F.3d 294, 307 (3d Cir.2005), *citing In re Cendant,* 264 F.3d at 231. My fiduciary role arises from a recognition of the potential economic conflict of interest between class members seeking to maximize recovery and lawyers seeking to maximize fees. *In re Cendant,* 264 F.3d at 254–55. The Court of Appeals has explained that the "divergence in [class members' and class counsel's] financial incentives ... creates the 'danger ... that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment for fees." ' *In re Cendant Corp. PRIDES Litig.,* 243 F.3d 722, 730 (3d Cir.2001), *quoting In re GM Truck,* 55 F.3d at 820. Consequently, "the danger inherent in the relationship among the class, class counsel, and defendants 'generates an especially acute need for close judicial serutiny of fee arrangements' in class action settlements." ' *Id., quoting In re GM Truck,* 55 F .3d at 820.

Second, I seek to protect the puhlic interest and, with it, the integrity of the judicial system. It is important to avoid awarding "windfall fees" and any appearance of having done so for the integrity of the judicial system, legal profession and Rule 23. *Stop and Shop Supermarket Co., et al. v. Smithkline Bcecham Corp.,* 2005 WL 1213926, at *8 (E.D.Pa. May 19, 2005). I must therefore heed the admonition of the Supreme Court in *Trustees v. Greenough,* 105 U.S. 527 (1881), advising that fee awards under the equitable fund doctrine were proper only "if made with moderation and a jealous regard to the rights of those who are interested in the fund." *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 469 (2d Cir.1974), *quoting Trustees v. Grcenough,* 105 U.S. 527, 536 (1881), abrogated ou different grounds by *Goldberger v. Integrated Resources, Inc.,* 204 F.3d 43 (2d Cir.2000).

*13 Keeping these two goals in miud, I "must thoroughly review fee petitions for fairness." *In re Aetna,* 2001 WL 20928, at * 13, citations omitted. Although the ultimate decision as to the amount of attorneys' fees" is within my discretion so long as I employ the

correct standards and procedures and make findings of faet not clearly erroneous, I must clearly set forth my reasoning. *In re AT & T Corp.*, 455 F.3d 160, 163–64 (3d Cir.2006).

"Attorney[s'] fees are typically assessed through [use of] the percentage-of-the-fund method or through the lodestar method." *In re AT & T Corp.*, 455 F.3d at 164. "The percentage-of-recovery method is generally favored in common fund cases because it allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.' " *In re Rite Aid.* 396 F.3d at 300, *quoting In re Prudential,* 148 F.3d at 333. The Court of Appeals has recommended that I cross-check the reasonableness of the result yielded under the percentage-of-recovery method by also applying the lodestar method. *In re AT & T Corp.*, 455 F.3d at 164. However, "[t]he lodestar cross-check, while useful, should not displace [my] primary reliauce on the percentage-of-recovery method." *Id.* I will analyze the reasonableness of the attorneys' fees requested accordingly.

1. *Percentage–of–Recovery method*

The percentage of recovery method first requires calculating "the percentage of the total recovery that the proposal would allocate to attorneys' fees by dividing the amount of the requested fee by the total amount paid out by the defendant; it then inquires whether that percentage is appropriate based on the circumstances of the case." *In re Cendant,* 264 F.3d at 256. The Court of Appeals has directed that I use the following seven factors in determining whether a percentage of recovery fee award is reasonable:

(1) the size of the fund created and the number of persons benefitted;

(2) the presence or absence of substantial objections by members of the class to the settlement terms and/or the fees requested by counsel;

(3) the skill and efficiency of the attorneys involved;

(4) the complexity and duration of the litigation;

(5) the risk of nonpayment;

(6) the amount of time devoted to the case by plaintiffs' counsel; and

(7) the awards in similar cases.

Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir.2000); *see also In re Rite Aid,* 396 F.3d at 301. Although I should "engage in robust assessments of the fee award reasonableness factors when evaluating a fee request," these factors are not to be applied in a formulaic manner. *In re Rite Aid,* 396 F.3d at 301–02.

a. *The size of the fund and number of persons benefitted*

Plaintiffs' counsel have obtained a settlement of $16,767,500 on behalf of the settlement class, which is made up of approximately 29,000 noteholders. As of October 23, 2008, there were 5,372 proof of claim forms. The estimated total damages to all noteholders is over $500 million. Consequently, the settlement fund amounts to approximately 2.5% of total damages to the settlement class. Although the 2.5% recovery is within the range of other settlements in complex class action lawsuits, it is in the lower range of typical recoveries in complex securities class actions. *See In re Cendant,* 264 F.3d at 231, noting that typical recoveries in eomplex securities class actions range from 1.6%–14% of estimated damages; *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *5 (E.D. Pa. June 2, 2004), collecting cases in which courts have approved settlements of 5.35% to 28% of estimated damages in complex antitrust actions. Although class counsel benefitted a large number of people with this settlement, what they will receive is very small compared to their losses. Thus, while this recovery may be comparable with other cases, this factor weighs against the percentage of recovery sought as an award of attorneys' fees in this case because such a recovery would take even more away from a class that is already receiving so little.

b. *Objections*

***14** The notice provided in this case informed class members that counsel sought an award of up to 30% of the settlement fund as attorneys' fees in this case. A small number of objections were received regarding the attorneys' fees request even when compared to the 5,732

proof of claim forms received as of October 23, 2008 instead of the 29,000 potential class members.

However, some objections in a case like this may reflect unfamiliarity with the legal system and absence of individual counsel. *See In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *5 (E.D. Pa. June 2, 2004). However, some of the objections received with respect to attorneys' fees were sent by counsel for individual class members. Additionally, the Court of Appeals has cautioned that in cases involving securities litigation, an assumption that silence constitutes tacit consent "understates potential objectors since many sharcholders have small holdings or diversified portfolios, ... and thus have an insufficient incentive to contest an unpalatable settlement agreement because the cost of contesting exceeds the objector's *pro rata* benefit." *In re GM Truck*, 55 F.3d at 812, *quoting Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1313 n.15 (3d Cir.1995) (citation omitted). Tbus, the limited objections do not weigh in favor of approving the attorneys' fees because many of the class members are unsophisticated, have varying investments and may not have the ability to object if appropriate.

While there are relatively few objections, the substance of and concerns raised in these objections are valid. The objections from David Banach, Robert Favela, John Garba, Dorthy Kleinworth, Jamcs McCarthy, R.W. Moore, Harvey and Jean Singer, Malkait Mannan, and Brook focus on the percentage requested for attorneys' fees of 30% being excessive in comparison to the 2.5% the class members will recover. The objections have merit in arguing that, when so little is available to cover the losses of the class, such a large percentage should not go to attorneys' fees to further decrease the classes' recovery. Class connsel explained to objectors that the settlement should be approved in part because more moncy may be available in other cases and the same is true for attorneys' fees. Thus, this factor does not weigh in favor of approving the reqnested attorneys' fees.

c. *The skill and efficiency of plaintiffs' counsel*

The skill and efficiency of plaintiffs' counsel is "measured by the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel." *In re Ikon*, 194 F.R.D. 166 at 194. citation omitted. Here, plaintiffs' counsel are highly experienced in complex sccurities class action litigation as evideneed by the attorneys' biographics filed with the Court. As discussed above, they have obtained the best possible settlement for the class considering the complexity and difficulties of this case, and the related bankruptcy case. They survived in part a motion to dismiss and a motion for judgment on the pleadings. Defense counsel commented at the hearing that the settlement would not have been possible without class counsel's high quality of advocacy. Accordingly, I find that this factor favors approval of the percentage of recovery requested as a fee in this case.

d. *Complexity and duration of the litigation*

***15** This litigation presented enormously complex legal and factual securities issues including the interplay of bankruptcy, issuing notes without a broker, exchange offers, securitization of subprime mortgages, valuation and accounting issues. Although the parties have been actively litigating this action for more than three years, in the absence of settlement complex legal and factual issues would remain to be decided in this case including motions for summary judgment and other pre-trial motions. As discussed above, it is likely defendants would strongly contest liability and damages. Given the enormous amounts of money at stake and the unlikelihood of recovering a larger award, and the vigorous advocacy of counsel for both parties over the course of this litigation, it can reasonably be expected that the non-prevailing party would file post-trial motions and an appeal. Consequently, it is reasonable to expect that this case would have continued for several more years absent settlement. Moreover, the time dedicated and the number of participants involved in the mediation supports the complexity of this litigation. Accordingly, I find that this factor favors approval of the percentage of recovery requested.

e. *Risk of nonpayment*

This action also presented considerable risk of non-payment. As discussed above, plaintiffs recognize that they faced potentially insurmountable barriers to establishing liability. Lead counsel acknowledges the difficulties of proving that the registration statements contained material misrepresentations and omissions and in dealing with defendants' affirmative defenses.

A risk also existed that even if a larger recovery would be awarded after trial it would not be paid. Defendants' inability to pay more than offered at the settlement is supported by their financial statements. The funds available from the insurance carrier were also at risk of not being available. Defense expenses had already consumed $5 million of the policy at the time of settlement. Additionally, the risk existed that the carrier would deny coverage claiming defendants engaged in willful misconduct.

Moreover, this action was riskier than many other securities class actions because there was no prior government investigation or prior finding of civil or criminal liability based on the alleged securities violations. I therefore find that this factor favors approval of the percentage of recovery requested as a fee in this case.

f. *The amount of time devoted to this case*

Plaintiffs' counsel expended 6,859.75 hours on this action excluding work performed in the pending related action against BDO and work performed in support of the application for attorneys' fees and expenses. Counsel dedicated a significant number of hours to achieving this result and therefore this factor weighs in favor of the percentage of recovery requested as a fee.

g. *Awards in similar cases*

This factor requires me to compare the percentage of recovery requested as a fee in this case against the percentage of recovery awarded as a fee in other common fund cases in which the percentage of recovery method, rather than the lodestar method, was used. *In re Cendant Corp. PRIDES Litig.*, 243 F.3d at 737. Percentages awarded have varied considerably but most fees appear to fall in the range of nineteen to forty-five percent. *In re Ikon*, 194 F.R.D at 194. The median award in class actions is approximately twenty-five percent hut awards of thirty percent are not uncommon in securities class actions. *Id., citing Computron*, 6 F.Supp.2d at 322; *Ratner v. Bennett*, 1996 WL 243645, at *8 (E.D.Pa. May 8, 1996); *In re Greenwich Pharmaceutical Sec. Litig.*, 1995 WL 251293, at *6 (E.D.Pa. Apr. 26, 1995); *In re Novacare*, 1995 WL 605533, at *9. Some courts have used twenty-five percent in cases with multi-million dollar settlements as a "benchmark ... in order to prevent a windfall to counsel." *Erie County Retirees Assoc. v. County of Eric, Pa.*, 192 F.Supp.2d 369, 381 (W.D.Pa.2002).

*16 The awards in cases with settlements of similar size are comparable to the attorneys' fees requested in this case. *See e.g., Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136 (E.D.Pa.2000), approving attorneys' fees equaling approximately thirty-three percent of a $7.3 million settlement fund; *In re Rent–Way Securities Litig.*, 305 F.Supp.2d 491 (W.D.Pa.2003), approving a $25 million settlement and awarding $6.25 million in attorneys' fees which was approximately twenty-five percent of the settlement; *In re Corel Corp. Inc. Sec. Litig.*, 293 F.Supp.2d 484 (E.D.Pa.2003), approving a $7 million settlement and awarding attorneys' fees of $2.3 million; *In re Computron Software, Inc.*, 6 F.Supp.2d 313 (D.N.J.1998), approving attorneys' fees equaling approximately twenty-five percent of a $15 million settlement; *Lazy Oil Co. v. Wotco Corp.*, 95 F.Supp.2d 290 (W.D.Pa.1997), awarding attorneys' fees equaling approximately twenty-five percent of a $18.9 million settlement.

The requested percentage of 30% is within the varying range. This factor weighs in favor of approving the percentage of recovery requested as a fee. However, "[t]hese varying ranges of attorneys' fees confirm that a district court may not rely on a formulaic application of the appropriate range in awarding fees but must consider the relevant circumstances of the particular case." *In re Cendant Corp. PRIDES Litigation*, 243 F.3d at 736.

h. *Conclusion of Gunter Factors*

After reviewing the *Gunter* factors, I conclude that the size of the fund and the objections do not support the attorneys' fees requested in this case. I further find

that these factors are not outweighed by the remaining *Gunter* factors, the skill and efficiency of counsel, the complexity and duration of the litigation, the amount of time put into the case, awards in similar cases and the risk of non-recovery, especially considering the circumstances of this case and that a lower percentage award would also be within the range of awards in similar cases. Consequently, I conclude that the *Gunter* factors do not support plaintiffs' request for an award of 30% of the settlement fund as attorneys' fees in this case.

2. *Lodestar cross-check*

The purpose of the lodestar cross-check echoes the second goal of the Court's analysis of motions for attorneys' fees: the avoidance of "windfall fees." *See Grinnell,* 495 F.2d at 469. The lodestar cross-check is performed to "ensure that the pereentage approach does not lead to a fee that represents an extraordinary lodestar multiple." *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 188 (3d Cir.2005). "The goal of this practice is to ensure that the proposed fee award does not result in counsel being paid a rate vastly in excess of what any lawyer could reasonably charge per hour, thus avoiding a 'windfall' to lead counsel." *In re Cendant,* 264 F.3d at 285.

"The lodestar method multiplies the number of hours class counsel worked on a case by a reasonable hourly billing rate for such services, based on the given geographical area, the nature of the services provided, and the experience of the attorneys." *In re Rite Aid Corp.,* 396 F.3d at 305. "The multiplier is a device that attempts to account for the contingent nature or risk involved in a particular case and the quality of the attorneys' work," *id.* at 305–06, and "to reward an extraordinary result or to encourage counsel to undertake socially useful litigation," *In re Aetna,* 2001 WL 20928, at *15. To perform the cross-check, district courts must divide the proposed fee award by the lodestar calculation, which will yield a lodestar multiplier. *In re AT & T Corp.,* 455 F.3d at 164. This calculation "need entail neither mathematieal precision nor bean-counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records. Furthermore, the resulting multiplier need not fall within any pre-defined range, provided that the District Court's analysis justifies the award." *In re Rite Aid,* 396 F.3d at 306–07, footnotes and citations omitted. It is appropriate for the court to consider the multipliers utilized in comparable cases. *Id.* at 307 n.17.

*17 To caleulate the lodestar amount, I reviewed the billing summaries provided by plaintiffs' counsel. After adding together the hours of work performed by plaintiffs' counsel and multiplying this total by the average hourly rate charged, this Court calculated a lodestar of $2,876,810.00 for all attorneys participating in the case.

To compute the lodestar multiplier, I must divide the requested attorneys' fees award by the lodestar amount. An award of the requested fees of $4,898,866 would result in a lodestar multiplier of 1.7. The Court has recognized that multipliers "ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied." *In re Cendant Corp. PRIDES Litig.,* 243 F.3d at 742, *quoting In re Prudential,* 148 F.3d at 341. Thus, this lodestar multiplier falls within the range approved for reasonable attorneys' fees awards.

However, after thorough review of the *Gunter* factors in this case, I conclude the percentage of the common fund requested as a fee is not fair and reasonable when the class members stand to recover only 2.5%. As I have determined that I will not approve the 30% fee award sought by lead counsel, I must reconsider the request for fees under the percentage-of-recovery metbod. *In re Rite Aid,* 396 F.3d at 306.

I find that lead counsel obtained the best result possible in a complex and risky case. However, the size of the fund is insubstantial compared to the class' damages. The objections to the attorneys' fees addressed this issue. Considering this and recognizing the time, skill and experience brought by counsel to the litigation, I find that 25% of the settlement fund results in a fair and reasonable award of attorneys' fees in this action of $4,082,388 .25. This amount is $816,477.75 above the lodestar and creates a lodestar multiplier of 1.42. The reduction of the fee from 30% to 25% is strongly influ-

enced by the size of the settlement fund compared to the significant losses the class members have suffered. This reduction also takes into consideration that this amount is still above the lodestar amount and therefore an incentive still exists for counsel to undertake such complex and risky litigation. A 25% fee compensates counsel for their time and effort, rewards them for the result achieved, and provides adequate incentive to pursue similar cases.

Having analyzed the *Gunter* factors and the lodestar cross-check in this case, and for the reasons stated above, I will award attorneys' fees in the amount of $4,082,388.25.

III. *Reimbursement of Attorneys' Costs*

Lead counsel seeks reimbursement for litigation expenses of $267,946.73 plus interest at the same rate as earned by the settlement fund. The notice provided that lead counsel would seek reimbursement of not more than $325,000 in litigation expenses. A few objections, mainly an objection by Harvey and Jean Singer, stated that these expenses were excessive and unreasonable in relations to the proportion of the settlement available to the noteholders.

***18** "Attorneys who create a eommon fund for the benefit of a class are entitled to reimbursement of reasonable litigation expenses from the fund." *In re Aetna, Inc. Sec. Litig.*, 2001 WL 20928, at *13 (E.D.Pa. Jan. 4, 2001), *citing In re Ikon Office Solutions Inc. Sec. Litig.*, 194 F.R.D. 166, 192 (E.D.Pa.2000). Courts in this circuit have awarded lead eounsel costs for filing fees, expert consulting, telephone and fax charges, copying charges, computer assisted research, travel expenses and mailing charges where affidavits and billing records have been provided that demonstrate the reasonableness of the requested eosts. *See e.g., Perry v. FleetBoston Finaneial Corp.*, 229 F.R.D. 105, 124 (E.D.Pa.2005), awarding $4,377.02 for these costs after reviewing "submitted affidavits and detailed billing records"; *In re SmithKline*, 751 F.Supp. at 534, awarding $202,460 for aggregate eosts based on the "law firms' supporting records and affidavits." As other courts have noted, " '[t]here is no doubt that an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of ... *reasonable* litigation expenses from that fund." ' *Ikon*, 194 F.R.D. at 192, *quoting Lachance v. Harrington*, 965 F.Supp. 630, 651 (E.D.Pa.1997), emphasis in original.

In class counsels' declarations, counsel from each law firm testified that the following unreimbursed out-of-pocket expenses are an accurate record of the expenses incurred as reflected in expense vouchers and check records: delivery and freight, class notice costs, duplication costs, online legal research, travel, meals, experts, telephone, fax services, transcripts, postage, messenger, mediator, filing and court fees, service fees, transportation and press releases. Since these eategories are considered expenses that are appropriate to reimburse in this circuit and the expenses appear to be reasonable, I see no reason to disallow them. I find that the requested litigation expenses are reasonable.

IV. *Reimbursement of "Expenses" to Lead Plaintiffs*

Lead plaintiffs ask that I award $37,868.00 to lead plaintiffs as reimbursement for costs and expenses incurred from their service as a class representative for this case. Specifically, in declarations accompanying their second submissions,[FN8] lead plaintiffs request the following amounts in reimbursement: John Malack $4,794.00, Michael Rosati $6,600.00, Virgil Magnon $10,170.00, Henry Munster $352.00, and S.S. Rajaram and Hayward Pediatrics, Inc. $3,200.00. The settlement notice provided that a fee and expense award, which would not exceed $50,000, would be sought. The objections filed generally note that the awards are excessive and unreasonable in relation to the proportion of the settlement amount for the noteholders or state an objection to the expenses without reason.

FN8. In the declarations accompanying their second motion for lead plaintiffs' expenses, lead plaintiff Henry Munster amended his request from 19 hours to 22 hours and his request from $304.00 to $352.00 and lead plaintiff S.S. Rajaram and Hayward Pediatries, Inc. amended their request from 80 hours at $200.00/hour to 16 hours.

The Private Securities Litigation Reform Act

(PSLRA) states that class representatives shall "not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery, except as ordered or approved by the court in accordance with paragraph (4)." 15 U.S.C. § 78u–4(a)(2)(A)(vi). Paragraph (4) provides that:

> ***19** [t]he share of any final judgment or of any settlement that is awarded to a representative party serving on behalf of a class shall be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class. Nothing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class.

15 U.S.C. § 78u–4(a)(4).

Lead plaintiffs state that they incurred these costs by performing duties related to this action including partieipating in conference calls with class counsel and other lead plaintiffs, reviewing documents and letters sent by class counsel, and preparing for and participating in depositions. The following hours and rates were submitted by the Lead Plaintiffs: John Malack—94 hours at $51.00 per hour; Michael Rosati—132 hours at $50.00 per hour; Virgil Magnon—226 hours at $45.00 per hour; Henry Munster—22 hours at $16.00 per hour; and S.S. Rajaram and Hayward Pediatries, Inc.—16 hours at $200.00 per hour.

In my view, not all of these submissions qualify as costs and expenses. As noted in *Smith v. Dominion Bridge Corp.*, WL 1101272, at *12 (E. D.Pa.2007), costs and expenses must be justified with evidence of actual expenses incurred, lost wages, lost vacation time or lost business opportunities. Here, Muster and Rajaram have demonstrated and justified their lost business opportunities from time spent working as a elass representative in their declarations; however, lead plaintiffs Malack, Rosati and Magnon bave not. As they are retired and so have no lost business opportunities, lost wages or lost vacation time and they have submitted no expenses incurred, they have failed to demonstrate that they have incurred any "reasonable costs and expenses" that can be awarded under PSLRA. While their time certainly has value, the PSLRA does not permit reimbursement corresponding to what they earned at their former positions. Though lead counsel correctly notes that many judges, including myself, have awarded compensation that is not justified under the PSLRA, *Dominion Bridge* correctly states the law. Lead counsel also notes several eases in which lead plaintiffs received incentive awards, but they are not apposite here. Incentive awards are permitted for lead plaintiffs in RICO and civil rights eases where plaintiffs justifiably fear retribution or are in danger because of their willingness to step forward. *See e.g. Denney v. Jenkens & Gilchrist*, 230 F.R.D. 317, 355 (S.D.N.Y.2005). There is no sueh danger associated with serving as the lead plaintiff in securities litigation.

I will approve the following costs and expenses for lead plaintiffs: Henry Munster $352.00 and S.S. Rajaram and Hayward Pediatrics, Inc. $3,200. The total eosts and expenses for lead plaintiffs is $3,552.00.

An appropriate Order follows.

ORDER

***20** All capitalized terms herein have the meanings set forth in the Settlement Agreement.

On November 3, 2008, following Notice to all parties and Notice to the Class Members as described herein, a Final Hearing was held before this Court to consider: (1) Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation (the "Settlement Approval Motion"); (2) the motion for an Award of Fees and Costs to Plaintiffs' counsel ("Fees and Costs Application"); (3) the motion for the payment of Plaintiffs' Expense Awards: ("Plaintiffs' Application"); and (4) Objections filed by Class Members, and Plaintiffs' Reply thereto, if any.

1. Pursuant to those Motions, the Court must:

a. determine whether the terms and conditions of the Settlement Agreement dated September 12, 2008 (the "Settlement Agreement") are fair, reasonable and

adequate for the settlement of all claims asserted by Lead Plaintiffs and the Class in the Amended Complaint in this Action, including the release of the Released Parties, and should be approved;

b. determine whether judgment should be entered dismissing the Amended Complaint on the merits and with prejudice in favor of the Noteholder Defendants and as against all persons or entities who are Members of the Class herein who have not requested exclusion therefrom;

c. determine whether to approve the Plan of Allocation as a fair and reasonable method to alloeate the Net Settlement Fund among the Class Members;

d. determine whether and in what amount to approve the Fees and Costs Application;

e. determine whether and in what amount to approve the application for Plaintiffs' Expense Awards; and

f. determine whether the Class Members' Objections, if any, have merit.

2. The Court has considered all matters submitted to it at the hearing and otherwise. It appears that a Notice of the hearing substantially in the form approved by the Court was mailed to all persons or entities reasonably identifiable, who suffered damage as a result of their purchase of Notes from American Business Financial Services, Inc. ("American Business") during the Class Period, and that a Summary Notice of the hearing substantially in the form approved by the Court was published in *USA Today* pursuant to the specifications of the Court and was also disseminated over the *PR Newswire*. The Court has considered and determined the fairness and reasonableness of the Settlement, the Plan of Allocation, the Fees and Costs Application, and the Plaintiffs' Application, and has considered all Objections of Class Members.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

3. The Court has jurisdiction over the subject matter of the Action, the Noteholder Plaintiffs, all Class Members, and the Noteholder Defendants.

4. The Court has previously certified a Class of all persons who suffered damage as a result of their purchase of Notes from American Business during the Class Period pursuant to Registration Statements, including prospectuses included as exhibits and all supplements thereto, that became effective on or about October 16, 2001, October 3, 2002 and November 7, 2003, respectively. Excluded from the Class are Noteholder Defendants, members of the immediate family of each of the Noteholder Defendants, any entity in which a Noteholder Defendant has a controlling interest and the heirs of any excluded person. Also excluded from the Class are all persons whose names appear on the attached Opt–Out List, including those who previously requested exclusion from the Class, and did not withdraw that request.

*21 5. Pursuant to Fed.R.Civ.P. 23, Noteholder Plaintiffs, John A. Malack, Michael R. Rosati, Virgil Magnon, S.S. Rajaram, M.D., Hayward Pediatries, Inc. have been certified as Lead Plaintiffs, and Henry Munster as a Class Representative.

6. Notice of the proposed Settlement of class action and related matters, including Notice of the November 3, 2008 Final Hearing, was mailed to all Class Members who could be identified with reasonable effort. The form and method of notifying the Class of the terms and conditions of the proposed Settlement met the requirements of Rule 23 of the Federal Rules of Civil Procedure, the Securities Exehange Act of 1933, and the Securities Exchange Act of 1934, as amended by the Private Securities Litigation Reform Act of 1995, due process and any other applicable law, constituted the best notice practicable under the circumstances, and constituted due and sufficient notice to all persons and entities entitled thereto.

7. The Settlement is approved as fair, reasonable and adequate, and the Parties are directed to consummate the Settlement in accordance with the terms and provisions of the Settlement Agreement. Any Objections of Class Members to the Settlement are overruled.

8. The Amended Complaint is hereby dismissed with prejudice and without costs, except as provided in the Settlement Agreement.

9. On the Effective Date, the Noteholder Plaintiffs and each Class Member, on behalf of themselves, their successors and assigns, and any other Person claiming (now or in the future) through or on behalf of them, and regardless of whether any such Noteholder Plaintiff or Class Member ever seeks or obtains by any means, including, without limitation, by submitting a Proof of Claim, any distribution from the Net Settlement Fund, (i) fully, finally and forever release, relinquish, remise and discharge all claims, including, without limitation, all Released Claims, against the Released Parties, (ii) by operation of the Final Order, fully, finally, and forever release, relinquish, remise and discharge the Released Parties from all claims, including, without limitation, Released Claims, arising out of or in connection with the institution, prosecution, or assertion of the Action, (iii) covenant not to threaten, demand, or sue the Released Parties or any of them regarding any action or proceeding of any nature with respect to the Released Claims, and (iv) are forever enjoined and barred from asserting the Released Claims, against the Released Parties or any of them in any action or proceeding of any nature, regardless of whether any such Noteholder Plaintiffs and/or each Class Member ever seeks or obtains any distribution from the Net Settlement Fund, whether or not such Noteholder Plaintiffs and/or each Class Member executed and delivered a Proof of Claim, whether or not such Noteholder Plaintiffs and/or each Class Member have filed an objection to the Settlement or to their claim being rejected as provided in this Agreement, the proposed Plan of Allocation, or any application by Plaintiffs' Counsel for an award of Attorneys' Fees and Costs and whether or not the claims of such Noteholder Plaintiffs or Class Members have been approved or allowed or such objection has been overruled by the Court.

*22 10. In accordance with the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 77k(f)(2)(A) and 15 U.S.C. § 78u–4(f)(7)(A)–(B) and other statutory or common law rights, the Released Parties, and each of them, are hereby fully, finally and forever released and discharged from all claims for contribution, indemnity or other federal or state law causes of action that have been brought or may be brought by any Person based upon, relating to, arising out of, or in connection with the matters alleged in the Action. Any final verdict or judgment obtained by or on behalf of any Noteholder Plaintiff or Class Member against any Person other than a Released Party relating to the Released Claims is to be reduced by the greater of (a) an amount that corresponds to the percentage of responsibility of the Released Parties for the loss to any Noteholder Plaintiff or Class Member or (b) the amount paid by or on behalf of the Released Parties to the Noteholder Plaintiffs and Class Members in connection with the Settlement.

11. The Noteholder Plaintiffs and each Class Member, on behalf of themselves, their successors and assigns, and any other Person claiming (now or in the future) through or on behalf of them, and regardless of whether any such Noteholder Plaintiff or Class Member ever seeks or obtains by any means, including, without limitation, by submitting a Proof of Claim, any distribution from the Settlement Amount, shall not after the Effective Date seek to institute, maintain, prosecute or continue to maintain or prosecute any suit, action or other proceeding, or collect from or proceed against the Released Parties or any of them, based on the Released Claims.

12. The Noteholder Defendants remise, release and discharge the Noteholder Plaintiffs and the Class Members and each of their estates, heirs, personal representatives, attorneys, accountants and insurers and the Class (the "Noteholder Releasees") of and from any and all actions, causes of action, claims, suits, demands, rights, damages, costs, losses, judgments, debts, obligations and liabilities, whether known or unknown, contingent, liquidated or unliquidated, which the Noteholder Defendants have or may have against the Noteholder Releasees arising out of, based upon or relating to the Noteholder Defendants' transactions or dealings with and/or relationships to American Business, including but not limited to any such actions, causes of action,

claims, suits, demands, rights, damages, costs, losses, judgments, debts, obligations or liabilities arising out of, based upon, or relating to the Action or the BDO Action.

13. With respect to any and all Released Claims, the Settling Parties stipulate and agree that, upon the Effective Date, they shall be deemed to have, and by operation of the Final Order shall have, expressly waived the provisions, rights and benefits of any statute, rule or provision which prohibits the release of Unknown Claims, including California Civil Code § 1542, which provides:

> *23 A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

A Settling Party may hereafter discover facts in addition to or different from those which he, she, it or they now know or believe to be true with respect to the subject matter of the Released Claims, but the Settling Parties, upon the Effective Date, shall be deemed to have, and by operation of the Final Order shall have, fully, finally, and forever settled and released any and all Released Claims, known or unknown, suspected or unsuspected, contingent or non-contingent, whether or not concealed or hidden, which now exist, or heretofore have existed, upon any theory of law or equity now existing or coming into existence in the future, including, but not limited to, conduct which is alleged to be negligent, intentional, with or without malice, or a breach of any duty, law or rule, without regard to the subsequent discovery or existence of such different or additional facts. The Settling Parties shall be deemed by operation of the Final Order to have acknowledged, that the foregoing waiver was separately bargained for and a key element of the settlement of which this release is a part.

14. Noteholder Plaintiffs and the Class are releasing only the Released Parties and no one else. The Noteholder Plaintiffs, on behalf of the Class, reserve and preserve in full all of their claims and actions against all other individuals and entities, including but not limited to the Noteholder Plaintiffs' claims in the BDO Action. The Noteholder Plaintiffs reserve the option and right to make claims against any and every other person or entity other than the Released Parties, including but not limited to BDO, and to assert that said other persons or entities and not the Noteholder Defendants are liable to the Noteholder Plaintiffs and the Class for the events, matters and damages alleged by the Action and the BDO Action and otherwise alleged.

15. Neither this Order and Final Judgment, the Settlement Agreement, nor any of its terms and provisions, or any of the negotiations or proceedings connected with it, nor any of the documents or statements referred to therein:

(a) is or may he deemed to be or may be used as an admission of, or evidence of, the validity of any Released Claim, or of any wrongdoing or liability of the Parties;

(b) is or may be deemed to be or may be used as an admission of, or evidence of, any fault or omission of the Parties in any civil, criminal or administrative proceeding in any court, administrative agency or other tribunal;

(c) shall constitute an adjudication or finding on the merits as to the claims of any Party and shall not be deemed to be, intended to be or construed as an admission of liability, in any way on the part of any Party or any evidence of the truth of any fact alleged or the validity of any claims that have been or could be asserted in the Action. All Parties expressly deny any liability for any and all elaims of any nature whatsoever, nor shall anything herein contained constitute an acknowledgment of fact, allegation or claim that has been or could have been made, nor shall any third party derive any benefit whatsoever from the statements made within this Agreement; nor

*24 (d) shall be construed against Noteholder Defendants as an admission or eonecssion that the consideration to be given hereunder represents the amount which could be or would have been recovered after trial.

The Noteholder Defendants may file the Agreement and/or the Final Order in any action that may be brought against them in order to support a defense or counter claim based on principles of res judicata, collateral estoppel, release, good faith settlement, judgment bar or reduction or any other theory of claim prcclusion or issue preclusion or similar defense or counterclaim.

16. The Plan of Allocation is approved as fair and reasonable, and Lead Counsel and the Claims Administrator are direeted to administer the Settlement in aecordance with its terms and provisions. Any Objections to the Plan of Alloeation filed by Class Members are overruled.

17. Plaintiffs' counsel are hereby awarded 25% of the Payable Amount, less $267,946.73 (or $16,329,554), in fees, which the Court finds to be fair and reasonable, and $267,946.73 in reimbursement of expenses, which fees and expenses shall be paid to plaintiffs' Lead Counsel from the Paid Amount, with interest from the date of deposit of the Paid Amount in Citizens Bank, to the date of payment at the same rate that the Paid Amount earns. These amounts are to be paid pursuant to the procedure set forth in the Settlement Agreement. The award of attorneys' fees shall be allocated among Plaintiffs' Counsel in a fashion which, in the opinion and sole discretion of Plaintiffs' Lead Counsel, fairly compensates Plaintiffs' Counsel for their respective contributions to the proseention of the Action.

18. Noteholder Plaintiffs are hereby awarded reasonable costs and expenses, pursuant to 15 U.S.C. 77z(a)(4) as follows: Henry Munster is awarded $352.00; and S.S. Rajaram M.D., Hayward Pediatries Inc. is awarded $3,200. Such amounts shall be paid from the Paid Amount.

19. The Court finds that all parties and their counsel have complied with each requirement of Rule 11 of the Federal Rules of Civil Procedure as to all proceedings herein.

20. Exclnsive jurisdiction is hereby retained over the administration, interpretation, effectuation or enforcement of the Stipulation and this Order and Final Judgment, and including the Fee Petition or any other application for fees and expenses incurred in connection with administering and distributing the settlement proceeds to the Class Members, and including any individual objections by Claimants to the rejection of their claim or to the Allocation of the Net Settlement Fund.

21. Without further order of the Court, the parties may agree to reasonable extensions of time to carry out any of the provisions of the Stipulation.

22. There is no just reason for delay in the entry of this Order and Final Judgment and immediate entry by the Clerk of the Court is expressly directed pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

REQUESTS FOR EXCLUSION
RECEIVED THROUGH OCTOBER 27, 2008

REFERENCE NUMBER & NAME AND ADDRESS	POSTMARKED & RECEIVED	PRINCIPAL AMOUNT	PURCHASE DATE	INFORMATION GIVEN BY REQUESTOR
# 1	05/07/08	$15,000.00		
JOSEPH HEPINGER	05/13/08			
MARGURITE SHINSKY				
544 E 200 ST APT 1				

REAR EUCLID, OH 44119				
# 2 FRANK W GULLA 1 ADLER CIRCLE LUMBERTON, NJ 08048	05/08/08 05/13/08	$20,000.00 $20,000.00 $20,151.39 $20,000.00	08/06/02 12/12/02 06/28/04 10/05/04	
# 3 MARY KLEIST 2530 BUCKELEW DRIVE FALLS CHURCH, VA 22046	05/08/08 05/13/08	$ 1,000.00	12/12/03	
# 4 RICHARD C ZANE 3635 GENESEE PLACE PHILADELPHIA, PA 19154	05/10/08 05/13/08	NO PRINCIPAL DETAIL GIVEN BY REQUESTOR		
# 5 JANET A HARRISON 200 WARDEL ROAD WILMINGTON, DE 19804	05/10/08 05/13/08	$52,000.00		PURHASES BETWEEN JAN. 18, 2002 AND JAN, 20, 2005
# 6 EUGENE D MON-TRONE 701 HIGHLAND AV-ENUE CLARKS GREEN, PA 18411	05/10/08 05/13/08	$ 1,003.02 $ 1,033.37	06/11/04 01/20/05	
# 7 ROBERT O MAR-STON 3502 MEMORIAL DRIVE LOMAR, CO 81052	05/10/08 05/13/08	$ 1,000.00	02/20/05	

# 8 DONALD A DEVINE DORORTHY V DEVINE 1202 DEXTER ST BLOOMFIELD, CO 80020	05/10/08 05/13/08	$ 1,000.00	04/15/04
# 9 ROBERT J SHAFFER 200 W 39TH ST READING, PA 19606	05/10/08 05/13/08	NO PRINCIPAL DETAIL GIVEN BY REQUESTOR	PURCHASE DATE 12/12/2002
# 10 STANLEY TRYZBIAK 65 SOLANDRA DR ORLANDO, FL 32807	05/10/08 05/13/08	$11,000.00	
# 11 JEANNE PALEN 3418 BERESFORD AVENUE BELMONT, CA 94002	05/10/08 05/13/08	$10,000.00 $10,000.00	05/13/02 03/01/04
# 12 DOUGLAS E HELM EVELYN HELM 239 BETTY CIRCLE REEDS VILLE, PA 17084	05/09/08 05/13/08	$29,500.00	05/29/03
# 13 SUSAN PINA 2720 14TH CT PALM HARBOR, FL 34684	05/08/06 05/13/08	$25,000.00 $15,000.00	10/31/03 07/20/04
# 14 ISENBERG FAMILY TRUST DTA RICHARD & AN-	05/08/08 05/13/08	$ 9,000.00 $10,000.00	06/13/02 04/16/03

GELINE ISENBERG TTEE 916 TOWNSHIP LINE RD PLYMOUTH MEETING, PA 19462			
# 15	05/08/08	NO PRINCIPAL DETAIL	
CHARLES B KALEMJIAN 83 GLENDALE ROAD EXTON, PA 19341	05/13/08	GIVEN BY REQUESTOR	
# 16	05/13/08	$10,000.00	12/27/02
PAUL DIMMICK MARGARETA DIMMICK 618 FOUNTAIN STREET PHILADELPHIA, PA 19128	05/14/08		
# 17	05/12/08	$ 2,000.00	01/20/04
JEAN M MARASCO 388 NORTH BURLEY RD ROCHESTER, N.Y. 14612	05/14/08	$ 2,210.92 $ 2,000.00 $ 2,000.00	11/28/04 09/13/04 10/18/02
# 18	05/12/08	$90,000.00	
JAMES D DRISCOLL 724 CHESTNUT LANE YARDLEY, PA 19067	05/14/08		
# 19	05/12/08	$ 2,151.96	03/18/02
BLANCHE A AANERUD 10052 N. 42 DRIVE PHOENIX, AZ 85051	05/15/08	$ 1,000.00 $ 1,000.00 $ 1,000.00	04/11/03 11/19/03 02/20/04
# 20	05/12/08	$ 1,151.96	04/22/02
SHIRLEY M JOHN-	05/15/08		

SON 9753 PINE SHORES DR PINE CITY, MN 55063				
# 21 SONNY LEE 27613 GREENLEAF DRIVE CANYON COUNY, CA 91351	05/12/08 05/15/08	$ 3,000.00	01/03/03	ALSO INVESTED $2000.00 PRIOR TO CLASS PERIOD
# 22 RICHARD SLATER PHYLLIS SLATER 7426 REDDING RD HOUSTON, TX 77036	05/12/08 05/15/08	$14,416.20		
# 23 BERNICE L KA-PLAN 16516 HIAWATHA STREET GRANADA HILLS, CA 91344	05/12/08 05/15/08	$ 7,500.00 $ 7,500.00 $ 5,000.00	06/02/03 07/01/04 10/24/01	
# 24 LAWRENCE P SKUMMER PO BOX 1028 ARLINGTON, VA 22211	05/13/08 05/15/08	$15,272.47	02/08/03	
# 25 RUTH G WEISS-MANN 1608 B KILLARNEY CT OCALA, FL 34472	05/12/08 05/15/08	$ 2,714.97 $ 3,000.00 $ 2,000.00 $ 2,714.97	08/06/02 12/24/02 04/22/04 08/06/04	
# 26 PHYLLIS SLATER RICHARD SLATER	05/12/08 05/15/08	$ 6,583.79		

7426 REDDING RD HOUSTON, TX 77036				
# 27	05/13/08	$ 6,423.00	06/16/04	
NORBERT A MROCZENSKI	05/19/08			
2404 SANDPIPER AVE	- -			
WAUSAU, WI 54401				
# 28	05/16/08	NO PRINCIPAL DETAIL		DOCUMENTATION IS
KAREN A SKELTON	05/19/08	GIVEN BY REQUESTOR		NO LONGER
JESSE F SKELTON (DECEASED)				AVAILABLE
9320 LANGWOOD DRIVE				
RALEIGH, NC 27617				
# 29	05/15/08	$10,000.00	05/29/02	
HARRY D BUCK-NER	05/19/08	$10,000.00	02/13/04	
CAROLYN S BUCK-NER		$ 5,000.00	04/30/04	
325 E CHURCH AV-ENUE, APT 215				
TELFORD, PA 18969				
# 30	05/16/08	$ 1,003.02	09/20/04	
HANSEN LIYING TRUST DTD 9/8/04	05/20/08	$ 3,296.14	10/21/04	
ANN M. HANSEN & STEPHEN G. HANSEN		$ 2,221.12	10/22/04	
TTEES				
7717 WEST 24TH STREET				
ST LOUIS PARK, MN 55426				
# 31	05/17/08	$ 2,000.00	05/27/04	
JOHN LESLIE	05/20/08	$ 2,000.00	10/25/04	
FLORENCE LESLIE				
1712 WILLOW CIR				

DR CREST HILL, IL 60403				
# 32 ROBERT W HOHL EDNA LOIS HOHL 146 BLUEBELL COURT NEW HOLLAND, PA 17557	05/19/08 05/21/08	$ 3,000.00		$3000.00 FROM JAN 18, 2002 THROUGH JAN 20, 2005
# 33 CAROL OZLANSKI 146 N. LOCUST ST MT CARMEL, PA 17851	05/21/08 05/22/08	150,000.00 132,000.00	01/24/03 03/31/03	
# 34 LUIS E NUNEZ 960 SUSQUEHANNA RD RYDAL, PA 19046	05/21/08 05/22/08	NO PRINCIPAL DETAIL GIVEN BY REQUESTOR		PURCHASED THREE (3) NOTES: 01/21/03, 05/21/03 & 08/14/04
# 35 FLORENCE ROCHE 8318 JEANES ST PHILADELPHIA, PA 19111	05/21/08 05/22/08	NO PRINCIPAL DETAIL GIVEN BY REQUESTOR		PURCHASED NOTE ON 03/16/03
# 36 BRUNO P TRACY DOROTHY A. TRACY 1356 ROMANE DR. SAGAMORE HILLS, OH 44067	05/21/08 05/23/08	NO PRINCIPAL DETAIL GIVEN BY REQUESTOR		NO LONGER HAVE ABFS NOTES, NOT ABLE TO PROVIDE NUMBERS
# 37 AUDREY T FREE-MAN 115 VALLEY	05/21/08 05/23/08	$ 5,000.00 $ 5,000.00 $ 5,000.00	01/03/03 06/05/02 01/11/04	

GREENE CIRCLE WYOMISSING, PA 19610		$ 5,000.00	10/31/02	
		$ 5,000.00	05/30/03	
		$ 2,000.00	02/09/04	
		$ 1,000.00	02/26/04	
		$ 5,000.00	01/28/04	
# 38	05/21/08	$ 1,000.00	07/13/02	
EWELL D ISAACS	05/23/08	$ 1,000.00	07/13/02	
PO BOC 9813		$ 1,000.00	04/15/02	
NORFOLK, VA 23505		$ 1,000.00	05/13/02	
		$ 1,000.00	02/27/03	
		$ 1,000.00	01/27/03	
# 39	05/22/08	NO PRINCIPAL DETAIL		HAS 3 ABFS NOTES
LUIS E NUNEZ	05/23/08	GIVEN BY REQUESTOR		PURCHASED
960 SUSQUEHANNA RD				
RYDEL, PA 19046				
# 40	05/23/08	NO PRINCIPAL DETAIL		HAS NO KNOW-LEDGE
TIMOTHY J MAL-LOY (DECEASED)	05/28/08	GIVEN BY REQUESTOR		OR PAPER WORK
C/O JANE MALLOY (WIDOW)				FOR ABFS
327 FIDLER RD				
DENNISVILLE, NJ 08214				
# 41	05/24/08	NO PRINCIPAL DETAIL		
THERESA K POLEY	05/29/08	GIVEN BY REQUESTOR		
1174 QUEEN LN				
APT 1				
WEST CHESTER, PA 19382				
# 42	05/24/08	$20,000.00	08/01/04	
ANDERSON FAM-ILY TRUST, DTD 12/17/90	05/29/08	$10,000.00	01/13/04	

JOSEPHINE M. ANDERSON TTEE 1615 LEYCROSS DR LA CANADA, CA 91011		$10,000.00	05/01/03	
# 43 JOY WALTER-SCHILD 50 KIMBALL RIDGE COURT CATONSVILLE, MD 21228	05/23/08 05/29/08	$ 2,000.00 $ 1,050.72	09/03/02 12/31/03	
# 44 DAVID ULSTROM 200 SO. PARK ST APT 206 MORA, MN 55051	05/22/08 05/29/08	$ 7,381.05	04/04/04	
# 45 ESTHER ENGLE 240 WILLIAMSBURG OR APT 3 THIENSVILLE, WI 53092	05/27/08 05/30/08	$ 1,000.00	02/02/03	DOES NOT REMEMBER THE EXACT DATE
# 46 EDWARD MCMANUS MARY MCMANUS 2806 NORWOOD HILLS DR KATY, TX 77450	05/23/08 05/30/08	NO PRINCIPAL DETAIL GIVEN BY REQUESTOR		
# 47 KRISTIAN SCHUETZ KAREN SCHUETZ 1822 E. WAVERLY DRIVE ARLINGTON HEIGHTS, IL 60004	06/02/08 06/02/08	NO PRINCIPAL DETAIL GIVEN BY REQUESTOR		

# 48 MARY GEDARO 67 WINDING WAY PORTLAND, ME 04102	05/30/08 06/02/08	$ 2,000.00				

REQUESTS FOR EXCLUSION
RECEIVED THROUGH OCTOBER 27, 2008

REFERENCE NUMBER & NAME AND ADDRESS	POST-MARKED & RECEIVED	PRINCIPAL AMOUNT	PURCHASE DATE	PRINCIPAL AMOUNT	PURCHASE DATE	INFORMATION GIVEN BY REQUESTOR
# 49	05/30/08	$ 2,191.52	02/10/04	$ 4,000.00	06/28/03	
EDMUND A RELLERGERT	06/02/08	$ 2,000.00	11/24/03	$ 3,000.00	01/22/04	
ELIZABETH J. RELLERGERT		$ 2,000.00	09/23/03	$ 5,000.00	06/26/04	
3713 PRIMM STREET		$ 3,000.00	07/09/03	$ 2,000.00	04/14/02	
ST LOUIS, MO 63123		$ 2,000.00	10/28/03	$ 3,000.00	12/06/02	
		$ 1,000.00	01/26/04	$ 3,185.49	01/17/04	
		$ 1,000.00	03/01/04	$ 4,000.00	04/17/03	
		$ 5,000.00	07/20/03	$ 3,000.00	10/28/03	
		$ 2,530.73	06/15/03	$ 4,000.00	12/12/03	
		$ 3,611.36	01/09/04	$ 2,000.00	04/27/04	
		$ 3,056.48	07/12/03			
# 50	05/29/08	$15,000.00	10/27/03			
ALEXANDER F FRIDKIS	06/02/08	$10,000.00	04/26/04			
LOUISE FRIDKIS		$ 5,000.00	10/01/04			
96 STERLING ST						
BEACON, N.Y. 12508						
# 51	05/30/08	$ 1,687.28	03/03/99			

AMANDA FIGU 06/02/08
64-48 BOOTH STREET
APT 1-C
REGO PARK
QUEENS, N.Y. 11374

REQUESTS FOR EXCLUSION
RECEIVED THROUGH OCTOBER 27, 2008

REFERENCE NUMBER & NAME AND ADDRESS	POSTMARKED & RECEIVED	PRINCIPAL AMOUNT	PURCHASE DATE	INFORMATION GIVEN BY REQUESTOR
# 52	05/30/08	$ 1,000.00	05/12/03	
HELEN R RICHARDS	06/02/08	$ 1,000.00	04/25/04	
50 S. MERIDETH AVE, APT 4				
PASADENA, CA 91106				
# 53	06/03/08	$ 5,000.00	09/20/04	
HELENE C BROWN	06/04/08			
524 KENDRICK ST, 2ND FLOOR				
PHILADELPHIA, PA 19111				
# 54	06/03/08	$ 3,586.72	12/31/04	
LORETTA D PANUNTO	06/04/08	$ 3,000.00	12/03/04	
1013 WEYBRIDGE COURT				
BENSALEM, PA 19020				
# 55	06/03/08	NO PRINCIPAL DETAIL		
JANET T BRADY	06/04/08	GIVEN BY REQUESTOR		
181 LONG HILL RD 75				

LITTLE FALLS, NJ 07424			
# 56	06/03/08	$ 2,632.11	01/10/03
RONALD G CAL-LANAN	06/06/08	$ 1,059.75	12/07/04
3122 EAGLE BEND RD		$ 1,000.00	05/07/04
SPRING HILL, FL 34606		$ 2,997.19	02/28/06
		$ 1,498.19	08/28/06
# 57	06/06/08	NO PRINCIPAL DETAIL	
ROBERT EDWIN DEVINE	06/09/08	GIVEN BY REQUESTOR	
21621 SANDIA RD SP55			
APPLE VALLEY, CA 92308			
# 58	05/09/08	NO PRINCIPAL DETAIL	
EVELYN F RODRIG-UEZ	06/09/08	GIVEN BY REQUESTOR	
1154 LAKE RIDGE RD			
LAKE ALMANOR, CA 96137			
# 59	06/06/08	$ 2,973.38	06/03/02
HELEN M COX	06/09/08	$27,003.48	10/21/02
33397 FARGO ST		$ 7,000.00	04/07/03
LIVONIA, MI 48152		$ 1,200.00	04/08/03
		$14,640.46	08/16/03
		$25,000.00	12/02/04
# 60	05/09/08	$ 3,000.00	
ALAN D COX	06/09/08		
1154 LAKE RIDGE			
LAKE ALMANOR, CA 96137			
# 61	05/10/08	NO PRINCIPAL DETAIL	
MILDRED L THOMAS	06/09/08	GIVEN BY REQUESTOR	

152 ALBEMARLE DR BLUE BELL, PA 19422			
# 62	06/09/08	NO PRINCIPAL DETAIL	
EILEEN BRENDEL	06/11/08	GIVEN BY REQUESTOR	
35–25 77 ST APT A66 JACKSON HTS, N.Y. 11372			
# 63	06/10/08	$40,000.00	03/14/03
NAOKO KOJIMA	06/12/08	$50,000.00	10/03/02
108 E. 96TH STREET		$50,000.00	07/29/02
APT # 2B		$40,000.00	03/21/03
NEW YORK, N.Y. 10128			
# 64	06/09/05	$12,000.00	04/30/03
CHARLES P SMITH	06/12/08		
PO BOX 15958 FORT WAYNE, IN 46885			
# 65	06/09/08	$ 1,000.00	05/20/03
DALE OHNEMUS TRUSTEE	06/16/08	$ 1,000.00	02/27/04
SANDRA K OHNEMUS TRUST-EE 2900 STATE ST APT 101 B QUENCY, IL 62301			
# 66	06/10/08	$ 1,087.07	12/29/02
KATHRYN A FIELDS	06/16/08	$ 1,056.26	06/05/02
PO BOX 90695		$ 5,724.71	02/10/03
PHOENIX, AZ 85066			
# 67	06/14/08	NO PRINCIPAL DETAIL	
YEPRAM DERVA-HANIAN	06/17/08	GIVEN BY REQUESTOR	
4756 FAIRLOOP			

RUN LEHIGH ACRES, FL 33973			
# 68	05/28/08	$10,000.00	06/04/04
KATHERINE A HOWE	06/17/08	$10,000.00	09/22/04
175 UNION AVENUE—APT C301			
RUTHERFORD, NJ 07070			
# 69	06/16/08	$ 3,573.66	11/26/03
CHRISTINE SNYDER	06/18/08	$28,798.98	04/30/02
2676 PLEASANT VIEW ROAD		$10,000.00	01/03/03
NEW COLUMBIA, PA 17856			
# 70	06/16/08	$11,101.94	05/31/03
THOMAS SNYDER	06/18/08		
2676 PLEASANT VIEW ROAD			
NEW COLUMBIA, PA 17856			
# 71	06/16/08	$10,000.00	02/20/04
DUANE E JENSEN	06/19/08	$ 6,056.14	08/31/04
PHYLLIS G JENSEN		$13,420.33	01/05/03
821 S HARRIET			
ALGONA, IA 50511			
# 72	06/15/08	$ 3,278.07	03/22/04
ROBERT CARR	06/19/08		
SHIRLEY CARR			
11760 ROSSMOOR LN			
ST LOUIS, MO 63128			
# 10001	06/20/08	$13,000.00	02/16/04
KARL DOLLINGER	06/24/08	$ 2,176.93	02/10/05
MARY ANN DOLLINGER			

3730 REINIGER ROAD HATBORO, PA 19040			
# 10002	06/27/08	$10,000.00	08/20/99
JUNE HARRISON REED	07/01/08	$20,000.00	11/17/02
818 N. DOHENY DRIVE		$10,000.00	04/20/03
SUITE 1206		$10,000.00	12/14/03
WEST HOLLY-WOOD, CA 90069			
# 10003	07/08/08	$ 3,413.74	04/11/03
SALVATORE A RUSSO	07/11/08	$ 3,600.39	07/22/04
ANGELA CAPANNA		$ 3,277.08	07/03/04
40 WEST 72ND STREET		$ 3,257.45	01/15/05
NEW YORK, N.Y. 10023			
# 10004	07/15/08	$25,088.37	
ELVIRA Z SAL-VATORE	07/20/08	$ 7,303.25	
9601 LOMITA COURT		$ 5,085.79	
SPT 100		$25,209.00	
ALTA LOMA, CA 91701			
# 10005	07/17/08	$10,000.00	07/11/00
PAUL MERRITT	07/21/08		
201 CAROB LANE			
ALAMEDA, CA 94502			
# 10006	07/17/08	$10,000.00	07/16/03
LOUISE W MERRITT	07/21/08		
201 CAROB LANE			
ALAMEDA, CA 94502			
# 10007	08/29/08	NO PRINCIPAL DETAIL	

MARY J JOHNSON 20020 EDDINGTON DR CARSON, CA 09746	09/02/08	GIVEN BY REQUESTOR	
# 20001	10/16/08	$15,000.00	10/08/03
RENEE M MC-CARTHY	10/20/08	$10,000.00	10/22/03
4600 41ST AVE N		$ 5,000.00	01/14/04
APT 206		$ 5,000.00	04/16/04
ROBBINSDALE, MN 55422		$ 6,000.00	03/01/04
Total: 80		Total Principal: 1,458,120	

E.D.Pa.,2008.
In re American Business Financial Services Inc. Noteholders Ltigiation
Not Reported in F.Supp.2d, 2008 WL 4974782 (E.D.Pa.), Fed. Sec. L. Rep. P 95,015

END OF DOCUMENT

1999 CarswellOnt 1851
Ontario Superior Court of Justice

Ontario New Home Warranty Program v. Chevron Chemical Co.

1999 CarswellOnt 1851, [1999] O.J. No. 2245, 37 C.P.C. (4th) 175, 46 O.R. (3d) 130

Ontario New Home Warranty Program, Kathy Adetuyi and Andrew Duke, Plaintiffs and Chevron Chemical Company, Hart & Cooley, Inc., Eljer Manufacturing Inc. cob as Selkirk Metalbestos, Underwriters' Laboratories of Canada, Underwriter's Laboratories Inc., Armstrong Air Conditioning Inc., Consolidated Industries Corp., Welbelt Corporation, Carrier Canada Limited, Evcon Supply Inc., Evcon Industry, Inc., Goodman Manufacturing Co., Ltd., Quietflex Manufacturing Company, L.P., Wabco Standard Trane Inc., Inter-City Products Corporation (Canada), Inter-City Products Corporation (U.S.), Lennox Industries (Canada) Ltd., Nordyne, Inc., Rheem Manufacturing Company, York International Ltd. and CMIL Industries Inc., cob. as DMO Industries, The Canadian Gas Association, Canadian Gas Research Institute, International Approval Services Canada Inc., Consumers Gas Utilities Ltd., Union Gas Limited, Centra Gas Ontario Inc., Superior Propane Inc., Superior Propane Inc./Superieur Propane Inc., Southcorp Water Heaters USA, Inc. and American Water Heater-West Inc. and American Water Heater-East Inc. all cob as American Water Heater Group, Slant/Fin Ltd/Ltee, Weil-McLain division of Marley Canadian Inc., Her Majesty The Queen in Right of Ontario, and General Electric Company, Defendants

Winkler J.

Heard: June 8-10, 1999
Judgment: June 17, 1999
Docket: 22487/96

Counsel: *C. Scott Ritchie, Q.C.* and *Michael Eizenga*, for plaintiffs.
Allan Farrer, for Chevron Chemical Co.
Robert Bell and *Peter Ruby*, for Hart & Cooley Inc.
Lawrence Thacker, for Selkirk Metalbestos.
Marcus Koehnen and *Kathryn Manning*, for Underwriters' Laboratories of Canada.
Paul Martin, for Underwriters' Laboratories Inc.
Marilyn Field-Marsham, *Randy Pepper* and *Stephen Lamont*, for Armstrong Air Conditioning Inc., Evcon Supply Inc., Evcon Industry, Inc., Inter-City Products Corporation (Canada), Inter-City Products Corporation (U.S.), RHEEM Manufacturing Company, York International Ltd. and Lennox Industries.
John Callaghan, for Consolidated Industries, Welbilt Industries and Nordyne Inc.
F. Paul Morrison and *Frank J. McLaughlin*, for General Electric Co.
J.A. Prestage, for Carrier Canada.
C. Stephen White and *Ellen Bessner*, for Goodman Manufacturing and Quietflex Manufacturing Company, L.P.
James Norton, for Wabco Trane Standard Inc.
John C. Cotter, for American Water Heater Group.
Dominic Clarke, for The Canadian Gas Association, Canadian Gas Research Institute and International Approval Services Canada Inc.

Jean Iu, for Her Majesty the Queen in Right of Ontario.
Cynthia Sefton and *Murdoch R. Martin*, for Consumers Gas Utilities Ltd.
Glenn Leslie, for Union Gas Ltd. and Centra Gas Ontario Inc.
No one, for CMIL Industries Inc., Superior Propane, Slant/Fin Ltd./Ltee and Weil-Mclain division of Marley Canadian Inc.

Subject: Torts; Civil Practice and Procedure

Table of Authorities

Cases considered by *Winkler J.*:

British Columbia Ferry Corp. v. T & N plc (1995), 16 B.C.L.R. (3d) 115, 65 B.C.A.C. 118, 106 W.A.C. 118, [1996] 4 W.W.R. 161, 27 C.C.L.T. (2d) 287 (B.C. C.A.) — considered

Canada v. Curragh Inc. (June 26, 1994), B112/93C (Ont. Gen. Div. [Commercial List]) — considered

Carom v. Bre-X Minerals Ltd. (1999), 43 O.R. (3d) 441, 30 C.P.C. (4th) 133 (Ont. Gen. Div.) — considered

Chace v. Crane Canada Inc. (1997), 14 C.P.C. (4th) 197, 164 W.A.C. 32, 101 B.C.A.C. 32, 44 B.C.L.R. (3d) 264 (B.C. C.A.) — considered

Dabbs v. Sun Life Assurance Co. of Canada (February 24, 1998), Doc. Toronto 96-CT-022862 (Ont. Gen. Div.) — applied

Sparling v. Southam Inc. (1988), 41 B.L.R. 22, 66 O.R. (2d) 225 (Ont. H.C.) — considered

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — considered

s. 5 — considered

s. 12 — considered

s. 13 — considered

s. 29(2) — referred to

Negligence Act, R.S.O. 1990, c. N.1
s. 1 — considered

s. 3 — considered

s. 5 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — referred to

R. 30.10 — referred to

R. 31.10 — referred to

MOTIONS to approve settlement of product liability action as between plaintiffs and certain defendants and for class certification under s. 5 of Class Proceedings Act.

Winkler J.:

The Nature of the Motion

1 This is a motion to approve the settlement of this action between the plaintiffs and Chevron Chemical Company, Hart & Cooley, Inc., Eljer Manufacturing Inc. c.o.b. as Selkirk Metalbestos, General Electric Company, Her Majesty the Queen in Right of Ontario, Goodman Manufacturing Co. Ltd., CMIL Industries Inc. cob as DMO Industries, Nordyne, Inc., Wabco Standard Trane Inc., Carrier Canada Limited, Slant/Fin Ltd/Ltee, Weil-McLean division of Marley Canadian Inc. and Underwriter's Laboratories Inc. (the "Settling Defendants").

2 The plaintiffs also seek class certification pursuant to s. 5 of the *Class Proceedings Act, 1992* with respect to the Settling Defendants.

3 The plaintiffs seek to discontinue the action against certain other defendants; namely Consumers Gas Utilities Inc., Union Gas Limited, Centra Gas Ontario Inc., Superior Propane Inc., The Canadian Gas Association, the Canadian Gas Research Institute and International Approval Services Canada Inc. This motion was adjourned at the hearing pending the disposition of the motions for certification and settlement approval.

4 The Plaintiffs propose to bring a subsequent motion for certification for litigation purposes with respect to the Non-Settling Defendants which consists a group of furnace manufacturers represented by one law firm and Underwriters' Laboratories of Canada ("ULC").

The Nature of the Claim

5 This is a product liability claim concerning residential mid-efficiency gas or propane furnaces, boilers and hot water heaters with High Temperature Plastic Vent ("HTPV") exhaust systems. The claim alleges negligent design, manufacture, negligent misrepresentation, breaches of warranty and misrepresentation, negligent approval, breach of fiduciary duty, and failure to warn.

6 The action is a proposed class proceeding brought by the Ontario New Home Warranty Program ("ONHWP") and two individuals, as representative plaintiffs. The plaintiff class consists of some 11,000 Ontario homeowners who installed mid-efficiency furnaces with the allegedly defective plastic venting pipes.

7 ONHWP makes a subrogated claim in place of many new homeowners whom it paid to repair or replace appliances and HTPV piping. The two individual representative plaintiffs were homeowners with heating systems using HTPV. The settling defendants include Chevron, Hart and GEC, three companies against which allegations have been made relating to HTPV. The Non-Settling Defendants are primarily furnace manufacturers, namely, Armstrong Air Conditioning Inc., Evcon Supply Inc., Evcon Industry Inc., Inter-city Products Corporation (U.S.), Lennox Industries (Canada) Ltd., RHEEM Manufacturing Company and York International Ltd. In addition, the defendant Underwriters Laboratory is included in the non-settling group.

Background

8 Prior to the 1980s, gas or propane heating appliances used chimneys or vertical metal vents to carry exhaust gases out of homes and other buildings. In the early 1980s, mid- and high-efficiency appliances were introduced into the marketplace. These appliances could be vented horizontally through the side walls of buildings. The exhaust gas of a mid-efficiency furnace is vented at a high temperature. With the horizontal vent pipes, there was a possibility that the exhaust gas would cool during

the venting process, and that the by-products in the gas would form acidic condensates in the horizontal vent pipes. These acidic condensates were known to be corrosive to metal vent pipes.

9 In response to this problem of corrosion, High Temperature Plastic Venting ("HTPV") was developed. As a result of the low cost and the corrosion resistance of HTPV, heating systems combining HTPV and mid-efficiency appliances came into wide-spread use.

10 The Plaintiffs allege that mid-efficiency gas or propane appliances, vented with HTPV, result in a defective product (the "Heating System"). As a result of residual stresses incurred during manufacture, thermal expansion and contraction of the pipe, and a build-up of acidic condensate during in-service use, HTPV pipes in the Heating System were prone to cracking or separating at the joints. This had the potential to release poisonous carbon monoxide gas into the building. Neither the appliances or the venting pipes were designed with any type of safety device which would prevent defective operation.

11 Prior to being marketed, these Heating Systems were submitted to the relevant regulatory bodies for product approval. The National Standards System, a Federation of independent organizations working towards the development of voluntary standardization in Canada is coordinated by the Standards Council of Canada ("SCC"). The SCC delegates the function of setting standards and approving testing procedures to various standards organizations which appoint key people from the relevant industry to develop standards in relation to particular products.

12 Once a standard has been agreed upon by SCC delegated members, a final draft of the standard is published. This standard must be accepted by the Ministry of Consumer and Commercial Relations ("MCCR") in the Province of Ontario before a product can be marketed. After the standard is accepted by the MCCR, manufacturers submit their product to testing and certification agencies to test the product against the standard accepted by the MCCR, in order to certify that the product meets the relevant standard.

13 In addition to the requirement for the certification of Heating Systems, each appliance manufacturer must approve and specify one or more vent product to be installed in combination with its appliances. No vent product other than those which are approved and specified by the appliance manufacturer is permitted to be installed in combination with the appliance.

14 All of the HTPV products which are the subject of this proceeding went through the process set out above. However, in response to a series of complaints concerning defective heating systems, the MCCR compiled Inspection Reports and found a high failure rate in the HTPV. As a result, in March 1994 the MCCR issued a consumer alert warning about the possibility that vent pipes found in the heating systems might crack or separate at the joints allowing poisonous gases to escape into homes.

15 On Sept. 12, 1995 the Ontario Government, through the Ministry of Consumer and Commercial Relations, issued a Director's Safety Order in respect of heating systems with HTPV. The Director's safety order stated that certain brands of plastic heating vents had been found to be defective and required all homeowners whose furnaces incorporated those vents to replace them by August 31, 1996. Pursuant to the order, natural gas utilities and propane distributors were prohibited from supplying gas after August 31, 1996 to any building in which the vents had not been replaced. The Director's Safety Order states in relevant part:

> **Director's Safety Order**
>
> **Heating Systems with High-Temperature Plastic Vents**
>
> Mounting engineering and technical evidence in Ontario and elsewhere confirms that heating systems using high-temperature plastic vents are defective, that permanent failure of the vents will take place and that the risk of failure increases with length of service. Specific heating systems using plastic vents bearing the name Plexvent, Sel-vent and Ultravent are affected. Over the past two years, four bulletins and a number of consumer advisories have been issued in Ontario as this evidence has been accumulating.

To eliminate the risk associated with these systems, owners are required to correct them with a fully approved heating system prior to August 31, 1996. The options for correction consist of: (a) an existing appliance with an approved alternate vent, if available, or (b) a replacement heating system consisting of vent and appliance. Temporary repairs made using improved plastic materials are not acceptable corrections after August 31, 1996.

After August 31, 1996, natural gas utilities and propane distributors will no longer be permitted to supply gas to these defective systems in Ontario.

16 In consequence, all owners of such furnaces were required to replace the vents by the Director's deadline.

17 In response to the Director's Safety Order relating to the defective Heating Systems, the ONHWP was required to establish a program to identify, administer and repair those Heating Systems covered by the ONHWP warranty program.

18 Where there was an approved alternative vent product available, the predominant corrective measure involved the replacement of the HTPV with B-Vent and a side-wall power venter, although owners were given a choice of receiving a credit towards the installation of a high efficiency heating system as an alternative. In situations where there was no approved alternative venting product, ONHWP replaced the defective Heating System with a high-efficiency heating system.

19 Not all of the homeowners with defective Heating Systems had the benefit of ONHWP coverage. Nevertheless, these homeowners were also required to comply with the Director's Safety Order. In order to comply with the Director's Safety Order, repairs similar to those described above were effected by the non-covered homeowners at their own cost.

Settlement Discussions

20 In early 1996, and continuing thereafter, settlement discussions have taken place in this action. To facilitate this process and to bring it to a conclusion, a mediation was conducted in July 1998 before a prominent American mediator, Mr. Kenneth Feinberg, who is experienced in resolving complex litigation proceedings. All Defendants were invited to participate in this process but the Non-Settling Defendants, other than Underwriters Laboratory, chose not to attend or make submissions.

21 The mediation before Mr. Feinberg resulted in a settlement with the Defendants GEC, Hart and Chevron. Subsequent to the execution of the Settlement Agreement by these Defendants, the Plaintiffs have settled their claims with the following additional Defendants:

Eljer Manufacturing Inc., c.o.b. as Selkirk Metalbestos;

Her Majesty the Queen in Right of Ontario, represented by the Ministry of Consumer and Commercial Relations;

Nordyne Inc.;

Weil McLean division of Marley Canadian Inc.;

Wabco Standard Trane Inc.;

Slant/Fin Ltd./Ltee.;

American Water Heater;

Underwriter's Laboratories Inc.;

22 In addition to these settlements, the Plaintiffs have reached an agreement with the Defendant DMO Industries, within the context of the receivership affecting that corporation, for a $50,000.00 payment.

23 The Plaintiffs have also reached agreements with the Defendants Goodman and Carrier, who have each conducted voluntary self-administered repair programs.

24 The Plaintiffs propose to discontinue the action against the following Defendants:

(a) Canadian Gas Association;

(b) Canadian Gas Research Institute;

(c) International Approval Services Canada Inc.

(d) Consumers Gas Utilities Ltd.;

(e) Union Gas Ltd.;

(f) Centra Gas Ontario Inc.;

(g) Superior Propane Inc.; and

(h) Superior Propane Inc./Superieur Propane Inc.

25 The plaintiffs intend to continue with the litigation against the following defendants:

(a) Underwriter's Laboratories of Canada

(b) Armstrong Air Conditioning

(c) Evcon Supply Inc./Evcon Industry Inc.

(d) Lennox Industries

(e) RHEEM Manufacturing

(f) Inter-City Corp. (Canada)/Inter-City Corp. (U.S.)

(g) York International Ltd.

The Settlement

26 The plaintiffs now seek certification against the Settling Defendants, concurrently therewith approval of the settlement in accordance with s. 29(2) of the *Class Proceedings Act*, and judgment in accordance with the provisions of the settlement agreement achieved through the mediation process. The settlement provides compensation both to ONHWP and to those individual claimants who were not covered by ONHWP and were thus forced to replace the defective Heating Systems at their own cost.

27 The compensatory amounts provided through the settlement are based upon ONHWP's costs to repair the defective systems. ONHWP's total repair costs averaged $1,160 per unit, plus internal administrative costs of $170.00 per unit. The mediated settlement figure is $800.00 per unit, exclusive of administration costs. This settlement figure takes into consideration litigation risk, the delays associated with this complex multi-party litigation, and the Settling Defendant's assertion that the replacement costs were unreasonably high.

28 From the mediated amount of $800.00 per unit, the Settling Defendants and the plaintiffs agreed that the Settling Defendants proportionate liability was to be fixed at 65%. Consequently, ONHWP's claim as against the Settling Defendants was settled on the basis of a lump sum payment for all such claims on the 65% proportionate share of the $800, plus amounts

for party and party costs, disbursements, interest, and claims administration. The total ONHWP settlement figure amounts to $5,230,000.00.

29 The Non-ONHWP claims were also settled on this basis, that is, 65% of the mediated $800.00 repair cost figure.

30 In addition, the Settling Defendants will be responsible for payment of the costs of administering the claims approval process for Non-ONHWP claims. The proposed Claims Administrator is Business Response Inc., a company located in St. Louis, Missouri ("BRI"). BRI is also the Claims Administrator in a similar action in the United States and is experienced in administering this type of settlement.

31 Non-ONHWP claimants will be able to take advantage of a simple claims approval process in which they will be compensated upon producing a proof of repair. This process will reduce legal and administrative costs and will allow claims to be processed quickly without the need for individual claimants to engage a lawyer. The period for claims submission will be five months from the mailing of the Notice of Certification and Settlement Approval.

32 A Non-ONHWP class member may be excluded from the Agreement by completing an Opt Out Form which may be obtained from the Claims Administrator. The Opt Out Deadline will be 60 days from the mailing of the Notice of Certification and Settlement Approval.

33 By virtue of this Settlement, Class Members will be eligible to receive payments within a few months of the Notice of Certification and Settlement Approval. Absent this agreement, in the face of complex multiparty proceedings, it could be a matter of years before any benefits are received by the Class.

34 The Settling Defendants support the plaintiff's motion for approval of the settlement, as long as the judgment approves the entire settlement agreement, especially those provisions which would prevent the Non-Settling Defendants from making any further claims for contribution and indemnity against the Settling Defendants in respect of any damages award to the plaintiffs at trial.

35 These clauses are the only aspects of the settlement agreement that are subject to opposition by the Non-Settling Defendants in this proceeding. Under the contested provisions, the court would be issuing an order preventing the Non-Settling Defendants from making any further claims against the Settling Defendants in relation to any damages suffered by the plaintiffs.

36 The contentious provisions are contained in clause 13 of the Settlement Agreement. They state, in pertinent part:

> ...all claims for contribution, indemnity, subrogation or other claims over shall be barred in accordance with the following terms:
>
> . . . . .
>
> d) The plaintiffs shall not make joint and several claims against the Non-Settling Defendants or Joining Defendants but shall restrict their claims to several claims against the Non-Settling Defendants such that the plaintiffs shall be limited to the degree of liability proven against the Non-Settling Defendants at trial, but in no event shall such liability of the Non-Settling Defendants be greater than 35% of the total damages proven at trial as against each Non-Settling Defendant.
>
> e) All claims for contribution, indemnity, subrogation or other claims over, whether asserted or unasserted or asserted in a representative capacity, inclusive of interest, GST and costs, for or in respect of the subject matter of the Class Actions by or against any Non-Settling Defendants or any other person or party are barred by or against the Settling Defendants and Joining Defendants. CLARITY NOTE: The bar order deals only with claims over and is not intended to bar bona fide independent and direct claims and causes of action between settling and non-settling defendants for damages other than those claimed by the Representative Plaintiffs and the Plaintiff Class.

f) Except as otherwise provided herein, nothing in this Judgment, shall prejudice or in any way interfere with the rights of the Settlement Class Members to pursue all of their other rights and remedies against persons and/or entities other than Settling Defendants and Joining Defendants.

g) Nothing in this Judgment affects any rights that the Non-Settling Defendants may have to move for leave for discovery and production of documents respecting the Settling Defendants and Joining Defendants pursuant to the *Rules of Civil Procedure* and, in particular, Rules 31.10 and 30.10.

37 The plaintiffs and Settling Defendants contend that the settlement, taken as a whole, is fair and reasonable. They assert that the contested provisions contain adequate safeguards for the Non-Settling Defendants. They point to the fact that the remaining claims of the plaintiffs have been converted from "joint and several" to several claims and that under this "several" approach, the liability of the Non-Settling Defendants will be capped at 35% of the total damages proven at trial. Indeed, the plaintiffs and the Settling Defendants state that the Non-Settling Defendants can only benefit from this provision because it limits their maximum exposure to liability in damages to the plaintiffs regardless of the ultimate apportionment of the liability as determined by the trial judge.

38 The plaintiffs and Settling Defendants characterize the prohibitive provisions as a "bar order." In support of their submissions urging the court to accept these provisions, they rely on "substantial U.S. Authority." The plaintiffs assert in their factum that "bar orders are a common mechanism used by the courts in the United States to assist in the management of complex litigation, and to encourage settlement and provide certainty to litigants while enabling them to reduce litigation costs."

39 I am unable to accept these American authorities as being dispositive of the issue here. In many instances, the American cases turn on specific statutes providing for the issuance of "bar orders." Furthermore, even where such orders have been granted on a common law basis in the United States, the influence of the statutory regime cannot be ignored.

40 I do, however, find that the underlying principles on which "bar orders" are granted in the American cases have some application to these proceedings. Moreover, the *Class Proceedings Act* provides a specific mechanism through which these objectives can be achieved in class proceedings in Ontario. Under s. 13 a court may "stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate." This broad discretion is buttressed by s. 12 which permits the court, on a motion by a party or class member, to make such orders as are necessary to ensure the fair and expeditious determination of the class proceeding.

41 By including ss. 12 and 13 in the *Act*, the legislature has given the Court a flexible tool for adapting procedures on a case specific basis. As stated in the *Report of the Attorney General's Advisory Committee on Class Action Reform* at 37:

> [These sections describe] the general power of the Court to control its own process and *to develop procedures as needed from case to case*. (Emphasis added.)

42 In view of the fact that it is apparent that a court has the statutory discretion to issue the order asked for, on appropriate terms, I turn to the objections raised by the Non-Settling Defendants. These defendants oppose the order sought on the grounds that the prohibitive provisions would prejudice them, substantively and procedurally, in presenting any defence that they might have. The Non-Settling Defendants do not object to any other terms of the settlement.

43 The plaintiffs and the Settling Defendants take the position that the Settlement Agreement must either be approved *in toto* or rejected by the court. Sharpe J., relying on Court of Appeal authority, enunciated this approach in *Dabbs v. Sun Life Assurance Co. of Canada* (February 24, 1998), Doc. Toronto 96-CT-022862 (Ont. Gen. Div.). He stated at para. 6:

> It has often been observed that the court is asked to approve or reject a settlement and that it is not open to the court to rewrite or modify its terms; *Poulin v. Nadon*, [1950] O.R. 219 (C.A.) at 222-3.

44 In respect of the contention of substantive prejudice, the Non-Settling Defendants assert that they have certain rights under ss. 1 and 5 of the *Negligence Act*, R.S.O. 1990, c. N.1 to pursue claims against the Settling Defendants for contribution

and indemnity. Thus, they state, this court has no jurisdiction to prohibit the *Negligence Act* claims because to do so would derogate from a substantive right. Derogation of substantive rights, it is argued, is beyond the power bestowed on the court by the provisions of the purely procedural *Class Proceedings Act*. In addition, they contend that they have independent claims founded in negligence and negligent misrepresentation against the Settling Defendants and that part of the damages claimed, based upon these causes of action, will include amounts they may be required to pay to the plaintiffs as a result of the trial.

45 Moreover, the Non-Settling Defendants claim that the prohibiting provisions contained in the settlement agreement are fundamentally unfair at a procedural level because the provisions deprive them of the ability to effectively ensure that they bear only their fair share of any liability to the plaintiffs. Specifically, they assert that they will be precluded from conducting effective discovery and denied evidence at trial necessary to establish the respective degrees of fault as between themselves and the Settling Defendants. This is especially prejudicial, they contend, in a context where the main issue at trial will be the nature of alleged defects in products manufactured by the Settling Defendants, rather than by the Non-Settling Defendants.

46 As a practical necessity, I will deal with the contested provisions of the Settlement Agreement prior to determining the other issues on this motion. If the provisions must be rejected on the basis of the objections raised by the Non-Settling Defendants, then the other issues will be rendered moot.

Analysis

47 The Non-Settling Defendants contend that this court lacks jurisdiction to approve the settlement and issue a concomitant order containing the prohibitive provisions because of the substantive prejudice that will enure to them. The prejudice arises in part, they assert, because of the contested provisions represent an abrogation of their rights under the ss. 1 and 5 of the *Negligence Act*.

48 These sections provide:

> 1. Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.
>
> 5. Wherever it appears that a person not already a party to an action is or may be wholly or party responsible for the damages claimed, such person may be added as a party defendant to the action upon such terms as are considered just or may be made a third party to the action in the manner prescribed by the rules of court for adding third parties.

49 I bear in mind the words of Farley J. in *Canada v. Curragh Inc.* (June 26, 1994), Doc. B112/93C (Ont. Gen. Div. [Commercial List]), in another context, as a starting point in the analysis of the jurisdictional objection raised by the Non-Settling Defendants. He stated at para. 1:

> ...jurisdiction cannot be conferred by agreement. Jurisdiction will only be assumed (i.e. undertaken) by this Court when the Court determines that it truly has jurisdiction based upon the legal principles applicable. It will not be taken by this Court merely because it will convenience the parties.

50 Moreover, this court has noted on multiple occasions that there is no jurisdiction conferred by the *Class Proceedings Act* to supplement or derogate from the substantive rights of the parties. It is a procedural statute and, as such, neither its inherent objects nor its explicit provisions can be given effect in a manner which affects the substantive rights of either plaintiffs or defendants.

51 While I have full regard to the preceding caveats, in my view, the Non-Settling Defendants assertion that the *Negligence Act* affords them substantive rights which will be abrogated by the proposed Settlement Agreement is untenable. When the

prohibitive provisions contained in the agreement are considered in total, it is apparent that they affect no claim of the Non-Settling Defendants that could be successfully asserted against the Settling Defendants under the *Negligence Act* or otherwise.

52 In essence, a claim for contribution and indemnity as between joint tortfeasors is a derivative claim. As stated by David Cheifetz in *Apportionment of Fault in Tort*, (Aurora: Canada Law Book, 1981) at 18:

> The basis of the claim for contribution and indemnity is a breach of duty owed by the tortfeasor subject to the claim of the injured person, not to the tortfeasor claiming contribution.

53 Entitlement to the claim only flows from a finding of joint liability between tortfeasors, and a requirement to pay damages, to the plaintiff. In those cases, the trial judge apportions liability as between the defendants, but the plaintiff may obtain satisfaction of the entire judgment from either of them. In the absence of a contractual obligation for indemnification, each of the defendants, on the other hand, has a right to claim contribution and indemnity from the other in accordance with the apportionment of liability found at trial. However, neither defendant may recover from the other any amount attributable to its own negligence. The responsibility for the negligence of each defendant must therefore be borne by that defendant.

54 Here, the Settling Defendants have abandoned any claim for contribution and indemnity as against the Non-Settling Defendants. In addition, the plaintiffs have chosen to seek damages only in the amount for which the Non-Settling Defendants are "severally" liable.

55 In the result, the rights provided to the Non-Settling Defendants under s. 1 of the *Negligence Act* form part and parcel of the Settlement Agreement. There will be no claim for contribution and indemnity as against them by the Settling Defendants. On the other hand, since they will only be required to pay damages in accordance with their own negligence and liability to the plaintiff, if any, they will have no claim for contribution and indemnity against the Settling Defendants in respect of any such payment.

56 The right provided under s. 5 of the *Negligence Act* is of a different nature in that it allows the Non-Settling Defendants to join third parties who are not already party to the action. It is apparent, however, that the intent of this section is to permit a defendant to have the opportunity of limiting its liability to the plaintiff to that for which it is actually responsible. As such, there can be no concern that the rights under s. 5 will be abrogated in this case. The protections it affords have likewise been incorporated into the Settlement Agreement. The Settling Defendants have been party to the proceedings and are now attempting to settle their liability and extricate themselves. In so doing, they have accepted a proportion of the liability but, more so, by virtue of their agreement with the plaintiffs, there are clauses which prevent the plaintiffs from obtaining any damages from the Non-Settling Defendants in excess of the Non-Settling Defendants' actually liability to the plaintiffs.

57 The Non-Settling Defendants have not delivered a statement of defence to the plaintiffs' claim, nor a statement of claim against the Settling Defendants in these proceedings. In argument on this motion, counsel for the Non-Settling Defendants gave an undertaking that it is their intention to commence an action against the Settling Defendants alleging causes of action in negligence and negligent misrepresentation as against them.

58 The Non-Settling Defendants assert that the Settling Defendants owed them a duty of care which was negligently breached. This negligence, it is stated, is the direct cause of any damages that the Non-Settling Defendants may be required to pay to the plaintiffs. In consequence, the Non-Settling Defendants contend that this negligence gives rise to an independent tort claim, separate and apart from a claim for contribution and indemnity against the Settling Defendants. It is the position of the plaintiffs and the Settling Defendants that such a claim would be nothing more than a claim for contribution and indemnity by another name and, therefore, would be prohibited by the clauses in the Settlement Agreement.

59 I do not necessarily accept this characterization of the potential claim of the Non-Settling Defendants. In my view, however, the thrust of the submissions of the plaintiffs and the Settling Defendants with respect to the effect of the provisions of the Settlement Agreement is correct. The Non-Settling Defendants cannot successfully assert a claim in damages against any party based upon their own negligence, no matter how such a claim is characterized, because of s. 3 of the *Negligence Act*. It provides:

> In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

In the result, in any claim against the Settling Defendants, any damages of the Non-Settling Defendants attributable to their own negligence cannot be recovered.

60 On the other hand, damages which have been incurred by the Non-Settling Defendants independent of any liability to the plaintiffs in a concurrent tort can be pursued and are not foreclosed by the contested provisions of the settlement agreement. The clarity note appended to clause 13(e) of the agreement speaks to this.

61 For these reasons, I do not find that there is any substantive prejudice caused to the Non-Settling Defendants by the contested provisions, nor is there any deprivation of any protections conferred upon them by the *Negligence Act*.

62 I turn next to the Non-Settling Defendants' contention that the contested provisions will prejudice them on a procedural level. In support of this contention, the Non-Settling Defendants rely on a decision of the British Columbia Court of Appeal in *British Columbia Ferry Corp. v. T & N plc* (1995), [1996] 4 W.W.R. 161 (B.C. C.A.). Although they rely on this case in support of their assertion of procedural prejudice, I observe that the decision supports the above reasons insofar as the allegation of substantive prejudice is concerned.

63 In the *B.C. Ferry* case, the plaintiffs had sued a group of asbestos manufacturers. The manufacturers sought to add the installers of the asbestos to the action by the way of third party proceedings. The plaintiffs entered into agreements with several of the third parties, in which the plaintiffs agreed that they would not seek to recover from the manufacturers any portion of the damages which a court attributed to the fault of the third parties.

64 The manufacturers sought contribution and indemnity from the third parties, and in addition, damages for the out of pocket expenses incurred in defending the plaintiffs' claim as well as a declaration as to the degree of fault, if any attributable to each third party. The third parties, in a series of proceedings, moved successfully for dismissal of all of the claims against them.

65 On appeal the Court upheld the dismissal of the claim in contribution and indemnity, on the basis that the agreement between the plaintiffs and the third parties saved the defendants "harmless from any damages caused or contributed to by the fault of the concurrent tortfeasor," thus eliminating any "basis upon which the right to contribution or indemnity, ... could be exercised." In addition, the dismissal of the claim in damages for out of pocket expenses for defending the plaintiffs' claim was upheld. The Court found that the trial judge had correctly determined that there was no duty of care existing between the defendants and the third parties such that the claim could be asserted.

66 However, the appeal in respect of the claim for declaratory relief was allowed because of considerations of fairness to the defendants. Wood J.A. stated at 175-6:

> It would, in my view, be manifestly wrong if a private accord between plaintiff and third party could work to deprive a defendant of the ability to establish an element of proof essential to a just resolution of the action on which all parties had joined issue. But that is precisely what will occur here if the defendants are denied the declaratory relief they seek.... In those circumstances, I am of the view that the third party claims for declaratory relief should be allowed to proceed.

67 In respect of submissions that declaratory relief could not issue because there was no *lis* between the parties, Wood J.A. stated at 175:

> While I am of the view that the general rule against sanctioning actions brought for purely procedural relief will always be an important consideration governing the exercise of the court's discretion to grant declaratory relief, I do not accept the proposition that it must be regarded as a controlling consideration in all cases. There will be instances, albeit rarely, where the declaratory relief should be granted notwithstanding the fact that it is needed only for such purpose.

. . . . .

> One has only to consider the importance to the process of proof of such procedures as the right of discovery, the notice to admit and the ability to call parties as adverse witnesses, to realize that there will be circumstances in which the need to resort to such procedures will meet the expanded definition given to the term "relief" by Lord Justice Bankes in the Guaranty Trust Company of New York case.

68 The agreement at issue in the *B.C. Ferry* case was much the same in effect as the provisions of the agreement between the plaintiffs and the Settling Defendants at issue here. However, the Court of Appeal was able to address the issue of procedural prejudice, without negating the agreement, in such a manner so that the fairness to the defendants was not compromised. Although, the decision is not binding on this court, it provides an enlightened guide in the current context.

69 The procedural objection raised by the Non-Settling Defendants brings to bear the requirement of balancing the interests of the plaintiff class, on the one hand and the defendants, on the other, in a complex class proceeding. The objects of the *Class Proceedings Act* must be met without prejudice to either the plaintiff class or the defendants.

70 However, the settlement of complex litigation is encouraged by the courts and favoured by public policy. Indeed, according to Callaghan A.C.J.H.C. in *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (Ont. H.C.) at 230-31:

> ...the courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system.

71 In consideration of the interests which must be balanced, it is my view that the procedural objections raised by the Non-Settling Defendants can be addressed without a wholesale rejection of the proposed Settlement Agreement.

72 This Court has pointed out in *Carom v. Bre-X Minerals Ltd.* (1999), 43 O.R. (3d) 441 (Ont. Gen. Div.), in another context, that "the CPA is a procedural statute replete with provisions guaranteeing order and fairness."

73 The *Class Proceedings Act* is meant to provide a mechanism for the redress of mass wrongs which are linked by an element of commonality. This is such a case. The court must remain flexible and exercise its inherent jurisdiction to meet the needs of the parties and to achieve the purpose of the statute.

74 The settlement before this court meets the underlying objective of the *Act*. There is no objection to its terms, save for the prohibitive provisions. However, if these provisions are not approved, the entire settlement will fail. This will seriously prejudice the plaintiff class in terms of delay and costs of litigation and further, expose the plaintiffs to the risks of litigation. Conversely, to ignore the procedural concerns advanced by the Non-Settling Defendants would unfairly prejudice those parties.

75 The *Class Proceedings Act* is *sui generis* legislation which envisions the balancing of interests between the parties. Through legislative foresight, the court has been given the necessary power to adapt procedures to ensure that the interests of all parties can be adequately protected in situations where those interests conflict. Here, the benefits of the settlement to the plaintiffs favour the approval of the settlement as presented, including the contentious prohibitive provisions. As I have stated above, these provisions do not occasion any substantive prejudice to the defendants. The procedural concerns may be adequately addressed through the terms on which the settlement is approved.

76 Accordingly, I am prepared to grant judgment on the basis of the Settlement Agreement, subject to terms I set out below. The prohibitive provisions will be entered as a "stay of proceedings," as against the Settling Defendants under s. 13 of the *Act*, subject to compliance by the Settling Defendants with the following terms as they relate to the conduct of the remaining portions of the action.

77 These terms, generally described, are that the Non-Settling Defendants may, on motion to this court, obtain:

> (1) documentary discovery and an Affidavit of Documents in accordance with the Rules of Civil Procedure from each of the Settling Defendants;

(2) oral discovery of a representative of each of the Settling Defendants, the transcript of which may be read in at trial;

(3) leave to serve a Request to Admit on each Settling Defendant in respect of factual matters;

(4) an undertaking to produce a representative to testify at trial, with such witness to be subject to cross-examination by counsel for the Non-Settling Defendants.

78 In addition, the fact of the settlement, but not the terms thereof, shall be disclosed to the trial judge at the commencement of trial.

79 Furthermore, pursuant to its case management powers under the *Act*, this court shall maintain an ongoing supervisory role in this action. In the event that any Settling Defendant fails to comply with an order of this court made pursuant to the above terms, the court may, in addressing any such failure, lift the stay of proceedings in respect of that defendant.

Certification

80 The next consideration is whether the the proceeding against the Settling Defendants meets the requirements for certification as a class proceeding. The elements of the test for certification are set out in s. 5 of the *Class Proceedings Act*.

5(1) The court shall certify a class proceeding on a motion under section 2,3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

(i) Cause of Action

81 The Statement of Claim discloses a cause of action. The plaintiffs claim damages against the Settling Defendants arising from, *inter alia*, their negligent design, manufacture, and failure to establish appropriate and safe standards relating to the Heating Systems, as well as breaches of statutory duties, warranties and representations, and negligent misrepresentations. The plaintiffs also claim that these Defendants failed: to warn the public of the potential safety hazard presented by the defective product; to report these defects to the Ministry of Consumer and Commercial Relations; and to recall the defective and dangerous product.

(ii) Identifiable Class

82 The Plaintiffs propose that upon certification, the Class be defined as

> ONHWP and all persons or entities in the Province of Ontario, Canada who have incurred or will incur remediation expenses as a result of owning a natural gas or propane fired appliance installed with high-temperature plastic venting under the trade names PLEXVENT, ULTRAVENT or SELVENT (manufactured or sold by Chevron, Hart&Cooley and Eljer Manufacturing respectively).

This class definition meets the second element of the test for certification.

(iii) Common Issue

83 The plaintiffs propose that the common issue for the class be defined as:

> What claims does the Settlement Class have arising from the Ministry of Consumer and Commercial Relations Director's Safety Order dated September 12, 1995.

The common issue proposed satisfies the third criterion of the certification requirements.

(iv) Preferable Procedure

84 A class proceeding is the preferable procedure for the resolution of the common issue as outlined above. The aggregate claims of the Class are substantial but individually, these claims cannot be litigated economically. On a practical basis, should certification be denied, the result would be to deny access to the Courts for many of the claims not covered by ONHWP. In addition to being expensive to litigate on an individual basis, the effect of multiple claims of this nature coming forward would place a heavy burden on judicial resources. In this case, a class proceeding is the preferable procedure for providing members of the Class with access to an effective remedy.

(v) Representative Plaintiff

85 Kathy Adetuyi and Andrew Duke are individuals who purchased heating systems with HTPV installed in conjunction with mid-efficiency appliances. Kathy Adetuyi's home was not enrolled in the ONHWP program and she bore the entire cost of complying with the Director's Safety Order. Andrew Duke's home was covered by ONHWP. As such, a portion of his cost to the correct the defective heating system was borne by ONHWP.

86 Kathy Adetuyi, Andrew Duke, and ONHWP are all prepared to act as representative Plaintiffs for the Class. Collectively, their actions indicate that they have fairly represented the class, and there is no evidence that they will not continue to do so. These proposed representative plaintiffs do not have interests which conflict with the interests of other Class Members and the Settlement Agreement provides a plan for the resolution of this proceeding. The proposed representative plaintiffs are acceptable to the court, thus meeting the final requirement for certification.

87 Accordingly, all of the requirements of the *Act* regarding certification are met.

Settlement Approval

88 Finally, I turn to the settlement. For a settlement to be approved it must be fair, reasonable and in the best interests of the Class, and, as stated in *Dabbs*, will generally take into account factors such as:

1. Likelihood of recovery or likelihood of success;

2. Amount and nature of discovery, evidence or investigation;

3. Settlement terms and conditions;

4. Recommendation and experience of counsel;

5. Future expense and likely duration of litigation;

6. Recommendation of neutral parties, if any;

7. Number of objectors and nature of objections; and

8. The presence of arms-length bargaining and the absence of collusion.

89 The exercise of settlement approval does not lead the court to a dissection of the settlement with an eye to perfection in every aspect. Rather, the settlement must fall within a zone or range of reasonableness. The range of reasonableness has been described by Sharpe J. in *Dabbs* as follows at 440:

> [All] settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interest of those affected by it when compared to the alternative of the risks and costs of litigation.

90 Furthermore, the recommendation of class counsel is a factor to be considered, though the potential for conflict must also be noted. Sharpe J. stated at 440:

> The recommendation of class counsel is clearly not dispositive as it is obvious that class counsel have a significant financial interest in having the settlement approved. Still, the recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputation for integrity and diligent effort on behalf of their clients is also on the line.

91 In Ontario, the courts have also recognized that the practical value of an expedited recovery is a significant factor for consideration. In *Dabbs*, Sharpe J. determined that in addition to the legal and factual risks, a practical concern favouring settlement includes the potential that the case would take several years to reach trial and exhaust all appeals.

92 Evidence sufficient to decide the merits of the issue is not required because compromise is necessary to achieve any settlement. However, the court must possess adequate information to elevate its decision above mere conjecture. This is imperative in order that the court might be satisfied that the settlement delivers adequate relief for the class in exchange for the surrender of litigation rights against the defendants. See *Newberg on Class Actions* (Shepard's/McGraw-Hill 3d ed 1992) ss. 11.45-46.

93 In the case at bar, the settlement proposed provides compensation to class members through a settlement mechanism that allows partial recovery for the damages of the class. I am satisfied that significant research and investigation was conducted in this matter prior to issuance of the statement of claim. Settlement negotiations between the settling parties have been ongoing since early 1996. These negotiations have been adversarial and protracted. The plaintiffs have been guided in their settlement negotiations by an understanding of the risks associated with the litigation, the potential future expense and the recommendation and experience of their counsel. Further, the terms of the settlement were arrived at as a result of intensive mediation conducted by an experienced arbitrator with specific knowledge of the factual background. The settlement benefits to the plaintiff class are well within the range of reasonableness.

94 In conclusion, I find that the settlement is fair and reasonable and in the best interests of the class as a whole.

Disposition

95 This action represents the quintessential class proceeding. It involves a single purpose product which is alleged to be defective. This core element of commonality is such that a determination of liability to the representative plaintiffs would be determinative of liability to the entire class. As stated in *Chace v. Crane Canada Inc.* (1997), 14 C.P.C. (4th) 197 (B.C. C.A.) at 202:

> This court recently observed that in a product liability case a determination that the product in question is defective or dangerous as alleged will advance the claims to an appreciable extent.... I agree with the chambers judge that is the situation here. The respondents are alleging an inherent defect.... This seems exactly the type of question for which a class action is ideally suited and remarkably similar to that concerning faulty heart pacemaker leads that was certified by the Ontario Court (General Division) in *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995) 25 O.R. (3d) 331. (Citations omitted).

96 This products liability claim involves thousands of relatively small, nearly identical claims. In the absence of certification as a class proceeding, they would not present viable individual lawsuits because of the costs of litigation. Cost barriers to litigation impact on both access to justice and behavioural modification, two of the goals of the *Act*. Taken together with the nature of the claim and the element of commonality, the case cries out for certification. The motion for certification against the Settling Defendants is granted.

97 The Settlement Agreement taken as a whole is fair and reasonable and in the interests of the class members. It brings a significant degree of resolution to a protracted proceeding, although the Non-Settling Defendants have raised some legitimate concerns about the prohibitive provisions, in light of the procedural protections available through the *Class Proceedings Act*, the *Rules of Civil Procedure* and the terms attached to the stay granted in these reasons, these procedural concerns can be addressed without rejecting the settlement. Accordingly, the settlement is approved in its entirety, subject to the terms set out above.

98 The motion raises a novel point of law and the result is divided. There shall be no order as to costs. I may be spoken to in respect of any other matters arising out of these reasons.

Motions granted.

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2012 ONSC 3801
Ontario Superior Court of Justice

Eidoo v. Infineon Technologies AG

2012 CarswellOnt 8093, 2012 ONSC 3801, 217 A.C.W.S. (3d) 821, 41 C.P.C. (7th) 410

Khalid Eidoo and Cygnus Electronics Corporation, Plaintiffs and Infineon Technologies AG, Infineon Technologies Corporation, Infineon Technologies North America Corporation, Hynix Semiconductor Inc., Hynix Semiconductor America Inc., Hynix Semiconductor Manufacturing America, Inc., Samsung Electronics Co., Ltd., Samsung Semiconductor, Inc., Samsung Electronics America, Inc., Micron Semiconductor Products, Inc. o/a Crucial Technologies, Mosel Vitelic Corp., Mosel Vitelic Inc. and Elpida Memory, Inc., Defendants

Perell J.

Heard: June 20, 2012
Judgment: June 27, 2012
Docket: 05-CV-4340

Counsel: Jonathan Foreman, Robert Gain, for Plaintiffs
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Julie K. Parla, for Hynix Semiconductor Inc. Hynix Semiconductor America Inc., Hynix Semiconductor Manufacturing America, Inc.
Cathy Beagan Flood, for Samsung Semiconductor, Inc., Samsung Electronics America, Inc.
David W. Kent, for Micron Semiconductor Products, Inc. o/a Crucial Technologies
Christopher P. Naudie, for Elpida Memory, Inc.
Susan E. Friedman, for Hitachi Ltd., Hitachi America Ltd., Hitachi Canada, Ltd. Hitachi Electronic Devices (USA), Renesas Electronics Canada, Ltd.
Justin G. Necpal, for Mitsubishi Electronic Corporation, Mitsubishi Electric Sales Canada, Inc, Mitsubishi Electric & Electronics USA, Inc.
Zohaib Maladwala, for Toshiba Canada Limited

Subject: Civil Practice and Procedure; Corporate and Commercial

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Dabbs v. Sun Life Assurance Co. of Canada (1998), 235 N.R. 390 (note), 118 O.A.C. 399 (note), 41 O.R. (3d) 97n (S.C.C.) — referred to

Eidoo v. Infineon Technologies AG (2012), 2012 ONSC 1987, 2012 CarswellOnt 3969 (Ont. S.C.J.) — referred to

Ford v. F. Hoffmann-La Roche Ltd. (2005), 74 O.R. (3d) 758, 12 C.P.C. (6th) 252, 2005 CarswellOnt 1095 (Ont. S.C.J.) — referred to

Frohlinger v. Nortel Networks Corp. (2007), 2007 CarswellOnt 240, 40 C.P.C. (6th) 62, 2007 C.E.B. & P.G.R. 8233 (Ont. S.C.J.) — referred to

Kelman v. Goodyear Tire & Rubber Co. (2005), 5 C.P.C. (6th) 161, 2005 CarswellOnt 154 (Ont. S.C.J.) — referred to

Parsons v. Canadian Red Cross Society (1999), 1999 CarswellOnt 2932, 40 C.P.C. (4th) 151, 103 O.T.C. 161 (Ont. S.C.J.) — referred to

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Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6
s. 29 — pursuant to

Competition Act, R.S.C. 1985, c. C-34
Pt. IV — referred to

APPLICATION by plaintiffs for approval of settlement with two of several defendants in class proceeding.

Perell J.:

1 On March 28, 2012, I certified this proposed class action for the purposes of a settlement between the plaintiffs Khalid Eidoo and Cygnus Electronics Corporation and Elpida Memory, Inc. and Elpida Memory (USA) Inc., two of the many defendants to this action. I approved a notice plan to give the Class members notice that the plaintiffs seek to have the settlement approved pursuant to s. 29 of the *Class Proceedings Act, 1992*, S.O. 1992, c. C.6. See 2012 ONSC 1987 (Ont. S.C.J.). The plaintiffs now seek approval of the settlement.

2 In this action, Khalid Eidoo and Cygnus Electronics Corporation sue Infineon Technologies AG, Infineon Technologies Corporation, Infineon Technologies North America Corporation, Hynix Semiconductor Inc., Hynix Semiconductor America Inc., Hynix Semiconductor Manufacturing America, Inc. Samsung Electronics Co., Ltd., Samsung Semiconductor, Inc., Samsung Electronics America, Inc., Micron Semiconductor Products, Inc. o/a Crucial Technologies, Mosel Vitelic Corp., Mosel Vitelic Inc. and Elpida Memory, Inc. for: (a) breach of Part IV of the *Competition Act*, R.S.C. 1985, c. C-34; (b) civil conspiracy; and (c) tortious interference with economic interests. The action concerns allegations that the Defendants conspired to fix prices in DRAM (dynamic random access memory) devices.

3 There are parallel proceedings in British Columbia and Québec. I am advised that the settlement has been approved in British Columbia and a settlement approval hearing is scheduled in Québec.

4 Mr. Eidoo purchased DRAM and DRAM products during the proposed class period. Cygnus Electronics is an Ontario corporation that was a direct purchaser of DRAM and DRAM products during the proposed class period.

5 Beginning in the fall of 2010, Mr. Eidoo and Cygnus Electronics began settlement negotiations with Elpida Memory, Inc. and Elpida Memory (USA) Inc. The negotiations were adversarial and at arms-length. The Elpida defendants never admitted liability and indicated that if there was no settlement, they would defend the action on its merits.

6 The parties reached an agreement in principle in November 2010, and they signed a settlement agreement dated November 15, 2011. Under the settlement agreement, Elpida agrees to pay $5.75 million plus interest for the benefit of the class members in Ontario, British Columbia, and Québec. The settlement funds are being held in an interest-bearing trust account for the benefit of Settlement Class Members.

7 Under the terms of the Settlement Agreement, the Elpida defendants are required to cooperate with the Plaintiffs in pursuing their claims against the Non-Settling Defendants. In a price fixing conspiracy action, a defendant's co-operation is obviously beneficial to the Plaintiffs. Under the Settlement Agreement, Elpida is required to:

- (a) provide an oral evidentiary proffer relating to the allegations in the Proceedings, including information with respect to dates, locations, subject matter, and participants in any meeting or discussions between competitors relating to the purchase, sale, pricing, discounting, marketing or distributing of DRAM Products in Canada;

- (b) provide electronic transactional data relating to sales of DRAM Products during the Settlement Class Period by Elpida to direct purchasers in Canada and respond to questions from Class Counsel regarding this data;

- (c) produce documents provided by Elpida to the Department of Justice, the Canadian Competition Bureau and to Class Counsel for the U.S. plaintiffs as part of the settlement of the US Direct Action;

- (d) to the extent permissible under the protective order issued in the U.S. Proceedings and subject to privilege and confidentiality, Elpida will provide access to all discovery evidence produced in the U.S. Actions, including transcripts or video depositions of Elpida employees; and,

- (e) make reasonable efforts to make available for testimony at trial, employees of Elpida who would be reasonably necessary to support the submission into evidence of any documents or information produced by Elpida pursuant to the Settlement Agreement.

8 As part of the Settlement Agreement, the Parties are seeking an order barring any claim for contribution or indemnity against Elpida. The terms of the bar order are set out in paragraphs 14 to 19 of the draft judgment, which state:

> 14. THIS COURT ORDERS that all claims for contribution, indemnity or other claims over, whether asserted, unasserted or asserted in a representative capacity, inclusive of interest, taxes and costs, relating to the Released Claims, which were or could have been brought in the Proceedings, the Ontario Additional Proceeding or otherwise, by any Non-Settling Defendant, any named or unnamed co-conspirators who are not Releasees, or any other Person or party, against a Releasee, or by a Releasee against a Non-Settling Defendant, are barred, prohibited and enjoined in accordance with the terms of this Order (unless such claim is made in respect of a claim by a Person who has validly opted-out of the Ontario Proceeding).
>
> 15. THIS COURT ORDERS that if, in the absence of paragraph 14 above, the Court determines that there is a right of contribution and indemnity or other claim over, whether in equity or in law, by statute or otherwise:
>
> (a) the Ontario Plaintiffs and the Ontario Settlement Class Members shall not be entitled to claim or recover from the Non-Settling Defendants and/or named or unnamed co-conspirators that are not Releasees that portion of any damages (including punitive damages, if any) restitutionary award, disgorgement of profits, interest and costs (including investigative costs claimed pursuant to s. 36 of the *Competition Act*) that corresponds to the Proportionate Liability of the Releasees proven at trial or otherwise;

(b) the Ontario Plaintiffs and the Ontario Settlement Class Members shall limit their claims against the Non-Settling Defendants and/or named or unnamed co-conspirators that are not Releasees to, and shall be entitled to recover from the Non-Settling Defendants and/or named or unnamed co-conspirators that are not Releasees, only those claims for damages, costs and interest attributable to the aggregate of the several liability of the Non-Settling Defendants and/or named or unnamed co-conspirators that are not Releasees to the Ontario Plaintiffs and the Ontario Settlement Class Members, if any, and, for greater certainty, the Ontario Settlement Class Members shall be entitled to claim and recover on a joint and several basis as between the Non-Settling Defendants and/or named or unnamed co-conspirators who are not Releasees, to the extent provided by law; and

(c) this Court shall have full authority to determine the Proportionate Liability of the Releasees at the trial or other disposition of the Ontario Proceeding or the Ontario Additional Proceeding, whether or not the Releasees remain in the Ontario Proceeding or appear at the trial or other disposition, and the Proportionate Liability of the Releasees shall be determined as if the Releasees are parties to the Ontario Proceeding and/or Ontario Additional Proceeding and any determination by this Court in respect of the Proportionate Liability of the Releasees shall only apply in the Ontario Proceeding and/or the Ontario Additional Proceeding and shall not be binding on the Releasees in any other proceedings.

16. THIS COURT ORDERS that if, in the absence of paragraph 14 hereof, the Non-Settling Defendants would not have the right to make claims for contribution and indemnity or other claims over, whether in equity or in law, by statute or otherwise, from or against the Releasees, then nothing in this Order is intended to or shall limit, restrict or affect any arguments which the Non-Settling Defendants may make regarding the reduction of any assessment of damages, restitutionary award, disgorgement of profits or judgment against them in the Ontario Proceeding or the Ontario Additional Proceeding.

17. THIS COURT ORDERS that a Non-Settling Defendant may, on motion to this Court determined as if the Settling Defendant remained a party to the Ontario Proceeding, and on at least ten (10) days notice to counsel for the Settling Defendant, and not to be brought unless and until the action against the Non-Settling Defendants has been certified and all appeals or times to appeal have been exhausted, seek orders for the following:

(a) documentary discovery and an affidavit of documents in accordance with the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 from the Settling Defendant;

(b) oral discovery of a representative of the Settling Defendant, the transcript of which may be read in at trial;

(c) leave to serve a request to admit on the Settling Defendant in respect of factual matters; and/or

(d) the production of a representative of the Settling Defendant to testify at trial, with such witness to be subject to cross-examination by counsel for the Non-Settling Defendants.

18. THIS COURT ORDERS that the Settling Defendant retains all rights to oppose such motion(s) brought under paragraph 17. Notwithstanding any provision in this Order, on any motion brought pursuant to paragraph 17, the Court may make such orders as to costs and other terms as it considers appropriate.

19. THIS COURT ORDERS that a Non-Settling Defendant may effect service of the motion(s) referred to in paragraph 17 above on the Settling Defendant by service on counsel of record for the Settling Defendant in the Ontario Proceeding.

9 Under the proposed bar order, the non-settling defendants are barred from claiming contribution and indemnity with respect to the claims released against Elpida Memory, Inc. and Elpida Memory (USA). However, if the Court determines that the non-settling defendants have a right to contribution and indemnity: (a) the Class members may not recover from the Non-Settling Defendants any damages that correspond to the proportionate liability of Elpida Memory, Inc. and Elpida Memory (USA); (b) the Class members may only recover damages from the Non-Settling Defendants attributable to the aggregate of the several

liability of the Non-Settling Defendants; (c) the Ontario Court shall have full authority to determine the Proportionate Liability of Elpida Memory, Inc. and Elpida Memory (USA) at the trial or other disposition of the Ontario Proceeding; and (d) the Non-Settling Defendants are at liberty to arguments that any assessment of damages, restitutionary award, or disgorgement of profits should be reduced. Under the proposed bar order, the non-settling defendants may move for orders for discovery from Elpida Memory, Inc. and Elpida Memory (USA), who are entitled to resist the discovery motions.

10 Notice of this approval hearing was published. No objections to settlement approval were received by Class Counsel in response to the notice. Many of the Non-Settling Defendants attended the hearing, but none made submissions.

11 Class Counsel from across the country, who are very experienced with class action litigation, recommend the settlement. The representative plaintiffs recommend the settlement and consent to the Court approving the settlement. Elpida Memory, Inc. and Elpida Memory (USA) Inc. consent to the approval of the settlement.

12 On February 27, 2012, Elpida Memory, Inc. commenced restructuring proceedings in Japan. Elpida Memory, Inc. is restrained from making certain payments and taking certain actions by Order of the Tokyo District Court. A recognition order has not been sought in Canada. Class Counsel submits that it is in the interest of all Class members that the settlement be approved without delay.

13 To approve a settlement of a class proceeding, the court must find that in all the circumstances the settlement is fair, reasonable, and in the best interests of those affected by it: *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Ont. Gen. Div.) at para. 9; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (Ont. S.C.J.) at paras. 68-73.

14 In determining whether to approve a settlement, the court, without making findings of facts on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the Class as a whole, having regard to the claims and defenses in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (Ont. S.C.J.) at para. 10.

15 When considering the approval of negotiated settlements, 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) settlement terms and conditions; (d) recommendation and experience of counsel; (e) future expenses and likely duration of litigation and risk; (f) recommendation of neutral parties; (g) if any, the number of objectors and nature of objections; (h) the presence of good faith, arms-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: *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 2811 (Ont. Gen. Div.), aff'd (1998), 41 O.R. (3d) 97 (Ont. C.A.), leave to appeal to S.C.C. refused October 22, 1998, [1998] S.C.C.A. No. 372 (S.C.C.); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (Ont. S.C.J.) at paras. 71-72; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (Ont. S.C.J.) at para. 8; *Kelman v. Goodyear Tire & Rubber Co.*, [2005] O.J. No. 175 (Ont. S.C.J.) at paras. 12-13; *Ford v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (Ont. S.C.J.) at para. 117; *Tesluk v. Boots Pharmaceutical PLC*, [2002] O.J. No. 1361 (Ont. S.C.J.) at para. 10.

16 In my opinion, the settlement is fair, reasonable, and in the best interests of the class as a whole. It provides tangible benefits to class members and a settlement is preferable when compared against the prospect of litigation with an uncertain outcome and duration.

17 At the settlement approval hearing, I approved the settlement and signed the settlement approval order.

Application granted.

End of Document

2001 ABCA 110
Alberta Court of Appeal

Amoco Canada Petroleum Co. v. Propak Systems Ltd.

2001 CarswellAlta 575, 2001 ABCA 110, [2001] 6 W.W.R. 628, [2001] A.W.L.D. 397, [2001] A.J. No. 600, 200 D.L.R. (4th) 667, 248 W.A.C. 185, 281 A.R. 185, 4 C.P.C. (5th) 20, 91 Alta. L.R. (3d) 13

Amoco Canada Petroleum Company Ltd., The George R. Brown Partnership, Encor Energy Corporation Inc., David W. Feeney, Trustee of the Estate of Eleanor Deering, deceased, Feliciana Corporation, Heather Oil Ltd., Joli Fou Petroleums Ltd., Lacana Petroleum Limited, Ralph S. O'Connor, Mark Resources Inc., Star Oil and Gas Ltd., Union Pacific Resources Inc., Westcoast Petroleum Ltd. and Wintershall Oil of Canada Ltd. (Respondents/Plaintiffs) and Propak Systems Ltd., Lynn Tylosky, L. Moore (Appellants/Defendants) and Quantel Engineering (1981) Ltd., V.J. Pamensky Canada Inc., WEG Exportadora S.A., Electromotores WEG S.A. and Gerry Brooks carrying on business as SDL Trucking and Cawa Operating & Consulting Ltd. (Respondents/Defendants) and Standard Electric Ltd., Mark Resources Inc., Able Industries Limited, Terrence Dingwall operating as Able Industries, Cawa Operating & Consulting Ltd., Flint Canada Inc. formerly known as Flint Engineering & Construction Ltd., Lovejoy Inc. and Engineered Bearings & Drives Ltd. formerly known as Engineered Bearings Co. Ltd. and Quantel Engineering (1981) Ltd. (Respondents/Third Parties) and ABC Company Ltd. (Not a Party to this Appeal/Third Party) and Able Industries Limited, Terrence Dingwall operating as Able Industries or Able Industries Limited, Cawa Operating & Consulting Ltd. and Flint Canada Inc., formerly known as Flint Engineering & Construction Ltd., Lovejoy Inc., Engineered Bearings & Drives Ltd. formerly known as Engineered Bearings Co. Ltd. and Quantel Engineering (1981) Ltd. (Respondents/Fourth Parties) and Able Industries Limited, Standard Electric Ltd., Gerry Brooks, carrying on business as SDL Trucking, Quantel Engineering (1981) Ltd., Flint Canada Inc., formerly known as Flint Engineering & Construction Ltd., V.J. Pamensky Canada Inc. WEG Exportadora S.A. (Respondents/Fifth Parties) and Propak Systems Ltd. (Appellant/Fifth Party)

Conrad, Sulatycky, Fruman JJ.A.

Heard: June 12, 2000
Judgment: May 4, 2001
Docket: Calgary Appeal 99-18589

Proceedings: affirming *Amoco Canada Petroleum Co. v. Propak Systems Ltd.* (1999), 74 Alta. L.R. (3d) 194, 39 C.P.C. (4th) 308 (Alta. Q.B.)

Counsel: *D.A. McDermott, Q.C.*, for Appellants.
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J.B. Rooney, Q.C., for Respondent, V.J. Pamensky Canada Inc.
G.S. Dunnigan, for Respondent, Gerry Brooks.
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D.J. Cichy, for Respondent, Mark Resources Inc.
H.D.D. Lloyd, for Respondent, Lovejoy Inc.

Subject: Civil Practice and Procedure

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Geleta v. Alberta (Minister of Transportation & Utilities) (1996), 193 A.R. 67, 48 Alta. L.R. (3d) 158, 135 W.A.C. 67, 60 L.C.R. 105 (Alta. C.A.) — considered

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Loewen, Ondaatje, McCutcheon & Co. c. Sparling, 143 N.R. 191, (sub nom. *Kelvin Energy Ltd. v. Lee)* 97 D.L.R. (4th) 616, (sub nom. *Kelvin Energy Ltd. v. Lee)* [1992] 3 S.C.R. 235, (sub nom. *Kelvin Energy Ltd. v. Lee)* 51 Q.A.C. 49 (S.C.C.) — considered

Margetts (Next Friend of) v. Timmer Estate (1996), (sub nom. *Margetts v. Timmer)* 192 A.R. 42, 5 C.P.C. (4th) 52, 43 Alta. L.R. (3d) 283, [1997] 1 W.W.R. 25 (Alta. Q.B.) — considered

Margetts (Next Friend of) v. Timmer Estate (1999), 178 D.L.R. (4th) 577, (sub nom. *Margetts v. Timmer)* 244 A.R. 114, (sub nom. *Margetts v. Timmer)* 209 W.A.C. 114, 73 Alta. L.R. (3d) 110, [2000] 2 W.W.R. 85, 39 C.P.C. (4th) 146 (Alta. C.A.) — considered

Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 46 O.R. (3d) 130, 37 C.P.C. (4th) 175 (Ont. S.C.J.) — considered

Pierringer v. Hoger (1963), 124 N.W.2d 106 (U.S. Wis. S.C.) — considered

Slaferek v. TCG International Inc., 46 Alta. L.R. (3d) 279, [1997] 3 W.W.R. 240, 199 A.R. 63, 8 C.P.C. (4th) 117 (Alta. Q.B.) — considered

Sparling v. Southam Inc. (1988), 41 B.L.R. 22, 66 O.R. (2d) 225 (Ont. H.C.) — considered

Vandevelde v. Smith (1999), 243 A.R. 161, 77 Alta. L.R. (3d) 160, [2000] 5 W.W.R. 405 (Alta. Q.B.) — considered

Viridian Inc. v. Dresser Canada Inc. (1999), 73 Alta. L.R. (3d) 348, 247 A.R. 23, [2000] 2 W.W.R. 389 (Alta. Q.B.) — considered

Wright (Next Friend of) v. VIA Rail Canada Inc., 76 Alta. L.R. (3d) 166, [2000] 4 W.W.R. 232, 40 C.P.C. (4th) 128, (sub nom. *Wright Estate v. VIA Rail Canada Inc.*) 256 A.R. 148 (Alta. Q.B.) — considered

Statutes considered:

Contributory Negligence Act, R.S.A. 1980, c. C-23
s. 2 — considered

s. 2(1) — considered

Tort-Feasors Act, R.S.A. 1980, c. T-6
s. 3 — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68
Generally — considered

R. 77 — considered

Civil Practice Note 7 — considered

Civil Practice Note 7, item 23 — considered

Civil Practice Note 7, item 48 — considered

Rules of Court, 1990, B.C. Reg. 221/90
R. 28(1) — referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 31.10 — referred to

APPEAL by non-settling defendant from judgment reported at (1999), 39 C.P.C. (4th) 308, 74 Alta. L.R. (3d) 194 (Alta. Q.B.), dismissing defendant's claims for contribution and indemnity from settling parties.

The judgment of the court was delivered by *Fruman J.A.*:

1 The question in this appeal is whether Alberta courts should permit some defendants in complex multi-party litigation to settle, even though the defendants who are left behind might encounter difficulties gathering pre-trial evidence to defend the lawsuit. The answer is yes.

BACKGROUND

2 On November 1, 1990, a fire occurred at the Eta Lake Gas Processing facility, near Drayton Valley, Alberta. The resulting claims for loss of property and profit allege both negligence and breach of contract for which the plaintiffs seek damages of several million dollars. Given the sizeable stakes, the plaintiffs cast their litigation nets as widely as possible, adding more defendants in successive amended versions of the statement of claim. The defendants in turn endeavoured to minimize their

respective risk by maximizing the number of parties potentially responsible for the loss. They issued notices to co-defendants and added third, fourth and fifth parties to this action. With the current tally at eleven groups of defendants, a schematic diagram of who is suing whom looks like the "triple reverse" from a football play book.

3 The case has meandered towards trial, with extensive though as yet incomplete discovery and document production. Now, nearly a decade after the fire occurred, ten groups of defendants want out and the plaintiffs want to let them go. They have entered into a type of settlement agreement known as a "Pierringer agreement" named after *Pierringer v. Hoger*, 124 N.W.2d 106 (U.S. Wis. S.C., 1963), the Wisconsin case in which this type of agreement was first considered. Such agreements permit some parties to withdraw from the litigation, leaving the remaining defendants responsible only for the loss they actually caused, with no joint liability. As the non-settling defendants are responsible only for their proportionate share of the loss, a Pierringer agreement can properly be characterized as a "proportionate share settlement agreement".

4 If given effect, the settlement agreement in this case would greatly simplify the trial by reducing the number of litigants from twelve groups, represented by twelve different lawyers, to two groups: the plaintiffs, and the appellants, Propak Systems Ltd. together with two of its employees, Lynn Tylosky and L. Moore ("Propak"). The settlement agreement entered into on June 23, 1999 (AB II at 150), stipulates the removal from this suit of the third, fourth and fifth parties and co-defendants (the "settling defendants") as a condition precedent to its main provisions coming into effect. It provides that:

> 1. The plaintiffs will discontinue their claims against all of the settling defendants (s. 1);
>
> 2. The plaintiffs covenant not to sue any of the settling defendants (s. 2);
>
> 3. The plaintiffs will amend their pleadings to abandon their claims against Propak, except to the extent of Propak's several share of liability, and will not seek to recover from Propak any amounts for which Propak would be entitled to contribution or indemnity from the settling defendants (s. 3);
>
> 4. All of the settling defendants will abandon their indemnity claims and any claims for costs against one another, and against Propak (s. 6);
>
> 5. The settling defendants will cooperate with the plaintiffs by making witnesses, documents and expert reports available to them (s. 10); and
>
> 6. To the extent required by law and the rulings and guidelines of the Law Society of Alberta, the agreement will be disclosed to the Court of Queen's Bench and to Propak (s. 11).

5 The agreement requires amendments to the statement of claim that would focus the issue for determination at trial solely on Propak's proportionate share of the loss. The previous version of the statement of claim set out diverse claims of alternative liability against various defendants in 28 paragraphs and sub-paragraphs (AB I at P-39). The newly amended statement of claim refers to four specific breaches by Propak relating to its faulty reinstallation of a motor in a refrigeration compressor on the Eta Lake Gas Processing facility (AB II at 145, paras. 29 - 31). It alleges that Propak's failure to properly preload the bolts fastening the coupling to the hub of the motor and its failure to align the motor led to the escape of gas and resulting fire.

6 The litigation is under case management. On September 3, 1999, the settling defendants brought an application before the case management judge to remove them from the lawsuit. At the same time, the plaintiffs applied to amend the statement of claim.

7 Propak resisted both applications, arguing that due to potential prejudice it would be made a scapegoat for liability at trial. It noted that because the *Alberta Rules of Court*, Alta. Reg. 390/68 do not contain an express rule permitting pre-trial discovery against third parties, Propak would lose its pre-trial procedural rights against the settling defendants if they were released from the lawsuit. Propak contended that this would affect its ability to gather evidence to show that the fire resulted from the settling defendants' actions, and would impede the court's ability to apportion Propak's share of the liability fairly.

THE CASE MANAGEMENT JUDGE'S DECISION

8 The case management judge granted both applications. He noted that the settlement agreement limits Propak's liability to its own several liability to the plaintiffs. Given Propak's limited exposure, he queried the basis on which Propak's claims for contribution and indemnity from the settling defendants could continue (AB I at 100).

9 The judge then observed that even if the settling defendants were removed from the suit, leaving the plaintiffs and Propak as the only remaining litigants, the court would nevertheless be compelled to determine the degrees of fault of all contributors to the plaintiffs' damages, whether parties to the action or not. The court would be required to make this assessment for two reasons: in order to isolate Propak's several liability, and because s. 2(1) of the *Contributory Negligence Act*, R.S.A. 1980, c. C-23 compels the court to do so (AB I at 102). Therefore, even though the settlement agreement sufficed to extinguish all issues of liability among the plaintiffs and settling defendants, and the settling defendants and Propak, removing the settling defendants from the suit could affect the court's ability to apportion fault properly.

10 The case management judge recognized that removing the settling defendants from the action would cause Propak to lose its rights of discovery and production of documents in respect of those parties. The judge noted that although examinations for discovery were not complete, Propak had the advantage of significant oral examination and discovery of the documents. He was unable to find that "Propak would be in any way prejudiced or disadvantaged by 'losing' the opportunity of further discovery of parties to whom it would no longer be adverse in interest [by virtue of the agreement taking effect]" (AB I at 105). Accordingly, he directed that the third, fourth and fifth party notices and notices to co-defendants be struck, the respective parties be dismissed from the suit, and the amendments to the statement of claim be allowed (AB I at 105-106).

PROPORTIONATE SHARE SETTLEMENT AGREEMENTS

An Introduction

11 The litigation of large losses in Canada has been characterized by two opposing trends: first, the practice of adding every conceivable party as a defendant or third party in order to spread out the risk of liability, which complicates and slows the litigation process; and second, the use of settlement agreements to help speed litigation and curb legal fees. See Barbara Billingsley, "*Margetts v. Timmer Estate*: The Continuing Development of Canadian Law Relating to Mary Carter Agreements" (1998), 36 Alta. L. Rev. (No. 4) 1017.

12 Now past is the day when "settlement agreement" can be understood to refer solely to the final resolution of all outstanding issues between all parties to a lawsuit, effectively bringing the suit to an end. In the last several years, in response to increasingly complex and commensurately dilatory and costly litigation, a new generation of settlement agreements has been cautiously adopted by the litigation bar.

13 The new settlement agreements, which include such exotically named species as the Mary Carter agreement and the Pierringer agreement, endeavour to attain a more limited objective: rather than trying to resolve all outstanding issues among all parties, a difficult task in complicated suits, they aim to manage proactively the risk associated with litigation. In short, contracting litigants prefer the certainty of settlement to the uncertainty and expense of a trial and the possibility of an undesirable outcome. This "risk-management" objective is accomplished by settling issues of liability between some but not all of the parties, thereby reducing the number of issues in dispute, simplifying the action, and expediting the suit. Ancillary benefits include a reduction in the financial and opportunity costs associated with complex, protracted litigation, as well as savings of court time and resources.

14 To the extent that a proportionate share settlement agreement completely removes the settling defendants from the suit, it is like a conventional settlement agreement that brings all outstanding issues between the settling parties to a conclusion. Proportionate share settlement agreements therefore typically include the following elements:

1. The plaintiff receives a payment from the settling defendants in full satisfaction of the plaintiff's claim against them;

2. In return, the settling defendants receive from the plaintiff a promise to discontinue proceedings, effectively removing the settling defendants from the suit;

3. Subsequent amendments to the pleadings formally remove the settling defendants from the suit; and

4. The plaintiff then continues its suit against the non-settling defendants.

15 There is, however, an added complication that a proportionate share settlement agreement must address. As a result of third party proceedings, settling defendants are almost always subject to claims for contribution and indemnity from non-settling defendants for the amount of the plaintiff's loss alleged to be attributable to the fault of the settling defendants. Before the settling defendants can be released from the suit, some provision must be made to satisfy these claims.

16 This obstacle is overcome by including an indemnity clause in which the plaintiff covenants to indemnify the settling defendants for any portion of the damages that a court may determine to be attributable to their fault and for which the non-settling defendants would otherwise be liable due to the principle of joint and several liability. Alternatively, the plaintiff may covenant not to pursue the non-settling defendants for that portion of the liability that a court may determine to be attributable to the fault of the settling defendants. It is the latter approach that prevails in the agreement at issue in this suit, but in either case the goal of the proportionate share settlement agreement is to limit the liability of the non-settling party to its several liability.

The Competing Positions

17 This court recently considered the validity of a "new generation" settlement agreement in *Margetts (Next Friend of) v. Timmer Estate* (1996), [1997] 1 W.W.R. 25 (Alta. Q.B.), aff'd (1999), 178 D.L.R. (4th) 577 (Alta. C.A.). There, the trial court recognized and this court affirmed that a tortfeasor has a legitimate and "undoubted right to contract to minimize his financial exposure to the plaintiffs": at W.W.R. 39.

18 However, in *Margetts*, *supra*, the settlement was in the nature of a Mary Carter agreement, which did not completely remove the settling defendants from the suit. As the settling parties continued to be adversarial in interest, a non-settling party remained entitled to full pre-trial disclosure from them. In *Margetts*, therefore, the court did not need to reconcile settlement rights with a non-settling defendant's ability to exercise its pre-trial procedural rights in an effort to deflect the plaintiff's accusation of fault.

19 In addition to being grounded in fundamental principles of justice and framed in the *Alberta Rules of Court*, a non-settling defendant's ability to defend against a suit is anchored in the statutory requirement found in s. 2(1) of the *Contributory Negligence Act*:

2(1) When damage or loss has been caused by the fault of 2 or more persons, the court shall determine the degree in which each person was at fault.

20 The effect of this provision is to compel the court to determine the degrees of fault of all contributors to the plaintiffs' damage, whether or not they currently are or ever have been parties to the action. In effect, this provision acts as a safeguard to establish the proportionate share of each defendant's liability, whether settling or non-settling.

21 It therefore becomes apparent that the right to settle, fixing a settling defendant's financial liability to the plaintiff through contract, may have a direct effect on a non-settling defendant's pre-trial rights of discovery and production of documents in order to gather evidence to defend the lawsuit.

The B.C. Ferry Approach

22 The Canadian cases in which proportionate share settlement agreements have been considered attempt to balance the right to settle against the right to pre-trial disclosure. One approach is represented by the decision of the British Columbia Court of Appeal in *British Columbia Ferry Corp. v. T & N plc* (1995), 27 C.C.L.T. (2d) 287 (B.C. C.A.). There, the court decided that

the non-settling defendants could not maintain a claim for contribution or indemnity against third parties that had settled with the plaintiffs, pursuant to the terms of a proportionate share settlement agreement. However, the court allowed the non-settling defendants to maintain a claim for a declaration to determine the degree to which the plaintiff's damages were attributable to the settling defendants. The court therefore permitted the action for declaratory relief to remain, keeping the settling defendants in the lawsuit for the purely procedural purpose of allowing the non-settling parties access to pre-trial procedural rights.

23 The court concluded that the non-settling defendants would be prejudiced in establishing the fault of the third parties, and thus in maintaining their own defence, if they did not retain the benefit of full pre-trial procedural rights against the settling parties: at 302. The decision is based on the proposition that it would be "manifestly wrong if a private accord between plaintiff and third party could work to deprive a defendant of the ability to establish an element of proof essential to a just resolution of the action": at 302 (emphasis added).

24 The difficulty with the *B.C. Ferry* approach is its emphasis on the potential prejudice a non-settling party might suffer. Indeed, it is likely that a non-settling party will always be able to allege some possible disadvantage when it remains as the sole target for liability after other parties abandon the litigation. That is true whether a partial settlement occurs during the course of litigation or even before an action is launched. The *B.C. Ferry* approach would seem to permit an action for declaratory relief to be maintained for purely procedural purposes against anyone who settled, whether or not they were ever a named party to the litigation, and even though there were no possibility that they might be liable.

25 Litigation, including settlement, is all about advantage, and corresponding disadvantage or prejudice. Settlement, after all, is nothing more than a compromise, in which parties gamble by trading prospective rights for certainty. Nor does prejudice run in only one direction. Failure to allow settlement by parties who want an exit ramp from costly and prolonged litigation may give a party who refuses to settle an even stronger tactical advantage. An unreasonable party can hold the other parties at ransom, virtually dictating the terms of settlement.

26 It is argued that without complete pre-trial disclosure a court will be unable to properly apportion the loss. This argument cuts both ways. The plaintiff always bears the burden of proof at trial. By agreeing to remove the settling defendants from the suit and focussing only on the non-settling defendant's alleged misdeeds, a plaintiff runs the risk of no recovery at trial, for it may fail to prove any basis on which a trial court could assign liability to the non-settling party. Decisions to settle with some but not all defendants give rise to challenging issues. What use can be made by the non-settling defendant of settling defendants' discoveries? Will adverse inferences be drawn against the plaintiff if it does not call settling defendants as witnesses? A plaintiff may encounter considerable obstacles in its attempt to recover any damages. It by no means follows that as a result of a partial settlement the non-settling defendant will shoulder a greater portion of the liability than it ought.

27 The *B.C. Ferry* approach undervalues the importance of settlement. In these days of spiralling litigation costs, increasingly complex cases and scarce judicial resources, settlement is critical to the administration of justice. The Supreme Court of Canada noted the strong public policy reason which encourages settlement in *Loewen, Ondaatje, McCutcheon & Co. c. Sparling*, [1992] 3 S.C.R. 235 (S.C.C.), at 259, citing *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 at 230 (Ont. H.C.):

> [T]he Courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial Court system. [Emphasis deleted.]

In *Geleta v. Alberta (Minister of Transportation & Utilities)* (1996), 193 A.R. 67 (Alta. C.A.) at 69, this court recognized that "public policy is to encourage compromise, whether it is partial or full".

28 Indeed, the Court of Queen's Bench of Alberta gives a high priority towards settlement. It has devoted considerable judicial resources to a successful judicial dispute resolution initiative and case management program. Proportionate share settlement agreements are most likely to be used in complex multi-party lawsuits, which are expected to consume more than 25 days of trial time. Such cases are considered to be "very long" trials which are subject to mandatory case management under *Court of Queen's Bench of Alberta Civil Practice Note No. 7 — The Very Long Trial* (September 1, 1995). *Practice Note No. 7* focuses

on full or partial settlement. One of its purposes is "to canvass settlement or other disposition of all or as many of the issues as possible" (s. 23). It provides for mandatory settlement conferences, "to settle some or all of the issues in the action" (s. 48). In decisions upholding proportionate share settlement agreements, Alberta trial courts have relied upon the public policy reason which supports settlement: *Slaferek v. TCG International Inc.* (1997), 46 Alta. L.R. (3d) 279 (Alta. Q.B.) at 286; and *Wright (Next Friend of) v. VIA Rail Canada Inc.* (2000), 76 Alta. L.R. (3d) 166 (Alta. Q.B.) at 175.

Potential Prejudice

29 Alberta courts have grappled with the *B.C. Ferry* approach, attempting to balance the certain benefit of settlement against the potential problem of prejudice. Faced with the difficulty of predicting future prejudice, they have looked to the past, assessing such things as the age and complexity of the action; the number of parties involved; how long the present structure of defendants and third parties has been in place; at what stage in the proceedings the application was made; whether discoveries have taken place, documents been produced and expert reports exchanged; whether a trial date has been set; delays and the reason for them; and whether the non-settling party has diligently exercised discovery rights. See *Slaferek, supra*; *Viridian Inc. v. Dresser Canada Inc.* (1999), 73 Alta. L.R. (3d) 348 (Alta. Q.B.) at 363; *Vandevelde v. Smith* (1999), 243 A.R. 161 (Alta. Q.B.); and *Wright, supra*.

30 Generally, the longer the action has been in existence and the greater the pre-trial disclosure received by the non-settling defendant, the less likely an Alberta judge will find potential prejudice and the more likely the settlement agreement will be given effect. See *Slaferek, supra*; and *Wright, supra*. Indeed, that approach was followed in the present case. The case management judge concluded that because Propak had the advantage of significant oral examination and discovery of documents, it was "clearly better off" than if the settling parties had not been sued or had been formally released by the plaintiffs from the outset, and would not "in any way" be disadvantaged or prejudiced (AB I at 105).

31 This approach has a number of flaws. First, the analysis tends to be superficial and the conclusions unpersuasive. From a pre-trial disclosure point of view, most parties will be better off at a more advanced stage in the litigation process. But a non-settling party, although better off, could still be disadvantaged if a court were to truncate its pre-trial procedural rights by giving effect to a proportionate share settlement agreement. No matter how dilatory the defendant has been, no matter how interminable its efforts to mine for information, the potential always exists for the next discovery question it asks to be the one that blows the litigation apart. It is difficult for any judge to definitively conclude that there is no potential for prejudice.

32 A second flaw is that this approach always favours settlement at advanced stages rather than earlier stages of litigation. But public policy dictates otherwise. Early settlement means reduced legal costs and less strain on the court system. In modern, complex litigation, it is the pre-trial skirmishes that consume most of the court's calendar. The surge in the number of cases under case management, and the need for intricate practice notes regulating long trials, such as *Practice Note No. 7*, confirm this.

33 A third flaw is that it gives little guidance to judges, and creates uncertainty for litigants. Because courts are looking at potential rather than actual prejudice, they sometimes have a difficult time evaluating the competing positions. In *Viridian, supra* at 363, for example, the judge noted that he did not "have a clear appreciation of the comparative procedural consequences" and was uncertain whether the negative effects would be of substantial significance. He concluded that "the appropriate response to my uncertainty [...] is to maintain the existing structure of this action".

34 A test which institutionalizes this degree of uncertainty is no test at all. By properly drafting a proportionate share settlement agreement, settling parties can ensure that a non-settling defendant is responsible only for its proportionate share of the loss. But a non-settling defendant can always assert some form of potential prejudice, which settling parties cannot avoid by contractual means. Litigants will no doubt be reluctant to spend time evaluating their legal position and displaying their hand in settlement negotiations if there is little ability to predict whether a proportionate share settlement agreement will be given effect by the court.

35 The fundamental problem with the current approach is that it requires judges to balance two competing interests, but gives judges few tools with which to do so. The *Alberta Rules of Court* contain no express rule permitting third party discovery

and at least to this point, no one has come up with a creative way of achieving equivalent disclosure by practice note, statute or private agreement.

36 Judges in other jurisdictions do not face the same difficulty. For example, in *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (Ont. S.C.J.) the court evaluated the non-settling defendant's procedural objections in light of the public policy which encourages settlement, concluding that the procedural complaints could be addressed without "a wholesale rejection of the proposed settlement agreement": at 147. The court made specific orders requiring pre-trial disclosure by the settling parties, as permitted by the Ontario class action statute being considered in that case. See also *The Ontario Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 31.10 and British Columbia *Supreme Court Civil Rules*, B.C. Reg. 221/90, R. 28(1), which permit parties to apply to examine on discovery third parties, who may have information relevant to a material issue in an action.

37 Alberta judges do not enjoy this type of flexibility. Because they can do little to remedy potential prejudice, the so-called balance they are supposed to achieve is no balance at all: to uphold a settlement agreement, a judge must conclude that there is little or no potential for prejudice. But in reality, curtailing pre-trial disclosure rights will almost always result in possible procedural disadvantage to the non-settling defendant. In most cases the disadvantage does not stem from the fact of settlement, but from the pre-trial disclosure regime which exists in this province. It is therefore more productive to focus on the cause, rather than the potential for prejudice.

38 Alberta's current pre-trial disclosure regime severely restricts third party discovery rights. This limitation, which affects all litigants equally, should not be equated to prejudice. Nor should it be used to justify jettisoning proportionate share settlement agreements in this province. A better solution is to introduce some form of third party discovery in Alberta, to address the type of procedural complaints levied in this case. The fact that non-settling defendants are confined to a statutory disclosure regime constrained by the *Alberta Rules of Court* is not a proper basis for refusing to give effect to proportionate share settlement agreements.

39 It is one thing when the *Alberta Rules of Court* limit rights of pre-trial disclosure. It is another matter entirely when settling parties deliberately thwart a non-settling party's ability to get at the truth. Courts need not countenance agreements containing express provisions that narrow the procedural rights a non-settling defendant would otherwise have or create other obstacles, for example, prohibiting a settling party from cooperating with a non-settling party, participating in interviews, or voluntarily making documents available.

40 A proportionate share settlement agreement should be disclosed to the non-settling party: *Hudson Bay Mining & Smelting Co. v. Fluor Daniel Wright*, [1997] 10 W.W.R. 622 (Man. Q.B.), aff'd (1998) 131 Man. R. (2d) 133 (Man. C.A.). To ensure that the trial judge is aware of the circumstances under which the non-settling defendant has operated, the terms of the agreement, although not necessarily the amount of the settlement, should also be disclosed to the court.

Summary

41 In summary, in evaluating proportionate share settlement agreements:

1. A court must keep in mind the strong public policy reason which encourages settlement;

2. The fact that a non-settling defendant has restricted rights of third party disclosure under the *Alberta Rules of Court* does not justify refusing to give effect to a proportionate share settlement agreement;

3. A court need not approve a proportionate share settlement agreement containing contractual provisions that directly limit the procedural rights a non-settling defendant would otherwise have; and

4. A proportionate share settlement agreement should be disclosed to the non-settling party. To further reduce potential prejudice, the terms of the agreement, although not necessarily the amount of the settlement, should also be disclosed to the court.

APPLICATION

42 The case management judge decided that Propak's liability was strictly limited to its own several liability to the plaintiffs and that it faced "no exposure for anything beyond that" as all claims, including claims for contribution and indemnity, had been settled (AB I at 100). That finding was not attacked by Propak on appeal. However, during oral argument the panel asked whether Propak asserted that its third party notices established independent duties which continue to give rise to a claim for indemnification.

43 Some confusion exists about claims for contribution and claims for indemnity. Although it is common practice for multiple defendants to issue cross-claims against one another seeking "contribution and indemnity" in respect of the plaintiff's loss, a claim for contribution is usually based on s. 2 of the *Contributory Negligence Act* and s. 3 of the *Tort-feasors Act*, R.S.A. 1980, c. T-6. The combined effect of these statutory provisions is the creation of joint and several liability, whereby a plaintiff may claim the whole of its loss from any one defendant, and that defendant may in turn claim contribution from the other defendants in proportion to their respective degree of fault. In contrast to the statutory basis for a claim for contribution, a claim for indemnity is grounded in either contract or tort, arising from an independent duty of care that one defendant or third party owed to another.

44 Proportionate share settlement agreements are relatively straightforward when all defendants are potentially liable to the plaintiff. A settlement is proper so long as the non-settling defendant's liability is strictly limited to the loss it actually caused. The situation is more complicated when the non-settling defendant has issued a third party notice claiming an independent duty that is owed to it, but not to the plaintiff. A settlement cannot extinguish the non-settling defendant's entitlement to indemnification from the third party unless it also extinguishes the non-settling defendant's liability to the plaintiff in respect of claims for which it could seek indemnification from the third party.

45 Propak was invited to present additional written submissions on these points, but did not avail itself of this opportunity. Having reviewed the settlement agreement, amended statement of claim and pleadings, we see no reason to question the case management judge's determination that Propak faces no exposure beyond its several liability for which it has no remaining right to indemnification.

46 The case management judge distinguished *B.C. Ferry, supra*, in which an action for declaratory relief was permitted to remain for purely procedural purposes, on the basis that no claim for declaratory relief had been advanced in this case. While *B.C. Ferry* should not be applied, the case need not have been distinguished on this basis. In Alberta, claims for declaratory relief are rarely maintained for purely procedural purposes; instead a legal right or interest must be at stake: *Brown v. Alberta* (1998), 64 Alta. L.R. (3d) 62 (Alta. Q.B.) at 74. Whether or not the non-settling party has asked for a declaration setting out its proportionate share of fault, a court is compelled to determine the degree of fault of all contributors to a plaintiff's damages, pursuant to s. 2(1) of the *Contributory Negligence Act*. The presence, or absence, of a request for declaratory relief adds little to the analytical framework and is not a factor which weighs in the balance.

47 The case management judge commented that "it would be a rare case [...] in which optimizing a non-settling party's access to discovery and/or production of documents would outweigh the benefits of a multi-party settlement and a shortened trial" (AB I at 105). He therefore properly considered the strong public policy reason which favours settlement. The judge noted that under the *Rules* only parties who are adverse in interest have discovery rights and that no such rights would exist with respect to the settling parties, who would be "mere witnesses". He commented that Propak "would have full recourse to all rights of subpoena and production which would apply to any party seeking to call evidence in a civil trial in Alberta" (AB I at 105). He therefore recognized that potential prejudice which arises as a result of the third party disclosure regime in the *Alberta Rules of Court* is not a proper basis for refusing to give effect to a proportionate share settlement agreement.

48 The case management judge did not mention disclosure provisions contained in the agreement, although he undoubtedly considered them. In fact, they do not limit Propak's procedural rights. Section 10 requires the settling defendants to cooperate with the plaintiffs, by making witnesses, documents and expert reports available to them, but does not restrict the settling defendants from cooperating with Propak. As Propak has a continuing right to examine the plaintiffs, it will also be entitled

to any documents received by the plaintiffs from the settling defendants. Section 11 provides for disclosure of the settlement agreement to both Propak and the Court of Queen's Bench.

49 Propak has failed to show that the case management judge erred.

OTHER ISSUES

50 Propak has advanced several other issues in this appeal, which will be dealt with summarily.

51 Although R. 77 requires that a notice to a co-defendant be filed and served within ten days after filing a defence, Propak filed notices to co-defendants more than five years after its statement of defence. Propak sought leave for late filing in the application heard by the case management judge on September 3, 1999. The judge declined to grant leave. Noting that the delay was inordinate, he found the real issue to be whether Propak had advanced a reasonable excuse for the delay. On the evidence before him, he was unable to make such a finding (AB I at 111). Propak appeals this decision.

52 In light of the decision giving effect to the proportionate share settlement agreement, this issue is academic. In any event, a review of the evidence filed in support of Propak's leave application indicates no error in the case management judge's conclusion.

53 Second, Propak asks that this court "deem [it] released along with [the] other joint tortfeasors" on the basis of its interpretation of the *Tort-feasors Act*, R.S.A. 1980, c. T-6 (Propak's Factum at 26). Whether the settling defendants and Propak are joint tort-feasors is a question of mixed fact and law, requiring an evidentiary basis and fact finding. Whether a proper interpretation of the *Tort-feasors Act* supports Propak's release from this action is a question of law. Neither issue was put before the case management judge and no evidence was adduced. It is inappropriate for this court to consider such questions for the first time on appeal.

54 Finally, Propak asks this court to provide guidance on the procedural and substantive limits they have "as to what response they may make to the restructured lawsuit" (Propak's Factum at 26). As a court of appeal sitting in review, it is not our job to provide this type of guidance. Propak should address its request to the case management judge.

55 The appeal is dismissed.

Appeal dismissed.

End of Document

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED, AND IN THE MATTER OF A PLAN OF COMPRISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Commercial Court File No.: CV-12-9667-00CL

The Trustees of the Labourer's Pension Fund of Central and Eastern Canada, et al.

and

Sino-Forest Corporation, et al.

Court File No: CV-11-431153-00CP

Plaintiffs

Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE AD HOC COMMITTEE OF PURCHASERS OF THE APPLICANT'S SECURITIES, INCLUDING THE CLASS ACTION PLAINTIFFS
Settlement Approval – Horsley Settlement
(Motion Returnable July 24, 2014)

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