SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

No : 500-06-000838-173

DATE : February 18, 2019

BY THE HONOURABLE CHANTAL CHATELAIN, J.S.C.

LAWRENCE CHANDLER

Applicant

v.

VOLKSWAGEN AKTIENGESTLLCHAFT

Respondent

JUDGMENT
(application to specify the class definition)

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[1] On May 28, 2018, this Court authorized Mr. Lawrence Chandler, the Applicant, to institute a class action against Volkswagen Aktiengestllchaft (**VW**) on behalf of the following group[1]:

> All residents of Québec who purchased Volkswagen Aktiengestllchaft's (**VW**) securities during the Class Period (i.e. between March 12, 2009, and

[1] *Chandler c. Volkswagen Aktiengestllchaft*, 2018 QCCS 2270, application for leave to appeal dismissed *Volkswagen c. Chandler*, 2018 QCCA 1347.

> September 18, 2015) and held all or some of those acquired VW securities until after September 18, 2015.

[2] The parties now disagree as to the content of the notice to class members. More specifically, VW believes that the definition of the class should be specified to confirm that it excludes debt instruments. VW is of the view that the term “securities”, for the purposes of the authorization judgment, only encompasses the following instruments:

- VW ordinary shares,
- VW preferred shares,
- VW sponsored American Depositary Receipts ("ADR") for ordinary shares, and
- VW sponsored ADR for preferred shares.

[3] For his part, in addition to the above, Mr. Chandler is of the view that the term “securities” includes debt instruments and that there should be no change to the class definition.

[4] In view of this disagreement, VW asks the Court to specify the class definition and to order that the notice to class members conform to it.

[5] At the outset, VW does not dispute the fact that debt instruments generally qualify as a type of “securities”.

[6] The Court agrees. For example, although the *Securities Act*[2] does not define a “securities”, Section 1(1) of the Act specifically refers to a bond, with is a debt instrument, as being a type of securities:

> 1. This Act applies to the following forms of investment:
>
> (1) any security recognized as such in the trade, more particularly, a share, bond, capital stock of an entity constituted as a legal person, or a subscription right or warrant;
>
> […]

[7] Similarly, under Section 1 of the *Ontario Securities Act*,[3] a "security" includes “a bond, debenture, note or other evidence of indebtedness or a share, stock, unit, unit certificate, participation certificate, certificate of share or interest, preorganization certificate or subscription” other than some limited specified items.

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2 CQLR, c. V-1.1.
3 RSO 1990, c. S. 5

[8] However, VW argues that “Plaintiff's class action, as presented at authorization, rests exclusively on Defendant's equity securities. It is Plaintiff's own record at authorization that informs the scope of his class definition-not external sources which Plaintiff has not called upon to define "securities" until now.”[4]

[9] The Court does not agree.

[10] It is true that Mr. Chandler himself had only acquired securities in the form of 300 of VW's sponsored unlisted American Depositary Receipts (**ADR**) listed on the OTC Markets Group. However, it was never discussed nor contemplated at the authorization hearing that the group should be limited to investors who had acquired a specific form of securities. To the contrary, the Court found in the authorization judgment that the proposed group purported to encompass all investors who have acquired VW’s securities, notwithstanding the nature or the form of the securities.

[11] As a matter of fact, at paragraph 3 of the authorization judgment, this Court summarized Mr. Chandler claim as follows:

> [3] Mr. Chandler basically claims that the proposed class members, who invested in VW’s securities, suffered monetary damages when the value of their securities dropped as a result of the disclosure of VW’s intentional misrepresentations in relation to the compliance of certain of its Volkswagen and Audi diesel-powered automobiles with the applicable emissions standards.
>
> (Our emphasis)

[12] Furthermore, at paragraph 58 of the authorization judgment, the Court described the legal syllogism put forward by Mr. Chandler as follows:

> [58] The legal syllogism put forward by Mr. Chandler is straightforward. He argues that pursuant to Article 1457 *CCQ*, VW was required to disclose facts that could affect the price of its securities as well as the decision of a reasonable investor to acquire VW's securities, or conversely that VW was required not to disclose facts that it knew to be false or constitute misrepresentations. According to Mr. Chandler, the failure to respect these obligations constituted a fault and the loss suffered by the proposed class members results from that fault.
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> (Our emphasis)

[13] In addition, in discussing the requirement of Article 575(3) *CCP*, the Court held:

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[4] Reply to plaintiff's argument brief in response to defendant's application to specify the class definition and to order that the notice to class members conform to it, par. 6.

> [104] VW pleads that the criterion of Article 575(3) has not been met as Mr. Chandler failed to allege that a single other Québec resident purchased VW ADR or is in a situation similar to that of his own.[5]
>
> [105] The Court does not agree. First, the proposed class is not limited to residents who purchased ADR, but rather purports to include residents of Québec who purchased VW securities during the Class Period.
>
> (Our emphasis)

[14] It appears clearly from the authorization judgment (and this was also the understanding of the Court) that the proposed class action was intended to cover all types of VW securities. If VW intended to raise an argument to limit the scope of the class, it should have done so at the authorization hearing. At the very least, it should have raised that matter in its application for leave to appeal the authorization judgment[6].

[15] Having failed to do so in due course, the Court believes that VW cannot try to limit the scope of the class at this point.

[16] In closing, VW argues that if the class definition includes debt instruments that *"would end run the requirement at authorization that individual class members, and the securities alleged to be affected by misrepresentations, be ascertainable."*

[17] The Court rather sees things from the opposite perspective. If the class definition is now specified to exclude debt instruments, class members who legitimately believed that they were included in the class would now be excluded without being heard. That would be unfair and contrary to law, in addition to being inconsistent with the proper administration of justice, as it gives rise to a second class action being required in relation to essentially the same matter[7].

FOR THESE REASONS, THE COURT:

[18] **DISMISSES** the Application to specify the class definition and to order that the notice to class members conform to it;

[19] **CONFIRMS** that the term "securities" for the purposes of the authorization judgment does include debt instruments and that there should be no change to the class definition;

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5 VW makes the same argument in relation to the criterion of article 575(1). The Court will however deal with the argument under the criterion of article 575(3).

6 The application for leave to appeal the authorization judgment was dismissed on August 28, 2018, *Volkswagen c. Chandler,* 2018 QCCA 1347.

7 *Apple Canada Inc. c. Charbonneau*, 2018 QCCA 2089, par. 22; *Société des loteries du Québec (Loto-Québec) c. Brochu*, 2007 QCCA 1392, par. 8-9.

[20] **ORDERS** that the notice to class members conform to the class definition;

[21] **WITHOUT LEGAL COSTS**.

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CHANTAL CHATELAIN, J.S.C.

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