FILE/DIRECTION/ORDER

BEFORE JUDGE Glustein ACTION # CV-17-573962

Makris
Plaintiff(s)

-v-

Endo International plc
Defendant(s)

CASE MANAGEMENT: YES [✓] NO [ ]

COUNSEL: H. Davarinia for the plaintiff PHONE NO. hdavarinia@morganlaw.com

M. Milne-Smith for the defendants PHONE NO. mmilne-smith@dwpv.com

_____ PHONE NO. _____

[ ] ORDER [ ] DIRECTION FOR REGISTRAR

[ ] REPORTED SETTLED ADJOURNED TO TRIAL SCHEDULING COURT_____
[ ] NO ONE APPEARED ADJOURNED TO TO BE SPOKEN TO COURT_____

Motion granted as per reasons attached. Order to go as attached at Tab 4 of motion record. Terms attached as Schedule "A" to apply.

June 24, 2020
DATE

J.
JUDGE'S SIGNATURE

SCHEDULE "A" TERMS

[1] Upon the courthouse reopening to the public, each party shall file with the Civil Motions Office a copy of all the material he, she, or it delivered electronically for this proceeding, with proof of service, and pay the appropriate fees therefor.

[2] Notwithstanding Rule 59.05, this Order is effective from the date it is made, and is enforceable without any need for entry and filing. In accordance with Rules 77.07(6) and 1.04, no formal Order need be entered and filed unless an appeal or a motion for leave to appeal is brought to an appellate court. Any party to this Order may nonetheless submit a formal Order for original signing, entry and filing when the Court returns to regular operations, or earlier if otherwise required.

CITATION: Makris v. Endo International PLC, 2020 ONSC 3930
COURT FILE NO.: CV-17-573962
DATE: 20200624

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: PHAEDRA A. MAKRIS, Plaintiff

AND:

ENDO INTERNATIONAL PLC, RAJIV KANISHKA LIYANAARCHCHIE DE SILVA, and SUKETU P. UPADHYAY, Defendants

BEFORE: Justice Glustein

COUNSEL: *Hadi Davarinia*, for the plaintiff

Matthew Milne-Smith, for the defendants

REASONS FOR DECISION

Nature of issue and overview

[1] The plaintiff, Phaedra A. Makris ("Makris") brings this motion, in writing and on consent:

(i) granting Makris leave of the court, pursuant to s. 138.8(1) of the *Securities Act*, R.S.O. 1990, c. S. 5 ("*OSA*"), for settlement purposes only, to commence an action under s. 138.3 of the *OSA*, and if necessary, under the concordant provisions of the other provincial securities statutes ("Equivalent Securities Acts") as against the Defendants Endo International plc ("Endo"), and the defendants Rajiv Kanishka Liyanaarchchie De Silva ("De Silva") and Suketu P. Upadhyay ("Upadhyay"),[1]

(ii) certifying the within action (the "Action") as a class proceeding pursuant to ss. 2 and 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*") as against the Defendants, on consent and for settlement purposes only,

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[1] The defendants are collectively referred to as the "Defendants".

(iii) approving the form, content, and method of dissemination of the Short-Form and Long-Form Notices of Certification and Settlement Approval Hearing (collectively, the "Notices") and the Opt-Out Form,

(iv) appointing Morganti & Co., P.C. ("Class Counsel") to administer opt-outs from and objections to the settlement of the Action, if any,

(v) setting the deadline by which class members may opt-out of the Action (the "Opt-Out Deadline"),

(vi) setting the date for the hearing of the motion to approve the proposed settlement, and

(vii) appointing Class Counsel to manage the escrow account in accordance with the terms of the settlement agreement reached between the parties dated June 2, 2020 (the "Agreement").

[2] For the reasons set out below, I grant the relief sought.

Facts[2]

A. The nature of the Action

[3] Endo is a global pharmaceutical company that maintains its headquarters in Dublin, Ireland, and which owns a subsidiary located in St. Laurent, Quebec.

[4] Endo is publicly traded and lists its common shares on the NASDAQ exchange in the United States. Endo's common shares were also formerly listed on the Toronto Stock Exchange ("TSX") from before the commencement of the proposed "Class Period" (from January 11, 2016 to and including June 8, 2017) until they were delisted on March 17, 2017.

[5] De Silva was Endo's Chief Executive Officer ("CEO") and President, as well as a director on its board of directors from February 25, 2013 until September 23, 2016. In his role as CEO, De Silva certified that Endo's core documents released on February 29, 2016 and May 6, 2016 did not contain any misrepresentations. De Silva is alleged to have made misrepresentations to investors during the Class Period.

[6] Upadhyay was Endo's Chief Financial Officer ("CFO") and Executive Vice President from September 23, 2013 until November 22, 2016. In his role as CFO, Upadhyay certified that Endo's core documents released on February 29, 2016, May 6, 2016 and November 8, 2016 did

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[2] I adopt the facts below *verbatim* from Makris' factum (except for minor editing changes), as the motion is on consent and the facts set out in the factum fairly and concisely provide the key background to the motion.

not contain any misrepresentations. Upadhyay is alleged to have made misrepresentations to investors during the Class Period.

[7] At all times relevant to this Action, Endo was a "responsible issuer" as defined in s. 138.1 of the *OSA* and the concordant provisions in the Equivalent Securities Acts. Accordingly, Endo was required to make regular disclosure regarding its operations and finances pursuant to applicable Canadian and American securities laws.

[8] This Action was commenced by issuance of a statement of claim on April 25, 2017, which was amended on January 7, 2019 (the "Claim)".

[9] The Action is brought on behalf of Makris and all Canadian-based persons and entities, other than Excluded Persons,[3] who acquired common stock of Endo during the Class Period, on any stock exchange, and who held some or all of those securities at the close of trading on May 5, 2016, or June 8, 2017 ("Class" or "Class Members").

[10] Makris alleges that during the Class Period, the Defendants made or authorized the making of misrepresentations and omissions regarding: (i) certain antitrust investigations and the corresponding risk to Endo's pro forma revenues therefrom, (ii) the deterioration of Endo's generic pharmaceutical business, and (iii) the potential for abuse of Endo's product Opana ER and the corresponding risk to Endo's pro forma revenues from the voluntary withdrawal of that product from the market.

[11] Makris, on behalf of herself and the members of the proposed Class, claims damages from the Defendants for the alleged misrepresentations made in Endo's Class Period disclosure documents.

[12] The Defendants have denied, and continue to deny all liability, and have indicated that they would have actively pursued affirmative defences and/or various other defences available to them had the Action not been tentatively settled.

[13] During early 2019, pursuant to s. 138.8 of the *OSA*, Makris served her notice of motion for leave to proceed with the cause of action under s. 138.3 of the *OSA*. Makris has nearly finalized preparation of her motion for leave of the court under s. 138.8 of the *OSA*. The hearing of a contested leave to proceed motion is no longer being pursued at this time in light of the parties' desire for settlement.

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[3] (corporate entities and individuals related to Endo or individuals with or related to those with senior management or employee roles)

B. The Settlement

[14] After extensive arm's length negotiations and with the assistance of former United States District Judge Layn R. Phillips as mediator, Makris and the Defendants have now reached a proposed settlement, as memorialized in the Agreement, to resolve the action. The Agreement is subject to court approval pursuant to s. 29 of the *CPA*.

[15] Under the Agreement, the Defendants have agreed to pay or cause to be paid the all-inclusive sum of CAD $700,000 (the "Settlement Amount") for the indirect benefit of the proposed Class. In return, Makris and the proposed Class (excluding people who may choose to opt out of this Action ("Opt-Out Parties")) will provide a release to the Defendants.

[16] The parties consent to the granting of leave to proceed and certification of this Action as a class proceeding solely for the purposes of implementing the Agreement. In the event that the Agreement is not approved by the court, the Agreement provides that the order granting leave and certifying this Action as a class proceeding will be set aside, Makris and the Defendants will retain all of their legal rights and defences, and Makris and the Defendants will be restored to their respective positions prior to the execution of the Agreement.

[17] Under the terms of the Agreement, Makris will first bring a motion seeking the "Certification and First Notice Order", asking the court to:

(i) grant leave of the court pursuant to the *OSA* to proceed with the statutory claim, for settlement purposes only,

(ii) certify the Action pursuant to the *CPA*, for settlement purposes only,

(iii) appoint Class Counsel (or, if the Court deems it necessary, a third-party) to act as the administrator for any Opt-Out Parties,

(iv) set the Opt-Out Deadline,

(v) set September 23, 2020 as the date for the hearing of the Approval Motion,

(vi) approve the form and content of, and authorize the manner of publication and dissemination of the Notices and Opt-Out Form, and

(vii) appoint Class Counsel to manage the escrow account in accordance with the terms of the Agreement.

[18] The Agreement further stipulates an Opt-Out Deadline of 60 days from first publication of the Notices, specifies the information which must be included in an opt-out request, and provides that Class Members who opt-out shall be excluded from continuing participation in this Action and the settlement contemplated under the Agreement.

[19] Pursuant to the Agreement, once the Certification and First Notice Order is granted by the court and the Opt-Out Deadline has passed, Makris will bring a motion seeking an Order ("Approval Order"), which will, inter *alia*:

(i) approve the settlement and the proposed distribution of the Settlement Amount,

(ii) approve the form of, and authorize the manner of publication and dissemination of the Long-Form Notice of Settlement Approval and the Short-Form Notice of Settlement Approval, and

(iii) dismiss the Action as against the Defendants with prejudice and without costs.

[20] Thereafter, the Settlement Amount will be distributed by Class Counsel pursuant to the terms of the Agreement.

Analysis

[21] I address the following issues arising from this motion:

(i) whether leave should be granted under s. 138.8(1) of the *OSA* to commence an action under s, 138.3, and if necessary, under the Equivalent Securities Act provisions as against the Defendants, on consent and for settlement purposes only,

(ii) whether the Action should be certified under s. 5 of the *CPA*, on consent and for settlement purposes only,

(iii) whether the notices of certification and settlement approval hearing should be approved, and

(iv) whether Class Counsel should be appointed as the "notice and opt-out administrator".

[22] The remaining issues raised in the notice of motion (setting an opt-out deadline, setting a date for the settlement approval hearing, and appointing Class Counsel to manage the escrow account in accordance with the terms of the Agreement) raise no substantive issues. I adopt the terms as proposed in the draft order for these issues, with a settlement approval hearing date of September 23, 2020 and a 60-day opt-out deadline from the date of first publication of the Long-Form Notice.

[23] Further, the delivery of the Settlement Amount into the escrow account only arises if the Approval Order is granted at the settlement approval hearing, and the remaining terms of the Agreement requiring an accounting of moneys paid from the account (including interest and taxes) are consistent with standard practice.

[24] I now address the four substantive issues before the court.

A. Issue 1: Leave under s. 138.8(1) of the *OSA*

[25] Under s. 138.8(1) of the *OSA*, the court must be satisfied that (i) the action is brought in good faith and (ii) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

[26] Even on an opposed leave motion, there is a "relatively low merits-based threshold" (*Mask v. Silvercorp Metals Inc.*, 2016 ONCA 641, at para. 45).

[27] Further, as with consent certification approval, I find that compliance with the criteria under s. 138.8(1) of the *OSA* on a consent motion should not be as strictly required as it would be in the contested context (*National Trust Co. v. Smallhorn*, 2007 CanLII 41893 (ON SC), at para. 8).

[28] The uncontested evidence is that Makris brought this Action in good faith to hold the Defendants accountable for alleged misrepresentations made to her and other investors, without any ulterior motive or collateral purpose.

[29] There is a reasonable possibility of success, as the evidence establishes a "plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim" (*Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18, at para. 41).

[30] The claim is based on the alleged misrepresentations set out at paragraph 10 above. That claim was also pursued in separate U.S. proceedings, with a settlement reached in those U.S. proceedings. Further, the Defendants consent to the granting of leave for the purposes of settlement.

[31] For the above reasons, I grant leave for the plaintiff to proceed under s. 138.8(1) of the *OSA*.

B. Issue 2: Certification of the action

[32] It is settled law that certification is mandatory if the requirements of s. 5 of the *CPA* are met (*Charmley v. Deltera Construction Limited*, 2010 ONSC 7153, at para. 10).

[33] Further, as I discuss above, compliance with the certification criteria is not as strictly required as it would be in the contested context given the different circumstances associated with settlements.

[34] The test under s. 5 is met for the purposes of settlement. In particular:

(i) The pleadings disclose a cause of action under s. 5(1)(a). A statutory claim for secondary market misrepresentation is pleaded pursuant to s. 138.3 of the *OSA*, and if necessary, the Equivalent Securities Acts. If the alleged representations were made as pleaded, and were corrected as pleaded, and if (as alleged) the

Defendants knew or ought to have known that the representations omitted material facts, a cause of action would arise;

(ii) There is an identifiable class under s. 5(1)(b). The proposed class of all Canadian-based persons (except Excluded Persons) who acquired Endo common shares during the Class Period is set out in objective terms such that membership in the class proceeding is readily ascertainable, and is rationally linked to the common issues asserted by class members. Inclusion in the class does not depend on the merits of the claim or the outcome of the litigation (*Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 ("*Dutton*"), at para. 38).

Further, it is appropriate to certify a national class since it will favour the fair and efficient resolution of interprovincial and international class litigation (*Currie v. McDonald's Restaurants of Canada Ltd.*, 2005 CanLII 3360 (ON CA), at para. 15);

(iii) The claim raises common issues under s. 5(1)(c). The two common issues proposed for certification are (i) whether Endo's Class Period disclosures contain a misrepresentation within the meaning of the *OSA*, and (ii) whether the statements released on May 5, 2016, May 6, 2016, January 10, 2017, March 9, 2017, and June 8, 2017 correct the previously released alleged misrepresentations within the meaning of the *OSA*.

Both of the above common issues would avoid duplication of fact-finding or legal analysis (*Rumley v. British Columbia*, 2001 SCC 69, at para. 29) and would substantially advance the claims on the right of action asserted. The resolution of the proposed common issues is necessary for each class member's claim (*Dutton*, at para. 39);

(iv) A class proceeding is the preferable procedure under s. 5(1)(d). The goals of access to justice, judicial economy, and behaviour modification are all enhanced by a class proceeding.

Shareholder litigation such as in the present case is complicated, risky, and expensive to pursue. Makris would likely have required at least one expert. Other expert-based issues would have likely arisen as to whether misrepresentations were made or the effect, if any, of such misrepresentations on stock prices. Extensive and time-consuming investigation and documentary review would have been required. This could not have been done efficiently without a class action. Judicial economy would not be served by numerous individual actions. Behaviour modification to enhance investor protection and restore investor confidence, while creating an incentive for public corporations to take precautions that will protect

market integrity, is served best by a class proceeding (see *LBP Holdings Ltd. v. Hycroft Gold Corporation*, 2020 ONSC 59 (Div. Ct.), at para. 49);[4] and

(v) There is an adequate representative plaintiff under s. 5(1)(e). Makris is prepared to act for the proposed class and would fairly and adequately represent the interests of the proposed class. She has no ulterior motives nor collateral purpose for her initiation of the lawsuit and does not, on the common issues, have any interest in conflict with those of the other class members. She was active in the litigation process, including mediation and settlement agreements.

[35] The 60-day opt-out period under the Agreement is clear and reasonable, allowing proposed class members sufficient time to consider the benefits of the Agreement before deciding whether to opt out of the action. The litigation plan for the remaining steps towards settlement approval is reasonable and practicable, with the benefit that the opt-out period will have expired prior to the settlement approval hearing.

C. Issue 3: Approval of the notices of certification and settlement hearing

[36] Both the short-form and long-form notices of certification and settlement approval hearing meet the requirements for notice under s. 17(6) of the *CPA*. I adopt Makris' submission that the proposed notices:

(i) enable those persons who are Class Members to identify themselves as such,

(ii) notify putative Class Members of the important dates in the Agreement,

(iii) advise putative Class Members of the certification of this Action,

(iv) advise putative Class Members of their right to request exclusion from the Class, and the process, timeframe and consequences of doing so,

(v) inform putative Class Members of the date of the settlement approval hearing,

(vi) alert putative Class Members that their legal rights may be affected,

(vii) advise putative Class Members of Class Counsel's intention to seek court approval of their legal fees and disbursements at the settlement approval hearing,

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[4] The comments in that case relate to the beneficial effect of the statutory primary market cause of action under s. 130 of the *OSA*, but apply equally to the secondary market cause of action under s, 138.3 of the *OSA*.

(viii) advise putative Class Members of their right to object to the Settlement and/or participate in the settlement approval hearing, and the process, timeframe and consequences of doing so, and

(ix) advise putative Class Members on how to obtain more information about this Action and the proposed Settlement, as well as the options available to them.

[37] Dissemination of the notice will provide a reasonable means of notice to class members, particularly given the modest amount recovered under the settlement. The short-form notice will be disseminated by electronic press release. The long-form notice will be disseminated by publication on Class Counsel's website, as well as sent by email or regular mail to all putative Class Members for whom Class Counsel has contact information, depending on the method of contact that Class Counsel has on file for such persons. Class Counsel will provide a contact phone number and email address to address any questions or concerns Class Members might have.

[38] For the above reason, I approve the Notices.

D. Issue 4: Appointment of class counsel as notice and opt-out administrator

[39] Under the Settlement Agreement, Class Counsel proposes that it be appointed as the administrator to effect publication of the notices and administer any opt-outs or objections. The opt-out form is straightforward, and that the notices can be efficiently and reliably published under the Agreement. For those reasons, and given the limited financial results, it is not necessary for Class Counsel to propose a separate claims administrator for the notice and opt-out stages.

Order

[40] For the above reasons, I grant the order in the form attached as Tab 4 to the Motion Record.

GLUSTEIN J.

Date: 20200624

CITATION: Makris v. Endo International PLC, 2020 ONSC 3930
COURT FILE NO.: 17-CV- 573962
DATE: 20200624

ONTARIO

SUPERIOR COURT OF JUSTICE

PHAEDRA A. MAKRIS

Plaintiff

AND:

ENDO INTERNATIONAL PLC, RAJIV KANISHKA LIYANAARCHCHIE DE SILVA and SUKETO P. UPADHYAY

Defendants

REASONS FOR DECISION

Glustein J.

Released: June 24, 2020