CITATION: Relvas v. Auxley Cannabis Group Inc., 2023 ONSC 6394
COURT FILE NO.: CV-19-00617136-00CP
DATE: 20231114

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: DANIEL RELVAS, Plaintiff

– and –

AUXLEY CANNABIS GROUP INC., Defendant

BEFORE: Justice E.M. Morgan

COUNSEL: *Albert Pelletier and Vincent DeMarco*, for the Plaintiff
Lara Jackson, for the Defendant

HEARD: November 14, 2023

SETTLEMENT AND FEE APPROVAL

[1] There are two motions before me in this certified class action.

[2] In the first motion, class counsel request approval of a proposed settlement agreement dated July 11, 2023 between the Plaintiff on behalf of the class and the Defendant ("Settlement Agreement"), along with other settlement-related documents: the Notice of Settlement Approval (referred to in the Settlement Agreement as the "Second Notice"), the Plan of Notice, the Plan of Allocation, and the Claim Form. They also seek to set a claims bar deadline, to appoint an Administrator and Referee to administer the Settlement Agreement, to pay an honorarium for the representative Plaintiff, and to have the action dismissed with prejudice and without costs.

[3] In the second motion, class counsel seek an order approving the Contingency Fee Retainer Agreement with the Plaintiff and authorizing payment of class counsel fees, taxes, and disbursements.

I. Settlement approval

[4] The Settlement Agreement provides that the Plaintiff and its insurer will pay $4,000,000 in exchange for final settlement of all claims against the Defendant. The settlement amount, less lawyers' fees, disbursements, Administrator's expenses, and taxes, is to be distributed to the class in accordance with the Plan of Allocation.

[5] The Plan of Allocation provides for a distribution of settlement funds to the class members on a *pro rata* basis up to each investor's actual loss for shares of the Defendant purchased during

the class period – i.e. on or after November 12, 2018 and held until after the close of trading on February 6, 2019.

[6] Class counsel have evaluated the result achieved in light of the litigation risks associated with protracted shareholder class actions. They have also taken into account the financial situation of the Defendant, the amount recovered in *Miller v. FSD Pharma Inc*, 2021 ONSC 911 – a parallel shareholder class action – where $3.8 million was obtained for the same class period. Further, they have kept in mind the statutory measure of damages and corresponding liability limits.

[7] Litigation is always inherently risky and expensive. In then present case, class counsel assessed that the Defendant had defences to argue. It is the view of experienced class counsel that resolution of the litigation through the proposed settlement was the most advantageous way to achieve certainty on a timely basis for all parties involved.

[8] I note that the terms of the proposed settlement were arrived at after extensive negotiation among counsel acting at arm's length. Courts have on previous occasions indicated that such arm's length dealings between experienced counsel give rise to a presumption of a reasonable settlement: *Serhan v Johnson & Johnson*, 2011 ONSC 128, at paras. 55-56. Counsel and parties met for two mediation sessions, one in April 2021 and another in July 2023, and made good use of a professional mediator in negotiating the Settlement Agreement

[9] The action has already been certified. The record shows that there were no opt-outs and that there have been no objections to the proposed settlement. This includes no objections to the proposed counsel fees.

[10] Class counsel proposes to have themselves appointed as Administrator to administer the Plan of Allocation. This role will be facilitated by the fact that class counsel is already involved in administering a settlement in the *Miller v. FSD* class action.

[11] I understand from counsel's submissions that their administration of the *FSD* settlement has been a learning experience for them, and that they have fashioned for this case a streamlined method for allocating the settlement funds to class members. I am confident from their description that the approach they have taken will be cost efficient for the class without sacrificing the equitable principles that go into calculating the distribution.

[12] Class counsel submit that the proposed settlement is fair, reasonable, and in the best interests of the class, and should therefore be approved. They further submit that the proposed Second Notice, Plan of Notice, Plan of Allocation and Claim Form to notify class members of the settlement and implement the terms of the settlement are also fair and reasonable and should be approved.

[13] Having reviewed the record and the various documentation accompanying the settlement, and having heard the submissions in respect of the settlement and related documentation, I would agree with class counsel. In coming to this conclusion, I have taken into account the experience of class counsel and Defendant's counsel, the arm's length settlement process, the amount at stake in

the litigation, and the financial position of the Defendant. In view of all of this, the settlement represents a more than adequate advantage for the class in return for surrendering its rights in litigation: *Osmun v Cadbury Adams Canada Inc*., 2010 ONSC 2643, at para. 31(e), aff'd 2010 ONCA 841.

[14] I likewise concur with class counsel that the Plan of Administration, Notice of Settlement, and proposed distribution of settlement funds appears reasonable and in the best interests of the class.

[15] As for the proposed honorarium for the representative Plaintiff, that is an issue that has been debated by the courts in recent years. In *Seed v. Ontario*, 2017 ONSC 3534, at para. 18, the court explained that, "where a representative plaintiff can demonstrate that he or she has rendered active and necessary assistance in respect of the preparation of a case, which aided in the ultimate outcome, it may be appropriate to award compensation to the representative plaintiff in his or her own right." The Divisional Court has now confirmed that this is the approach to be taken to honoraria in class actions: *Doucet v. The Royal Winnipeg Ballet*, 2023 ONSC 2323.

[16] I have reviewed the materials submitted by class counsel. Under the circumstances, I am satisfied that the Plaintiff's level of participation in this matter entitles him to some special recognition by way of an honorarium: *Garland v. Enbridge Bas Distribution Inc.*, 2006 CanLII 41291 (ON SC), [2006] O.J. No. 4907 (S.C.J.).

[17] Class counsel has recommended $7,500 as an honorarium for the representative Plaintiff. In my view that is enough to provide him with recognition of his work, and some personal sacrifices he has made, on the class' behalf. At the same time, it is modest enough that it does not impact in any significant way on the class' overall settlement: *Doucet*, at para. 92(6).

[18] An honorarium of this amount is roughly mid-way between the levels of awards I have seen in other class actions. It in no way suggests that the representative Plaintiff was out for personal gain over and above his fellow class members: *Tesluk v. Boots Pharmaceutical PLC*, 2002 CarswellOnt 1266, at para. 22 (SCJ). In fact, it is the same amount as awarded by the Divisional Court in its recent approval of the practice of granting honoraria for representative plaintiffs: *Doucet*, at para. 119.

II. Fee approval

[19] At the outset of litigation, the Plaintiff retained class counsel's predecessor firm, Morganti & Co., P.C. It was set out in the retainer agreement that Morganti & Co. would finance any and all disbursements, including adverse cost awards. Counsel were only to be remunerated if there was a financial recovery to the Plaintiff and proposed Class.

[20] Throughout four years of litigation, class counsel financed all aspects of this action for the Plaintiff and class. In doing so, they spent a significant amount of time and resources in advancing the claim and, once the Defendant's deteriorating financial situation became apparent, in attempting to resolve the action as quickly as possible.

[21] The Contingency Fee Retainer Agreement dated October 5, 2022 provides that class counsel must prosecute the claim on behalf of the class entirely at its own expense. In return, they are to earn a fee ranging from 28% to 30% of the total value recovered in any final settlement or judgment.

[22] In the motion before me, class counsel have requested that the court approve legal fees in the amount of $1,200,000, or 30% of the Settlement Amount. The representative Plaintiff agrees with this request. In my view, the fee sought by class counsel appropriately reflects the level of risk that class counsel has assumed in carrying this case from inception to settlement: *Lavier v. MyTravel Canada Holidays Inc.*, 2013 ONCA 92, at paras. 32-35,

[23] The 30% figure proposed here is within the range that the courts have deemed to be "presumptively valid": *Cannon v. Funds for Canada Foundation,* 2013 ONSC 7686, at para. 3. I see no reason not to award fees at that rate in this case.

[24] Class counsel submit, correctly, that this is not a case in which the settlement amount constitutes a "mega fund" in the $40 to $50 million range, and in which a straight application of the agreed-to contingency fee percentage would not be appropriate: *Macdonald v. BMO Trust Company*, 2021 ONSC 3726, at paras. 21-23,

[25] Class counsel also point out that as of this settlement approval motion, they have invested in this action the equivalent of $900,000 in professional time. The requested fee represents a multiplier of approximately 1.2x on Class counsel's docketed time. This figure is significantly below the multiplier level that Ontario courts have generally been accepted as fair: *Gagne v. Silcorp Ltd*. (1998), 41 OR (3d) 417 (CA).

[26] Class counsel have also incurred disbursements of $76,236.90, which they seek to have reimbursed in addition to the requested legal fees. Given that this case is at a relatively mature, post-certification stage, that is not an unreasonable amount of disbursements to have incurred.

III. Disposition

[27] The Plaintiff shall have an Order approving the Settlement Agreement along with the Second Notice, the Plan of Notice, the Plan of Allocation, and the Claim Form.

[28] The Order will also appoint class counsel to serve as Administrator and David Robins to serve as Referee, in accordance with the Settlement Agreement and Plan of Allocation, and will set the Claims Bar Deadline at 120 days after the last publication of the Second Notice.

[29] The Order will further authorize a $7,500 honorarium to be paid to the representative Plaintiff from the settlement funds.

[30] The Contingency Fee Retainer Agreement is hereby approved, as are class counsel fees in the amount of $1,200,000, plus taxes fixed in the amount of $156,000 and disbursements (inclusive of taxes) in the amount of $76,236.90.

[31] The action is to be dismissed with prejudice and without costs.

Date: November 14, 2023 **Morgan J.**