CITATION: Frank v. Caldwell, 2014 ONSC 1484
COURT FILE NO.: 10-CV-415821-CP
DATE: 20140306

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
MICHAEL FRANK, SHELDON ZAMICK, and NOR-DOR DEVELOPMENTS LIMITED	)	*John Archibald*, for the Plaintiffs
Plaintiffs	)	
– and –	)	
R. PATRICK CALDWELL, LARRY MOELLER, NEIL E. SCHWARTZMAN, JASON A. WILLIAMS, BRIAN L. STAFFORD, HENRY H. SHELTON, FRANK E. JAUMOT, KEITH J. ENGEL, RICHARD P. TORYKIAN, SR., CHARLES E. PETERS, JR., and DEON VAUGHAN	)	*Adam Stephens*, for the Defendants
Defendants	)	
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD**: March 6, 2014

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] The Plaintiffs, Michael Frank, Sheldon Zamick, and Nor-Dor Developments Limited bring a motion for: (a) approval of a settlement in a certified class action; (b) approval of Class Counsel's fee; and (c) payment of an honorarium to each of the Plaintiffs.

B. FACTUAL BACKGROUND

[2] Protective Products of America, Inc. ("PPA") manufactured tactical body armour. Its primary customers included the U.S. military. With predecessor corporations in Alberta, Canada, PPA had come to be incorporated in the State of Delaware, in the United States. It was a

"reporting company" under the American *Securities and Exchange Act of 1934*. It was a public company and its shares traded on the Toronto Stock Exchange (TSX). It was a "reporting issuer" under the *Ontario Securities Act*, R.S.O. 1990 c. S.5 with disclosure obligations under Part XVIII of the *Ontario Securities Act*. It was also a "responsible issuer" in accordance with section 138(1) of the *Securities Act* and is therefore, along with its directors, officers, and influential persons, subject to civil liability provisions for secondary market disclosure of Part XXIII.1 of the *Securities Act*.

[3] The Plaintiffs were shareholders of PPA.

[4] Throughout 2008 and 2009, PPA was pursuing a major contract with the U.S. Army with a value of up to USD$1 billion for up to 736,000 improved outer tactical vests or "IOTV" and 253,000 Deltoid and Auxiliary Protectors or "DAPS," but on August 14, 2009, PPA announced it had not been awarded the contract.

[5] However, due to a protest of the initial awarding of the contract, PPA was eventually awarded an IOTV Contract. But, its shareholders were not advised about this change in circumstances. PPA's receipt of the IOTV Contract was never publicly announced.

[6] The Plaintiff, Michael Frank, commenced a proposed class action on December 6, 2010. His claim arose from PPA's alleged misrepresentations and failure to disclose material changes in relation to the IOTV Contract from October 8, 2009 to and including January 13, 2010 (the "Class Period").

[7] On January 13, 2010, PPA filed for bankruptcy in the U.S. Bankruptcy Court, Southern District of Florida.

[8] The Statement of Claim named as Defendants PPA's directors and certain officers; PPA's investment bank Farlie Turner and its affiliate Bayshore (collectively, "Farlie Turner"); and Stephen Giordanella, a former CEO and director of PPA who, during the Class Period, was employed by PPA as a consultant and who owned approximately 10.3% of PPA's shares along with USD$2,950,600.90 of its secured debt.

[9] On or about February 24, 2011, PPA commenced an action against Mr. Frank in Florida seeking to permanently enjoin him from prosecuting the proposed class action in Ontario. It also filed, in Florida, a motion for temporary injunctive relief to enjoin the action.

[10] Mr. Frank did not attorn to the court in Florida; nevertheless, the U.S. Bankruptcy Court issued a preliminary injunction on April 11, 2011 and a default judgment and permanent injunction against him on May 17, 2011.

[11] On October 5, 2011, the U.S. Bankruptcy Court approved a liquidation plan under which the rights of PPA's shareholders were extinguished and any claims of PPA against its officers and directors or other third parties were vested in the Creditor Trustee.

[12] On January 11, 2012, the Creditor Trustee Action was commenced in Florida against certain of the same Defendants as in the Ontario action. There was overlap between the two proceedings, with the Creditor Trustee Action, on behalf of PPA's creditors, making allegations of material non-disclosure in relation to the IOTV Contract. The Creditor Trustee also advanced a claim based on PPA's alleged failure to have an adequate system in place to ensure compliance with the *Foreign Corrupt Practices Act*, 15 U.S.C. § 78dd-1, et seq.

[13] In or around February 2012, the Defendants and Mr. Giordanella brought motions seeking recognition and enforcement of the injunction and default judgment against Mr. Frank and the U.S Bankruptcy Order. Mr. Giordanella also brought a motion to strike for failure to provide sufficient material facts in relation to the statutory claim being advanced against him. The Defendant, Farlie Turner, challenged the Ontario court's jurisdiction on the basis that there was no real and substantial connection and on the basis of *forum non conveniens*. Farlie Turner also brought a motion to strike for failure to disclose a reasonable cause of action.

[14] Following service of the Plaintiffs' responding motion materials, the Defendants and Mr. Giordanella withdrew their motions to enforce the injunction and the U.S. Bankruptcy Order and, in exchange, the Plaintiffs withdrew their common law negligence claim against the Defendants.

[15] The remaining motions, along with a motion by the Defendants to strike the Plaintiffs' claim for punitive damages, were heard in September 2012. The moving parties succeeded and Farlie Turner and Mr. Giordanella were removed from the Action. See *Frank v. Farlie, Turner & Co.*, LLC, 2012 ONSC 5519.

[16] On April 24, 2013, the Court certified this proceeding as a class action and granted leave pursuant to Part XXIII.1 of the *Securities Act*. The Defendants consented to this relief.

[17] The Defendants served their Statement of Defence on May 1, 2013.

[18] The discovery process commenced in late May 2013. Documentary production was substantial. The parties in the Action and in the Creditor Trustee Action agreed to a protocol for a joint cross-border discovery.

[19] In or around May 2013, Florida counsel for the Creditor Trustee initiated discussions with Plaintiffs' counsel, Rochon Genova LLP, which dealt with, among other things, the issue of a joint-discovery protocol and the making of a joint settlement offer aimed at crystallizing a bad faith claim against the Insurer, XL Specialty Insurance Company. These negotiations were lengthy and complex and continued regularly over the next several months.

[20] In or around October 2013, the Plaintiffs and the Creditor Trustee reached an agreement on how any proceeds paid on the insurance policy would be shared between them. (The Settlement reflects a 70/30 allocation in favour of Class Members.)

[21] Beginning in or around late September 2013 and continuing through October, Class Counsel also negotiated with Defendants' counsel regarding the possibility of a joint cross-border discovery.

[22] The parties in the Action and the Creditor Trustee Action ultimately agreed to a protocol for a joint cross-border discovery and confidentiality agreement. The protocol contemplated that, following the examinations of four of the Defendants (namely, the former CEO Caldwell, the former CFO Williams, the former general counsel Vaughan, and the former director and Chair of the Audit Committee Jaumot), along with certain non-parties, the parties in both proceedings would participate in a joint mediation. In the event the mediation was unsuccessful, discoveries would continue.

[23] On December 17, 2013, the parties and the Insurer participated in a joint mediation in Toronto conducted by two experienced mediators, Thomas Heintzman, a Toronto-based lawyer and mediator with experience and expertise in Canadian securities law, and Jed Melnick, an

experienced U.S.-based mediator. The mediation, which lasted approximately 13 hours, was successful, resulting in an agreement in principle that would globally resolve both proceedings.

[24] Following the mediation and the agreement in principle, the particularized terms of the Global Settlement Agreement and Collateral Settlement Agreement as well as settlement implementation matters formed the subject of continued negotiations that concluded with execution of both agreements on January 14, 2014.

[25] On January 16, 2014, the Plaintiffs obtained an order approving the form, content, and manner of distribution of notice of the Settlement and the Approval Hearing.

[26] No objections to the Settlement have been received.

[27] Rochon Genova believes the Settlement is fair and reasonable and is in the best interests of the Class.

[28] The Settlement requires the approval of the U.S. Bankruptcy Court in Florida, which is scheduled to hear the approval motion on March 11, 2014.

C. TERMS OF THE SETTLEMENT AGREEMENT

[29] The major terms of the Settlement and plan of distribution are as follows:

- PPA's Insurer, XL Specialty Insurance Company, will pay for the benefit of the Class the amount in Canadian dollars equivalent to USD$3.5 million.
- PPA's Insurer shall pay 25% of any savings on an estimated USD$1.6 million reserve in respect of a pending, unrelated claim within fifteen (15) days of resolution of that claim.
- The Initial Settlement Payment (in Canadian dollars equivalent to USD$3.5 million) will be distributed, after payment of any administration costs and legal fees, expenses and honoraria awarded by the Court, among all Class Members who timely submit valid claim forms to the Administrator.
- The Defendants and the Insurer are to receive a full and final release from all Class Members.
- The Plan of Allocation reflects the Plaintiffs' damages theory that the value of PPA's shares was artificially deflated by the non-disclosure of allegedly material information relating to the IOTV Contract during the Class Period.
- The amount of each Class Member's compensation will depend upon: (a) the number of PPA shares held by the Class Members at the commencement of the Class Period; and (b) the total number and value of all claims for compensation filed with the Administrator.

D. FEE APPLICATION

[30] The retainer agreements signed by each of the Plaintiffs provide that Class Counsel may seek fees of 30% of the amount of any recovery obtained on behalf of the Class, plus disbursements and taxes, or up to a four times multiplier of the time spent prosecuting the claim, whichever is higher.

[31] Since the commencement of the within proceeding up to and including February 3, 2014, Class Counsel have docketed time of $1,089,541.66.

[32] Class Counsel requests Class Counsel Fees in the amount in Canadian dollars equivalent to USD$1,050,000 (30% of USD$3.5 million), plus disbursements and applicable taxes as outlined further below.

[33] Class Counsel has reserved its right to bring an additional application for fees in the event the Insurer pays the Class any Reserve Savings.

[34] In order to compensate them for their time and effort spent advancing the Action on behalf of the Class, Class Counsel requests approval of an honorarium to each of Mr. Frank and Mr. Zamick in the amount of $10,000 and to Nor-Dor in the amount of $5,000 to be paid from the Settlement.

E. SETTLEMENT APPROVAL

[35] Section 29(2) of the *Class Proceedings Act, 1992* provides that a settlement of a class proceeding is not binding unless approved by the court. 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 the class: *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (S.C.J.) at para. 57; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 (S.C.J.), at para. 43; *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868.

[36] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and, (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation. See: *Fantl v. Transamerica Life Canada*, *supra* at para. 59; *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.J.), at para. 38; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, *supra*, at para. 45; *Kidd v. Canada Life Assurance Company*, *supra*.

[37] In my opinion, having regard to the various factors used to determine whether to approve a settlement, the Settlement should be approved.

F. FEE APPROVAL

[38] Factors relevant in assessing the reasonableness of the fees of class counsel include: (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

the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement: *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.J.) at para. 67; *Lawrence v. Atlas Cold Storage Holdings Inc.*, [2009] O.J. No. 4271 (S.C.J.), aff'd [2009] O.J. No. 4067 (C.A.)

[39] Having regard to the factors relevant in assessing the reasonableness of the fees of Class Counsel, I am satisfied that their fee request should be approved.

[40] I am also satisfied that the honorariums are appropriate and should be approved.

G. CONCLUSION

[41] For the above reasons, the Plaintiffs' motion is granted.

Perell, J.

Released: March 6, 2014

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Defendants

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