CITATION: Kirsch v. Bristol Myers Squibb, 2024 ONSC 7191
COURT FILE NO.: CV-16-553833-00CP
DATE: 20241223

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MATTHEW KIRSH and GAYLE KIRSH, Plaintiffs

– and –

BRISTOL-MYERS SQUIBB, BRISTOL-MYERS SQUIBB CANADA CO./LA SOCIÉTÉ BRISTOL-MYERS SQUIBB, OTSUKA PHARMACEUTICAL CO., LTD., OTSUKA CANADA PHARMACEUTICAL INC., OTSUKA AMERICA PHARMACEUTICAL, INC., OTSUKA AMERICA, INC., OTSUKA MARYLAND MEDICINAL LABORATORIES, INC., and OTSUKA PHARMACEUTICAL DEVELOPMENT & COMMERCIALIZATION, INC., H. LUNDBECK A/S, and LUNDBECK CANADA INC., Defendants

BEFORE: Justice E.M. Morgan

COUNSEL: *Joel Rochon, Golnaz Nayerahmadi, and Sarah Fiddes*, for the Plaintiffs

Randy Sutton, Gordon McKee, Robin Linley, and Frank McLaughlin, for the Defendants

HEARD: December 20, 2024

SETTLEMENT APPROVAL – AMENDED

[1] The Plaintiffs bring this motion pursuant to sections 27.1 and 32(2) of the *Class Proceedings Act, 1992*, SO 1992, c.6 ("*CPA*") for approval of a proposed settlement and approval of counsel fees.

Background

[2] The class is composed of persons who suffered adverse reactions to the aripiprazole, the atypical antipsychotic medication marketed under the trade names ABILIFY and ABILIFY MAINTENA. The action was certified under section 5(1) of the *CPA* on March 13, 2020: *Kirsh v. Bristol-Myers Squibb*, 2020 ONSC 1499 (SCJ), aff'd 2021 ONSC 6190 (Div. Ct.). As this is a national class action, a motion for settlement approval is scheduled to be heard in the Superior Court of Québec in the parallel Québec class action on January 8, 2025.

[3] ABILIFY was introduced to the Canadian market in September 2009. It is approved for use in the treatment of schizophrenia, manic episodes associated with bipolar disorder, and as an adjunctive treatment for major depressive disorder. ABILIFY MAINTENA is approved for use in

the treatment of schizophrenia and as a maintenance therapy following remission of bipolar disorder.

[4] The claim contends that in some people a side effect of the two products is that they cause various compulsive behaviours, including compulsive gambling, hypersexuality, compulsive shopping and binge eating. The claim also alleges that the pharmaceutical companies responsible for developing, manufacturing, and marketing ABILIFY and ABILIFY MAINTENA in Canada failed to conduct adequate pre- and post-marketing research and testing, and that they failed to warn class members of the risks of compulsive behaviour that accompany use of these pharmaceuticals.

[5] It is fair to say that the litigation has been hard fought. The certification motion argued in March 2020 was accompanied by a motion to stay the action based on the basis of there having already been a national class action authorized in Quebec. The stay motion was dismissed simultaneously with certification being granted, followed by lengthy appeal processes for both decisions.

[6] In September 2022, the parties in the Ontario proceeding and the parallel Québec proceeding participated in a mediation before the Honourable Gloria Epstein. The mediation was inconclusive, but the parties continued to have her assistance as they pursued further arm's length negotiations. Those negotiations continued between the parties until a Settlement Agreement was finalized on September 3, 2024.

The proposed settlement

[7] The Settlement Agreement provides for the creation of a settlement fund in the amount of $14,750,000.00, which will be used to pay compensation to ABILIFY and ABILIFY MAINTENA class members who suffered adverse reactions to the medications, as well as certain family class members. It will also be used to settle the Public Health Insurers' claims in the amount of $386,750.00 (all inclusive), and to pay for Notice expenses and settlement administration, to provide honoraria to the representative Plaintiffs, and finally, to pay class counsel fees, disbursements and applicable taxes. As indicated, it is the culmination of over two years of intense negotiations and consultations with reputable subject-matter experts.

[8] All counsel involved in this case are very experienced. I am satisfied that they have given careful consideration to the relative strengths and weaknesses of the case. The Settlement Agreement has been entered into in recognition of the need for finality in an action involving highly vulnerable individuals who have experienced serious harm related to use of the pharmaceutical products in issue.

[9] Under the Settlement Agreement, eligible Class Members will be entitled to compensation under one of several categories: Psychological Harm, Residual Catastrophic Injury, and Financial Loss. Compensation for Psychological Harm and, where applicable, Residual Catastrophic Injury, ranges from $3,246.00 to $85,000.00 per person (subject to the applicable adjustments). The Residual Catastrophic Injury category includes HIV infection and other incurable STIs caused by

hypersexuality, along with attempted suicide and hospitalization caused by compulsive behaviours.

[10] For quantification purposes, subcategories of "Mild", "Moderate" and "Severe" Psychological Harm have been set. These are based on: i) the duration of usage of ABILIFY/ABILIFY MAINTENA; ii) the length of time the compulsive behaviours were experienced and/or the severity of the compulsive behaviours; and iii) the presence of serious consequences of compulsive behaviours, including bankruptcy, divorce, re-mortgaging of a property and/or criminal prosecution for fraud, theft, etc.

[11] Furthermore, the Settlement Agreement recognizes that even short-term compulsive behaviour may have severe consequences. Accordingly, there is flexibility built into the Distribution Protocol to enable class members to satisfy the highest possible category of harm depending on their circumstances. Thus, for example, class members who assert that they experienced unplanned pregnancies while on ABILIFY or ABILIFY MAINTENA may claim compensation under both the Severe Psychological Harm and the Residual Catastrophic Injury categories. In addition to the ABILIFY and ABILIFY MAINTENA class members, eligible Family Class members (defined as spouses, children, parents, grandparents, and siblings of those advancing claims for Moderate or Severe Psychological Harm) are also entitled to compensation under the Settlement Agreement.

[12] A total of $1.7 million has also been set aside for compensable Financial Loss. This category can cover: i) compensable gambling losses; ii) compensable income loss; and iii) compensable loan losses.

[13] The proposed Distribution Protocol and the specific caps set for "Mild", "Moderate", and "Severe" Psychological Harm and Residual Catastrophic Injury are based on a projected take-up by 900 class members. The specific amount of compensation that each class member will receive may be adjusted upward or downward based on the number of claims submitted to the Claims Administrator.

[14] Class counsel have produced a Distribution Grid, under which total compensation under the Settlement Agreement's various categories of harm is capped at certain percentages, as follows:

Mild Psychological Harm: 27.5%
Moderate Psychological Harm: 25%
Severe Psychological Harm: 18%
Residual Catastrophic Injury: 2.5%
Eligible Financial Losses: 20%
Family Class Members: 7%.

[15] In addition, the settlement proposes that if more class members than anticipated come forward with claims for Residual Catastrophic Injury, the Distribution Grid can be adjusted to re-allocate up to $1,000,000.00 of additional funds for that category of compensation without further

Order from the court. This provision was added to the draft Order to provide flexibility, as it is difficult to estimate how many of the roughly 900 class members will claim compensation in different categories.

[16] Class counsel advise that they have received only two objections to the settlement. One of the objectors, Rejean Charpentier, has written that he may not be able to find his original prescription for the subject medication, and is concerned that he will not be able to complete the paperwork for compensation. It was explained at the hearing that the Settlement Agreement contains a provision allowing a class member to submit a Declaration in the event that they do not have other proof of having used ABILIFY or ABILIFY MAINTENA.

[17] Mr. Charpentier also indicated in his letter of objection that he would like his compensation paid immediately, as he, like other class members, have been waiting for years to receive some compensation. Again, it was explained at the hearing that the settlement administrators will have to wait until they know how many claimants there are in the different categories until they determine how much of the fund is available in each category and for each claimant.

[18] The other objector, Siobhan Snyder, appeared in person at the hearing and delivered a very thoughtful and impassioned submission on her personal situation after having been prescribed ABILIFY. She explained that as a result of her behavioral changes on this medication, she became pregnant and has given birth to a daughter. While she loves the daughter, and the child is by all accounts healthy and well, this has imposed on her and her family – in particular on her own parents who have had to forego their retirement in order to assist her in caring for their grandchild – a heavy cost burden and psychological burden that was unexpected.

[19] It is Ms. Snyder's view that, despite the availability of an elevated payment under the Severe Psychological Harm and the Residual Catastrophic Injury categories as explained above, the Settlement Agreement does not adequately compensate the lifelong costs she and her family have had to assume. In preparing her presentation, Ms. Snyder did a substantial amount of research into the Defendant corporations and their profitability in recent years. She feels strongly that she is being undercompensated in view of the fact that the Defendants are an enormously profitable enterprise. She made a heartfelt argument that the Defendants have put profit over people's lives, and should be made to pay substantially more than they have offered.

[20] Ms. Snyder has been placed in a difficult position. On one hand, unwanted parenthood is a difficult claim to make: see *PP v. DD*, 2017 ONCA 180, para 47. However, the Ontario Court of Appeal has indicated that since physicians owe a duty of care to a patient who is either pregnant or who might contemplate pregnancy, failure to warn or help avoid unwanted economic burden may in certain circumstances be compensable: *Paxton v. Ramji* (2008), 92 OR (3d) 401, at paras 72-73. On the other hand, the Quebec Court of Appeal has reasoned that the circumstances logically must be such that the burden and inconvenience, both financial and emotional, outweighs the joys associated with child rearing: *Suite v. Cooke*, [1995] RJQ 514.

[21] Although the question is never an easy one, Ms. Snyder was prescribed ABILIFY MAINTENA in the first place due to her mental health issues, and the effect of the drug has both

exacerbated her medical condition and depleted her finances. The Defendants' conduct in marketing the medication without adequate research or warning may have caused a birth in which the mother cannot in the usual way fulfil her support responsibilities to the child: *Kealey v. Berezowski* (1996), OR (3d) 37 (Gen. Div.). Although I am not in a position on this motion to undertake an actual assessment of Ms. Snyder's case, her circumstance suggests that she may have a strong claim for compensation for the "wrongful birth" of her child.

[22] That said, I explained to Ms. Snyder at the hearing that my authority in a settlement approval motion is limited to either approving or rejecting the settlement. I cannot adjust the settlement amount, either by making the Defendants pay more overall or by apportioning more to one class member out of the proposed settlement fund. Ms. Snyder was informed by counsel, however, that she still had until the end of the day of the hearing to opt out of the settlement and commence her own individual action. She acknowledged to me at the hearing that she understood that option.

[23] It may be that Ms. Snyder, and perhaps others in equivalent circumstances, are indeed undercompensated by the settlement proposal. But there are trade-offs to a class action, one of which is that she and the other class members have not had to litigate this case on their own. They have not had to retain counsel, be examined for discovery, or generally endure the stress and cost risk of being a sole plaintiff. The representative Plaintiffs and class counsel have undertaken all of that on her behalf. I am convinced that after 8 years of difficult litigation and 2 years of negotiation, the class overall has gotten the most it could get for the class overall. Any one class member might ultimately get more by litigating on their own, but I am not inclined to impose that risk on the entire class.

[24] In my view, the Settlement Agreement is in the best interests of the class as a whole. It is well established that the compensation of the class need not be optimal; rather, it must fall into the zone of reasonableness: *Rizzi v. Handa*, 2021 ONSC 1004, at para. 19. It is not tailor-made for any one class member, but rather treats them in a collectively fair and reasonable way.

[25] Considering such factors as the litigation risk, future expenses, recommendation of experienced counsel, advice of an experienced mediator, the arm's-length bargaining with experienced adversaries, and the settlement terms themselves, the settlement package is a reasonable one: *Vell v. Mattel Canada Inc*., 2016 ONSC 5789, at para. 27. These factors are a useful guide in assessing the merits of the settlement: *Maggisano v. Skyservice Airlines Inc*., 2010 ONSC 7169, at para. 19. Under the circumstances, they lead me to the conclusion that the Settlement Agreement is in the class members' best interest.

[26] As indicated at the outset of these reasons, there will also be honoraria paid to the representative Plaintiffs. From the overall settlement amount, $10,000 will go to each of them. I pause to note that the current style of cause contains only two named Plaintiffs, but that three new representative Plaintiffs were added and approved by me at the time of certification. The style of cause is to be amended by class counsel to reflect the fact that there are 5 representative Plaintiffs in this action. All five of those representative plaintiffs are to receive honoraria.

[27] Finally, a relatively small 2.5% of the settlement funds will go to compensate the provincial health insurers. The payment to the health insurers, along with the honoraria proposed for the representative Plaintiffs, are modest and reasonable under the circumstances.

Counsel fees

[28] As indicated earlier, class counsel in the Ontario and Québec proceedings jointly seek approval for the payment of legal fees in the amount of $4,425,000.00 plus HST. This amount represents the 30% contingency fee included in the Representative Plaintiffs' retainer agreements with class counsel, plus disbursements, for a total of $5,350,697.00. From the counsel fee amount, $45,000 will be paid to Alberta counsel who commenced, but then stayed, a parallel action in that province in favour of the Alberta class members participating in the Ontario action.

[29] Class counsel advise that although they have received no formal objections to the payment of their fees, at least one class member has indicated that, in their view, the fees being requested by class counsel are far too high. They describe this as a general impression created by the overall amount at issue – a sort of 'sticker shock' at the notion of over $5 million of the settlement fund going legal fees and disbursements. As class counsel themselves conceded at the hearing, one can certainly understand that initial reaction.

[30] However, one must look more closely at what has been accomplished by class counsel to appreciate the time and effort they have invested and the value they have achieved for the class. While I can sympathize with a class member's response to the overall fee amount, the legal fees reflect the fact that class counsel have worked on behalf of the class for the past 8 years without being paid. I understand from class counsel that for much of the action, the entire effort was self-funded by their law firm or firms. This has been an extraordinary undertaking by class counsel, who not only put in a tremendous amount of work taking on well-funded and experienced adversaries, but assumed substantial financial risk on behalf of the class. They have earned the right to be adequately compensated.

[31] To be approved by the court, counsel fees must be fair and reasonable. In other words, they "must provide access to justice for class members, and at the same time provide an economic incentive to lawyers to take on a class action and to strive for a successful result for the class.": *Rizi*, *supra*, at para. 24.

[32] In making that determination, I start with a presumption that the contingency fee retainer agreement with the Plaintiffs was "fully understood and accepted by the representative plaintiffs" and is therefore valid: *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686, at para. 8. In that sense, the fees sought here, which reflect the retainer agreement, are squarely within the reasonable expectations of the representative Plaintiffs and the class: *Lawrence v. Symantec Corporation*, 2024 ONSC 2621, at para. 16.

[33] Moreover, this Court has on a number of occasions reiterated that a 33% contingency fee is considered "the benchmark for class counsel fees": *Ibid*., at para. 14. This percentage is considered to be "standard in class action litigation": *Abdulrahim v. Air France***,** 2011 ONSC 512,

at para. 13. It has become the norm that "a fully understood one-third contingency fee agreement [is] presumptively valid" and should be approved: *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686, at para. 11.

[34] I see no reason to deviate from that view here. I find the 30% contingency fee agreement to be valid and enforceable, and the counsel fees at issue to be fair and reasonable.

Disposition

[35] The Settlement Agreement is hereby approved. Likewise, the proposed honoraria for the representative Plaintiffs is approved in the amount of $10,000.00 each.

[36] Class Counsel Fees in the amount of $4,420,000.00, plus HST and disbursements are also hereby approved.

Date: December 23, 2024 **Morgan J.**