

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

DAVID AINSLIE and MURIEL
MARENTETTE

Plaintiffs

and

AFEXA LIFE SCIENCES INC., GRANT
THORNTON LLP,
JACQUELINE J. SHAN, GORDON G.
TALLMAN
and HARRY BUDDLE

Defendants

)
)
) *William Sasso and Jay Strosberg*, for the
) Plaintiffs/Moving Parties
)
)
)
)
)
) *Patrick O'Kelly and Simon Bieber*, for the
) Defendants/Respondents Afexa Life
) Sciences Inc. and others
)
) *Matthew Fleming*, for the
) Defendant/Respondent, Grant Thornton
) LLP

HEARD: June 28, 2010

Proceeding under the *Class Proceedings Act, 1992*

**REASONS ON MOTION FOR CERTIFICATION, SETTLEMENT APPROVAL AND
APPROVAL OF FEE OF CLASS COUNSEL**

G.R. Strathv J.

[1] This is a proposed class action in which the plaintiffs claim that the defendant CV Technologies Inc. (now known as "Afexa Life Sciences Inc." and referred to herein as "CV"), the manufacturer of a cold and flu medicine known as "Cold-IX®", misrepresented its financial

results, causing the price of its shares to be artificially inflated. The plaintiffs claim that they and other shareholders suffered a loss when the truth was disclosed. They seek to hold CV, and its auditors Grant Thornton LLP (“GT”), responsible for the loss. After three years of litigation, the parties have reached a settlement in the amount of \$7.1 million, inclusive of costs. That settlement is subject to court approval.

[2] The plaintiffs now move for an order certifying this proceeding as a class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (“C.P.A.”) and approving the settlement. For the reasons that follow, that order will be granted. The plaintiffs also ask for approval of class counsel’s fee of \$1,378,749.49, plus disbursements. I approve immediate payment of two-thirds of that fee, plus all disbursements and G.S.T. Approval of the balance of the fee will take place after class counsel makes a final report to the court requesting authorization for the distribution of the settlement.

Background

[3] The plaintiffs bring this action on behalf of certain holders of securities of CV, which is a public company. Although CV is incorporated under the laws of the Province of Alberta, it maintains a corporate office in Toronto and its securities are publicly traded only on the Toronto Stock Exchange (“TSX”).

[4] The proposed class is defined as:

All persons, other than Excluded Persons, who acquired securities of CV on the TSX during the class period and who held some or all of those securities on March 26, 2007.

[5] The class period is December 11, 2006 to March 23, 2007.

[6] Before May, 2006, CV had marketed its product in Canada. In May, 2006, it began to market Cold-fX® in the United States and it reported significant revenues from U.S. sales in its audited financial statements for the fiscal year ended September 30, 2006 and in its unaudited financial statements for the first quarter of 2007, ended December 31, 2006.

[7] On March 26, 2007, CV issued a press release stating that:

While reported U.S. sales in the fourth quarter of 2006 and the first quarter of 2007 were \$8.6 million, this primarily represented sales to retailers for stocking their shelves. The actual sell through to consumers has been disappointing and is estimated to be \$1.5- \$2.5 million for the first six months of 2007. Slow U.S. sales will likely result in rebalancing of seasonal inventory by some retailers. *Significant rebalancing and product returns could have a serious impact on the Company's cash position and working capital. The anticipated second quarter loss is dependent upon the degree and extent of possible returns.* [Emphasis added.]

[8] Following the issuance of this press release, the price of CV's shares declined by approximately 20 per cent from \$2.37 (the closing price on March 23, 2007, which was the last trading day before March 26, 2007) to \$1.89, the closing price on March 26, 2007.

[9] On April 11, 2007, CV issued a second press release announcing that its financial statements for 2006 and for the first quarter of 2007 required restatement due to a revenue deferral issue in the U.S. Following this disclosure, the price of CV's shares declined by approximately 6 per cent from \$1.47 (the closing price on April 10, 2006) to \$1.38 (the closing price on April 11, 2007).

[10] The restated financial statements for 2006 were released on June 14, 2007. They disclosed that CV's net sales were approximately 12 per cent lower than originally reported, before-tax earnings were approximately 51 per cent less than originally reported, and net earnings were approximately 85 per cent less than originally reported.

[11] The restated consolidated financial statements for the first quarter of 2007 disclosed that CV's net sales were 10 per cent lower than originally reported, earnings before income tax were 141 per cent lower than originally reported, and net loss was 130 per cent greater than originally reported.

[12] Contemporaneous with the release of these restated financial statements, CV issued a press release stating that:

[i]n the fourth quarter of fiscal year 2006, the Company entered the U.S. market and recognized revenue with the same revenue recognition criteria as used in Canada, a market with a strong history and nominal product returns. Given that the U.S. was a new market and that Cold-fX® was a new product for this market, the Company has now realized that in the absence of any history of returns, the criteria to recognize revenue were not met. The appropriate application of the revenue recognition policy would have prevented the recognition of such revenues until the right of return has expired.

[13] The plaintiffs allege that CV misrepresented its financial results, including its income, revenue and earnings, during the class period and that the individual defendants and GT participated in the misrepresentation.

[14] The plaintiffs allege that, as a result of the misrepresentation, the trading price of CV's common shares was artificially inflated during the class period. It is alleged that the sharp decline in the trading price of CV's shares following the March 26, 2007 public correction of the

misrepresentation, caused loss to investors who had purchased CV securities during the class period and continued to hold those securities at the time of the correction.

[15] There is a parallel class action in the province of Alberta. As part of the settlement, that action has been dismissed, on consent, but the order is being held in escrow pending the outcome of this motion. The class members in the Alberta action are included in the proposed class in this action. There are no other known actions in Canada that have been commenced against CV, GT or the individual defendants relating to the claims at issue in this action.

[16] The principal terms of the proposed settlement are as follows:

(a) the total settlement amount is \$7.1 million. The defendants, other than GT, will contribute \$6.6 million and GT will contribute \$500,000;

(b) the settlement will apply to all class members in Canada or elsewhere who acquired CV securities during the class period;

(c) there is no right of reversion or opt-out credit available to the defendants. The settlement amount will be distributed, after payment of any administration costs and legal fees and expenses as awarded by the court, among all class members who submit valid claim forms to the administrator on a timely basis;

(d) in exchange for the payment of the settlement amount, it is intended that the defendants will be released from all claims of class members;

(e) the Alberta action will be dismissed;

(f) there is an opt-out threshold, which gives the defendants the ability to terminate the settlement if opt-outs exceed the threshold;

(g) approximately \$5.325 million of the settlement will be available for distribution to members of the class, after payment of administrative expenses (\$129,950), notice costs (\$100,000) and the fees and disbursements claimed by class counsel (\$1,541,900);

(h) notice will be published in the manner described below;

(i) Marsh Risk Consulting Canada will provide claims administration services and disputes as to entitlement will be resolved by Ms. Reva E. Devins, an experienced and well-respected referee;

(j) the plan of allocation creates a user-friendly claims process - there is no requirement that each claimant prove reliance upon the alleged misrepresentation. Each class member will complete a claim form and will submit evidence of purchase and sale of CV shares;

(k) allowable claims will be pro-rated against the settlement fund;

(l) prior to distribution of the settlement fund to eligible claimants, class counsel and the administrator will report to the court;

(m) the court will continue to supervise the administration, implementation and distribution of the settlement;

(n) in the event that there is a surplus of the settlement available after distribution to all eligible class members, the court will receive further submissions on an appropriate *cy-pres* award.

[17] An opt-out threshold is a common form of protection for a defendant wishing to settle a class action. The defendant does not want to pay a large amount of money to settle, only to find that an unanticipated number of class members opt-out, leaving it exposed to their claims. The opt-out threshold is confidential to the settling parties, for obvious reasons. I have been informed of the threshold and I am satisfied that it is appropriate.

[18] Notice of settlement approval will be given to the class by short-form and long-form notices, which will be disseminated to class members pursuant to the settlement agreement and the plan of notice. These notices will advise class members of the court's approval of the settlement agreement and will provide them with information concerning their right to participate in the settlement by filing a claim form or to opt out of the action by submitting an opt-out form.

[19] Class members will have 60 days after the date of publication of the short form notice to opt out of the settlement.

[20] A long form notice of settlement approval will also be sent by direct mail to as many class members as possible, using the services of Broadridge Financial Solutions Inc., a company specializing in communications with corporate shareholders. Class counsel are confident that notice of settlement approval and of the claims process will come to the attention of a large number of class members.

Certification

[21] In order to give effect to the settlement, and to make it binding on members of the class who do not opt out, it is necessary that the action be certified as a class action under the *C.P.A.* Section 5 of that statute provides that the court shall certify the action as a class proceeding where the following test is met:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant who,
 - (i) would fairly and adequately represent the interests of the class;
 - (ii) has a plan which sets out a workable method for the advancement of the proceeding on behalf of the class, including notification of class members; and

- (iii) does not, on the common issues, have an interest in conflict with the interests of other class members.

[22] It is well-established that the requirements for certification need not be as rigorously applied in the settlement context - the certification test will be satisfied if there is a *prima facie* case favoring certification: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (Sup. Ct.) at para. 24; *Osmun v. Cadbury Adams Canada Inc.*, [2009] O.J. No. 5566 (Sup. Ct.) at para. 21.

[23] I do not propose to review these criteria in detail. The defendants support the settlement and certification is necessary in order to give effect to the settlement. There is no opposition to the settlement in spite of extensive publication of notice of this hearing. A similar sort of case, involving alleged misrepresentation in the secondary securities market, *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (Sup. Ct.), has been certified on a contested basis and others have been certified for the purposes of settlement: see *Pysznyj v. Orsu Metals Corp.*, 2010 ONSC 1151.

[24] In summary:

- (a) the pleadings disclose a properly pleaded cause of action for negligent misrepresentation: *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at p. 110; *Elliott v. NovaGold Resources Inc.*, 2010 ONSC 2683 (Sup. Ct.);

- (b) the class definition is set out in objective terms and enables members of the class to readily identify themselves as such. The definition is not dependent on the merits of the case and satisfies the purposes of the class definition set out in leading case of *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Ct. J. (Gen. Div.)). In securities class actions the class is typically those who owned the securities at the material time: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 20; *Frohlinger v. Nortel Networks Corporation* (2007), 40 C.P.C. (6th) 62 (Ont. Sup. Ct.) at paras. 14-15;

(c) I am satisfied that in the circumstances of this case, where the shares of CV were traded only on the TSX, it is appropriate to certify a “global” class as was done in *Silver v. Imax Corporation*, above. A purchaser of securities of CV, a Canadian company with a presence in Ontario, a reporting issuer under the Ontario *Securities Act*, with shares trading only on the TSX, could reasonably expect that his or her rights in relation to those securities would be determined by the courts of Ontario. There is a real and substantial connection between the claims asserted in this action and Ontario and this province is a natural forum for the action. The requirements of order and fairness will be met by a comprehensive notice plan that will ensure, to the extent reasonably possible, that actual notice is received by all members of the class: see *Currie v. McDonalds Restaurants of Canada Ltd.*, 74 O.R. (3d) 321 (C.A.); *Ramdath v. George Brown College of Applied Arts and Technology*, [2010] O.J. No. 1411 (Sup. Ct.); *Silver v. Imax Corporation*, above, at para. 117; *Mondor v. Fisherman* (2002), 22 C.P.C. (5th) 346 (Ont. Sup. Ct.) at para. 12; *Elliott v. NovaGold Resources Inc.*, above, at paras. 11-12;

(d) the common issue proposed by the plaintiff¹ is acceptable for certification and meets the requirement of avoiding duplication of fact finding and legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 39. A similar common issue was approved by van Rensburg J. in *Silver v. Imax Corporation*, above. In *McKenna v. Gammon Gold Inc.* [2010] O.J. No. 1057, I declined to certify a common issue based on common law misrepresentation in the securities context because of the need to establish reliance as an element of the cause of action. In this case, the settlement will extend to all members of the class regardless of whether they relied upon or were even aware of the alleged misrepresentation. Accordingly, bearing in mind the relaxed test for certification on settlement, the common issue is appropriate;

(e) the requirement that a class proceeding be the preferable procedure for the determination of the common issue is of less significance in the context of the settlement of this case because the settlement provides a mechanism for ensuring compensation of all eligible class members. I am satisfied that the proposed settlement is an efficient and manageable method of resolving the claims of the class and that it fulfills the goals of judicial economy, access to justice and behaviour modification.: *Hollick v. Toronto (City)*, above, at paras. 27-28. Many individual claims by shareholders would be for relatively small amounts and would be uneconomical to pursue

¹ “Did the Defendants, or any of them, misrepresent the results of CV’s revenue for fiscal 2006 and the first quarter of 2007?”

individually. Without an action of this kind, it is probable that the claims of most shareholders would not be satisfied. The action also supplements the deterrent effects of regulatory oversight and encourages public companies to take precautions to protect investors: see *Allen v. Aspen Group Resources Corp.*, [2009] O.J. No. 5213 (Sup. Ct.) at paras. 144-5;

(f) the proposed representative plaintiffs fairly and adequately represent the interests of the class. Both purchased shares of CV during the class period and continued to own them after the corrective disclosures were made. They have a clear interest in the litigation and there is no evidence that they have any conflict with the class. They have diligently and faithfully prosecuted the claim to a successful conclusion by way of settlement. I am also satisfied that the litigation plan, as set out in the settlement agreement, is a workable method of resolving the action.

[25] The settlement agreement incorporates the plaintiffs' damages theory that the value of CV's shares was artificially inflated by the misrepresentation made by the defendants during the class period and that the inflation was removed from the share value as a result the March 26, 2007 corrective disclosure.

[26] The class members' entitlements under the settlement agreement will be calculated in a manner analogous to the damages provisions in s. 138.5 of the *Securities Act*, R.S.O. 1990, c. S.5 ("*O.S.A.* "). The plan of allocation sets out formulae to calculate damages: (a) for shares disposed of on or before the tenth trading day following the corrective disclosure; in this case, on or between March 26 and April 9, 2007; (b) for shares disposed of after the tenth trading day following the corrective disclosure; in this case, after the close of trading on April 9, 2007; and (c) for shares that have not been disposed of, or are otherwise still held by the claimant.

[27] Ultimately, the amount of each class member's actual compensation will depend upon: (i) the number and the price of shares purchased by the class member; (ii) the time and the price at

which the class member sold such shares; and (iii) the total number and value of claims for compensation filed with the administrator.

[28] I agree with class counsel that the plan of allocation methodology treats the class members fairly and that the plan of allocation is a fair and reasonable manner of distributing the settlement proceeds to authorized claimants under these circumstances.

Settlement approval

[29] Section 29(2) of the *C.P.A.* provides that a settlement of a class proceeding is not binding unless it has been approved by the court. The test for approving a settlement is whether, in all of the circumstances, the settlement is fair, reasonable and in the best interests of the class as a whole, taking into account the claims and defences in the litigation and any objections to the settlement. A settlement need not be perfect. It need only fall “within a zone or range of reasonableness”: *Bilodeau v. Maple Leaf Foods Inc.*, [2009] O.J. No. 1005 (Sup. Ct.) at paras. 45-46; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (Sup. Ct.) at para. 69; *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at pp. 439-440; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (Sup. Ct.) at para. 8; *Ontario New Home Warranty Program et al. v. Chevron Chemical Company et al.* (1999), 46 O.R. (3d) 130 (Sup. Ct.) at paras. 70, 89.

[30] In determining whether to approve a settlement, the court may take into account factors such as:

- the likelihood of recovery or likelihood of success;

- the amount and nature of discovery, evidence or investigation;
- the proposed settlement terms and conditions;
- the future expense and likely duration of litigation;
- the recommendation of neutral parties, if any;
- the number of objectors and nature of objections;
- the presence of arm's-length bargaining and the absence of collusion;
- the information conveying to the court the dynamics of, and the positions taken, by the parties during the negotiations;
- the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation; and
- the recommendation and experience of counsel.

See: *Bilodeau v. Maple Leaf Foods Inc.*, above, at para. 47; *Ford v. F. Hoffmann-LaRoche Ltd.* (2005), 74 O.R. (3d) 758 (Sup. Ct.) at para. 117; *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Gen. Div.) at para. 10; *Parsons v. Canadian Red Cross Society*, above, at paras. 126-132.

[31] The “zone of reasonableness” concept is helpful in guiding the exercise of the court’s supervisory jurisdiction over the approval of a settlement of class actions. It is not the court’s responsibility to determine whether a better settlement might have been reached. Nor is it the responsibility of the court to send the parties back to the bargaining table to negotiate a settlement that is more favourable to the class. Where the parties are represented – as they clearly are in this case – by highly reputable counsel with expertise in class action securities litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking his or her reputation and experience on the recommendation.

[32] As stated in *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at p. 440, there is a strong initial presumption of fairness when a proposed class

settlement, which was negotiated at arm's length by class counsel, is presented for Court approval:

[T]he recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputation for integrity and diligent effort on behalf of their clients is also on the line.

[33] In this case, I accept the submission of class counsel that the settlement was the product of hard negotiations at arm's length in the face of formidable opposition by experienced counsel for the defendants. The settlement appears to be favourable to the class, consistent with a reasonable risk-based analysis of the potential recovery after trial, grounded in a principled approach to the assessment of damages and reasonably reflective of the litigation risks, costs and delays that would result from taking the matter to trial.

[34] The following factors are particularly significant in leading me to conclude that the settlement is fair, reasonable and in the best interests of the class:

(a) at the time the settlement was reached, there was uncertainty regarding how the leave test in Part XXIII.1 of the *O.S.A.* would be interpreted and a significant risk that the leave test would not be met and/or that the court would not certify the claims in Part XXIII.1 of the *O.S.A.*;

(b) there was, at least in my respectful view, a serious risk that the court would not certify the common law misrepresentation claims – I declined to do so in *McKenna v. Gammon Gold Inc.*, above, although I recognize that there is authority to the contrary;

(c) the statutory limits of liability in Part XXIII.1 of the *O.S.A.* would be in the range of \$14 million to \$17.2 million if the action was entirely successful and the total value of the settlement (before costs and expenses) is about 50 per cent of that;

(d) the plaintiffs' expert estimated the total damages recoverable by the class in the range of about \$9.8 million – this figure would no doubt be disputed by the defendants and there is at least a possibility that the damages would be less than this amount;

(e) on a practical level, there is no guarantee that a judgment would be fully collectible. CV's liability insurance is \$10 million, inclusive of defence costs, and counsel for CV advises that costs have eroded the insurance to around \$8 million at this time. If the matter were to proceed to a contested trial and possibly appeals, there is a probability that the available insurance would be less than the amount of the settlement; and

(f) there were at least some issues concerning the underlying merits of the plaintiffs' claims as the defendants took the position that there had in fact been disclosure during the class period as a result of management discussion and analysis reports that were delivered to shareholders at the same time as the financial statements.

[35] All these considerations support my conclusion that, viewed objectively, the settlement falls within the zone of reasonableness and is a fair reflection of the merits of the claim and the risks of litigation, taking into account as well the value of an early settlement. The settlement comes with the recommendation of experienced counsel, the support of the representative plaintiffs and, despite extensive pre-hearing publication, there is not a single voice raised in opposition to the settlement. If the opt-out threshold is exceeded, the defendants will be entitled to terminate the settlement and the proceedings will continue. Absent that, any shareholder who does not wish to accept the settlement and to "go it alone" and maintain an individual action, may opt out of the action and the settlement.

[36] Approval of Fees of Class Counsel

[37] Class Counsel request a fee of \$1,378,749.48, including taxes. Disbursements are claimed in the amount of \$163,150.52. The costs of administration are fixed at \$129,950.00, the costs of the notice plan at \$100,000.00 and the cost to receive objections at \$3,150.

[38] The task for the court on a motion of this kind is to determine a fee that is “fair and reasonable” in all of the circumstances: *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (Sup. Ct.) at paras. 13 and 56.

[39] In *VitaPharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (Sup. Ct.) at para. 67, Cumming J. summarized some of the factors to be considered by the court when fixing class counsel’s fees:

Factors relevant in assessing the reasonableness of the fees of any class counsel include the following:

- (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 fees; and
- (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

[40] It seems to me that one of the most important factors in this list, particularly where the lawyer seeks a contingent fee, as is invariably the case in class actions, is the result achieved in relation to the amount at issue and the complexity of the case. An excellent result will deserve a higher fee than a modest result. All other things being equal, the settlement of a \$7 million claim for \$7 million would deserve a greater fee than the settlement of a \$70 million claim for \$7 million. It is important to ask, then, what was the client's claim "worth" and what did they get for it? Regard must always be had to the complexity and difficulty of the case, because the \$7 million claim may have been a "slam dunk" whereas the \$70 million claim may have been a "long shot", settled only through the persistence and skill of counsel.

[41] A second important factor is the time spent and financial risks incurred by the lawyers. What fee are the lawyers requesting in relation to the time they have spent on the case and the costs and risks they have incurred in prosecuting it? In this case, the lawyers have incurred some \$500,000 in unbilled fees and over \$150,000 in actual disbursements, in a period of more than three years.

[42] The third important factor is the fee agreement between class counsel and the representative plaintiff, which of course impacts the reasonable expectations of the class as to the amount of the fees. The fee formula in this case, a contingent fee on a sliding scale of 25-30-33.3

per cent depending on the timing of settlement, is typical. In this case, class counsel say that they are actually requesting a fee that is 19.4 per cent of the gross recovery, which is somewhat less than the fee to which they would be entitled under the fee agreement with the plaintiffs.

[43] A fourth important factor is the level of fees awarded in other proceedings of a similar nature, with a view to achieving predictability and consistency in fee awards.

[44] After examining all these factors, it is important to ask whether the work of class counsel has fulfilled the goals of the *C.P.A.* by giving access to justice to claimants who might not otherwise obtain it and by promoting behaviour modification of wrongdoers. It is also important to recognize that the achievement of these goals demands that there is an available pool of experienced and skilled lawyers of high repute, who are prepared to take on the onerous and risky responsibility of class counsel. Where counsel achieve successful results, they render a service not just to the class but to the legal system itself, by providing access to justice and by achieving judicial economy. Their fees should not be assessed simply on the basis of *quantum meruit* – they should be enhanced in appropriate cases to recognize and reward successful performance and to serve as an incentive to counsel to take on class action litigation

[45] Turning to the above factors, what was the result achieved in relation to the amount at issue and the complexity of the case? What was the case worth? I have mentioned that the upper limit of recovery, based on the *O.S.A.* limits, was between \$14 and \$17 million, but that the plaintiffs' expert put the recoverable damages in the range of \$9.8 million and that, as a practical matter, there was insurance available (after deduction of defence costs) of around \$8 million.

Viewed practically, a settlement at \$7.1 million must be regarded, as I have found, as being in the zone of reasonableness – it appears to be a good settlement.

[46] I also accept the submission that there were significant risks undertaken by class counsel in taking on the case. It was by no means a “slam dunk”. Class counsel had every reason to believe that it would be vigorously defended by experienced counsel.

[47] The fee agreement between class counsel and the plaintiffs contemplated a fee of 25 per cent of the recovery if the action was settled prior to discovery, as it was. This is a common provision in contingent fee agreements. The fee sought is less than the amount of class counsel’s contractual entitlement. It is comparable to the percentage fees awarded in other recent proceedings.

[48] The following chart summarizes four awards, including the award I made on settlement approval in *Osmun v. Cadbury Adams Canada Inc.*, [2010] O.J. No. 2093 (Sup. Ct.):

Decision	Amount Recovered	Fee	Percentage
<i>Martin v. Barrett</i> ²	\$13,926,195	\$4,086,870	29%
<i>Garland v. Enbridge Gas Distribution Inc.</i> ³	\$22 million plus savings	\$10.13 million	27%
<i>Stone Paradise Inc. v. Bayer Inc.</i> ⁴	\$3,321,712 plus interest	\$834,000	25%
<i>Osmun v. Cadbury Adams Canada Inc.</i> ³	\$5,340,940	\$1,335,235.12	25%

² *Martin v. Barrett*, [2008] O.J. No. 2105 (Sup. Ct.)

³ *Garland v. Enbridge Gas Distribution Inc.*, [2006] O.J. No. 4907 (Sup. Ct.)

[49] For the reasons set out earlier, I am satisfied that the services of class counsel have resulted in a settlement that fulfills the objectives of the *C.P.A.* It will result in real access to justice for real investors. It has achieved significant judicial economy. It will result in behaviour modification not only by the defendants, but in the securities industry generally. The significance of these accomplishments should not be understated.

[50] The remaining issue is whether the fee should be payable immediately or whether all or some part should be deferred until the claims process has been completed. It was vigorously argued by Mr. Strosberg that all the criteria necessary to assess the reasonableness of the fee are known at this time and that there is no reason to defer compensation. It is also fair to note that class counsel has gone without compensation for some three years, all the while incurring disbursements, paying lawyers and incurring substantial overheads. Deferred compensation means less compensation.

[51] I have concluded that there are several reasons why it is more fair and reasonable to approve payment of two-thirds of the amount claimed as fees now and to defer approval of the balance until after the results of the claims process are known. This is similar to the procedure I adopted in *Boulanger v. Johnson & Johnson Corp.*, [2010] O.J. No. 1913 and I believe that it is appropriate to do so in this case.

⁴ *Stone Paradise Inc. v. Bayer Inc.* (19 April 2006), London 45604CP (Ont. Sup. Ct.).

⁵ *Osmun v. Cadbury Adams Canada Inc.*, [2010] O.J. No. 2093 (Sup. Ct.).

[52] First, in the case of a results-based fee, there is nothing inherently unfair in requiring the lawyer to wait for payment until the client actually receives his or her money. Any delay in payment can be compensated by interest.

[53] Second, an important test of the value of the settlement will be the number and amount of claims actually paid to the class as a result of the settlement and the extent to which the settlement fund is sufficient to satisfy the claims of the class. If the projections of counsel and their expert are correct, and if all eligible class members make claims, each class member might be expected to receive around 50 per cent of his or her loss. If, at the end of the claims process, the recovery is substantially less than that, one might have reason to question the value of the settlement. If, on the other hand, there are a very small number of claims, or the total amount of compensation awarded is small, one might question the real value of the settlement in terms of access to justice.

[54] Third, class counsel acknowledges an ongoing responsibility to the class to respond to inquiries concerning the claims process, to supervise the implementation of the settlement and to report to the court prior to the distribution of funds. The responsibilities of class counsel after settlement are important and the court must rely on class counsel to ensure that the settlement is in fact efficiently implemented in accordance with its terms. It is no reflection on the diligence of class counsel to suggest that the fee should not be paid in full until such time as counsel's responsibilities have been fully discharged.

[55] For this reason, I will order payment of two-thirds of the fees claimed by class counsel, together with all disbursements, at this time. The balance of counsel's fees will be reviewed at the same time as the request for distribution of the settlement.

[56] The draft form of order submitted by class counsel at the hearing of the motion is generally satisfactory. Counsel may submit to me, care of Judges' Administration, a clean copy, approved as to form and content.

A large black rectangular redaction box covering the signature of the judge.

G.R. Strathy J.

Released: August 5, 2010

CITATION: Ainslie v. Afexa Life Sciences Inc., 2010 ONSC 4294
COURT FILE NO.: 07-CV-336986PD1
DATE: 20100805

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

DAVID AINSLIE and MURIEL MARENTETTE

Plaintiffs

and

AFEXA LIFE SCIENCES INC., GRANT
THORNTON LLP, JACQUELINE J. SHAN,
GORDON G. TALLMAN and HARRY BUDDLE

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**REASONS ON MOTION FOR
CERTIFICATION, SETTLEMENT
APPROVAL AND APPROVAL OF FEE OF
CLASS COUNSEL**

G.R. Strathy J.

Released: August 5, 2010