CITATION: Miller v. FSD Pharma, Inc., 2021 ONSC 911
COURT FILE NO.: CV-19-614980-00CP
DATE: 20210204

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Anne Miller, Plaintiff

– AND –

FSD Pharma, Inc., Defendant

BEFORE: E.M. Morgan J.

COUNSEL: *Albert Pelletier, Andrew Morganti,* and *Ian Literovich,* for the Plaintiff

Samuel Robinson, for the Defendant

HEARD: February 4, 2021

SETTLEMENT AND CLASS COUNSEL FEE APPROVAL

[1] In this securities class action, class counsel seek approval of a settlement they have reached with the Defendant together with approval of class counsel's fees. Defendant's counsel has indicated his client's agreement with everything proposed here. No objecting class members attended at the hearing or filed a written objection with the Court.

[2] The Claim alleges that the Defendant made material misrepresentations in FSD's business, operations and finances by omitting from core documents, non-core documents and statements, material facts regarding the status of its project with Auxly Cannabis Corp. to build-out 220,000 square feet of cannabis cultivation space in Cobourg, Ontario. The Claim further alleges that these misrepresentations resulted in the price for FSD securities being artificially inflated during the Class Period, thereby causing damage to Class Members once the truth was revealed and the inflation in the prices for those securities was removed, and that the Defendant is liable for a portion of these losses.

[3] On July 21, 2020, I rendered judgment in the Plaintiff's motion for leave to proceed with a claim for secondary market securities misrepresentation under Part XXIII.1, s. 138.3 of the *Securities Act*, RSO 1990, c. S.5 ("*OSA*"). In that judgment I reviewed the background of the dispute and granted the Plaintiff leave to proceed with a claim commencing with the release of the Defendant's third quarter Management Discussion and Analysis ("MD&A") dated November 29, 2018: *Miller v. FSD Pharma, Inc.*, 2020 ONSC 4054.

[4] The parties held a mediation in October 2020 in which a tentative settlement was reached. On November 3, 2020, on consent, I certified the action for settlement purposes, approved the form, content and method of dissemination of the First Notice and press release, appointed Trilogy

Class Action Services ("Trilogy") as the Administrator for receiving objections and opt-outs to the proposed Settlement, and set the deadline for objections and opt-outs as 5:00 pm on January 22, 2021: *Miller v. FSD Pharma, Inc.*, 2020 ONSC 6716.

[5] The test on a motion for settlement approval is "whether the settlement is fair, reasonable and in the best interests of the class as a whole", and "not whether it meets the demands of a particular member": *Parsons v Canadian Red Cross Society*, [1999] OJ No 3572, at para 69 (SCJ). The test is one of "range of reasonableness", which holds that a number of settlement possibilities may be in the best interests of a class when compared to the unpredictable alternative of costly protracted litigation. Compromises are to be expected and, indeed, encouraged by the Court and supported by public policy: *Dabbs v Sun Life Assurance Co. of Canada*, [1998] OJ No 2811, at para 30 (Gen Div).

[6] This was a hard fought and hard bargained settlement. The class faced certain legal hurdles despite the fact that I had granted leave to proceed on a motion that was very much argued on the merits of the entire claim. The Defendant had filed notice of appeal, and there were a sufficient number of contentious issues at stake that the outcome of an appeal was not entirely predictable.

[7] Further, the Defendant was in financial trouble and it was unclear how long it could survive or if it would be able to satisfy any eventual judgment. The affidavit of Mr. Morganti contained in the Motion Record here attests to the fact that the Settlement was negotiated at arm's length among sophisticated parties and experienced counsel, and through the use of a professional and highly-qualified mediator. The mediation resulted in a global settlement of all claims, which exhausted all available insurance and was topped up by the Defendant contributing an additional $1,000,000 of its own money.

[8] Taking all of this into account, I find that the Settlement is fair, reasonable and in the best interests of the Class as a whole.

[9] The proposed Second Notice and Plan of Notice will fulfill the requirements of providing notice to Class Members that the Settlement has been approved, that it is time to submit claim forms, and the manner and deadline for doing so. It has been translated into French and German and will be published in the business/legal section of the weekend edition of The National Post, the Montreal Gazette, and La Presse, as well as on websites administered by class counsel and the proposed Administrator. It will also be disseminated to investors by the Administrator through their Investment Dealers in Canada.

[10] The proposed Second Notice and Plan of Notice were negotiated by experienced counsel at arm's length. They appear to me to be fair and reasonable to the class as a whole.

[11] The claims process described by the Plan of Allocation contemplates Class Members making claims primarily online (although there is also a process for Class Members to file their claims on paper). The system has been described as being relatively user friendly, and the Administrator has a French/English toll-free number that class members can call for assistance.

[12] The class period as pleaded was September 20, 2018 to February 7, 2019, but leave to proceed was only granted for the period beginning November 29, 2018. The Settlement with its attendant release, however, is on the basis of the originally pleaded class period. The parties have recognized that the case became stronger in the later period after the release of the Defendant's core document on November 29, 2018, and that the action could have been settled for that period alone. Accordingly, the 30% of the settlement amount has been allocated to the first period, and 70% of the settlement amount to the second period.

[13] For each of the two periods, the Administrator will make a *pro rata* distribution to each authorized claimant from the net amount allocated to each period, and based on the amount of each class member's total loss (up to their actual loss) from shares purchased in that period and held until after the end of the class period. In this way, each claimant in the September disclosure period will have the same rate of recovery as will claimants in the November disclosure period, although likely at a higher rate than the claimants in the September disclosure period given the higher percentage allocation of Settlement funds to that period.

[14] This approach to allocating the settlement funds was considered by all parties and their counsel to be the fairest way of distributing the funds to harmed investors. I agree with them, and find that the proposed Plan of Allocation and the claim form are fair and reasonable.

[15] Class counsel propose appointing Trilogy as Administrator for the Settlement and Avram Joseph as Referee for any claims needing adjudicating under the Plan of Allocation. They have both been described by class counsel as competent, experienced, and able to fulfill their duties under the Settlement. They are also autonomous, independent, and neutral from the parties and their counsel. I have no reason to doubt that they will fulfill their respective functions at the standard expected of them, and that they will administer and adjudicate the Settlement in accordance with its terms and the terms of the Plan of Allocation.

[16] The Settlement provides that the claims bar deadline is 120 days from the last publication of the Second Notice, which is predicted to be published on or about February 19, 2021. Class counsel propose that the 120-day period be extended by a couple of days to reach the end of a calendar week. That is reasonable, and would bring the claims bar deadline to June 21, 2021 at 5:00 p.m.

[17] Class counsel propose an honorarium for the representative Plaintiff in the amount of $5,000. They have advised that it was the representative Plaintiff that initiated the investigation into this matter. She took time to participate in the prosecution of the action. This included conducting her own investigation prior to contacting class counsel and sharing the results with the class, completing affidavits on the motion for leave to proceed and on this approval motion, making herself available for examination on her affidavits, and meeting and speaking with class counsel as necessary to advance the matter. Class counsel attribute much of the present Settlement to the representative Plaintiff's efforts.

[18] The amount of the proposed honorarium is modest and falls well within the range of previously approved representative plaintiff honoraria: see *Calhoun v. Barkerville Gold Mines Ltd*., 2018 ONSC 1055, at para. 25; and *Gerard v Detour Gold Corporation*, 2017 ONSC 3966, at

para. 29. I find that the requested honorarium is fair and reasonable and should be paid to the representative Plaintiff out of the Settlement funds.

[19] Turning to the issue of class counsel fee approval, I note that class counsel entered into a written contingency fee retainer agreement with the Plaintiff on February 21, 2019 (the "Retainer Agreement"). The Retainer Agreement provides, among other things, that class counsel prosecute the claim on behalf of the class at counsel's own expense (including an indemnity to the Plaintiff for any cost awards). In exchange, and only if successful in the matter, class counsel will request a fee ranging from 28% to 33% of the total value recovered in an award or settlement.

[20] Mr. Morganti, in his affidavit sworn January 14, 2021, has requested approval of legal fees in the amount of 30% of the Settlement amount, which comes to $1,650,000. He also advises that class counsel have invested time in this action that is the equivalent to approximately $800,000. The sought fee therefore constitutes a multiplier of approximately 2x docketed time, well below the presumptively fair 4x multiplier. In my view, it fairly reflects the risks assumed by class counsel and the results they have achieved: *Gagne v. Silcorp* (1998), 41 OR (3d) 417, 42 (Ont CA).

[21] As the Court of Appeal has stated, "fees should not be 'clearly excessive' or 'unduly high' in the sense of having little relation to the risk undertaken or the result achieved: *Lavier v. MyTravel Canada Holidays Inc*., 2013 ONCA 92, at para 32, citing *Parsons v. Canadian Red Cross Society* (2000), 49 OR (3d) 281, at para 58 (SCJ); and *Martin v. Barrett*, [2008] OJ No 2105, at para. 43 (SCJ); and *Boulanger v. Johnson & Johnson Corp.*, 2010 ONSC 2359, at para. 15. The fees sought by class counsel here meet this test of proportionality. Moreover, the 30% sought by class counsel is less than the 33% that this Court has held to be presumptively valid: *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686, at para 3.

[22] Given all of these factors, I find that the class counsel fee requested here is fair and reasonable in all the circumstances, and within the reasonable expectations of the Plaintiff and the class.

[23] Accordingly, the following Orders shall be granted:

a) approving the Settlement Agreement;

b) approving the Second Notice, the Plan of Notice, the Plan of Allocation, and the claim form;

c) approving the appointment of Trilogy as Administrator and Avram Joseph as Referee;

d) setting the claims bar deadline at June 21, 2021 at 5:00 p.m.;

e) approving the Retainer Agreement and class counsel fees in the amount of $1,650,000 plus disbursements of up to $25,000; and

f) dismissing the action without costs.

Morgan J.

Date: February 4, 2021