CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL
No.: 500-06-000859-179

SUPERIOR COURT
(Class Action)

DENIS GAUTHIER
Representative Plaintiff
v.

DAVID BAAZOV
Defendant
and

FONDS D'AIDE AUX ACTIONS COLLECTIVES
Mis-en-cause

APPLICATION TO APPROVE A SETTLEMENT AGREEMENT AND FOR OTHER RELIEF
(Articles 575, 590, 593 and 595 *CCP*)

TO THE HONORABLE MR. JUSTICE SYLVAIN LUSSIER OF THE SUPERIOR COURT OF QUEBEC, SITTING AS CASE MANAGEMENT JUDGE, THE PLAINTIFF RESPECTFULLY STATES AS FOLLOWS:

I OVERVIEW

1. The present securities class action arises out of the Defendant's alleged misrepresentations relating to a potential going private transaction involving Amaya Inc./The StarsGroup Inc. ("**Amaya**").[1]

2. In September 2023, the Plaintiff and the Class reached a proposed agreement with the Defendant ("**Agreement**"), attached hereto as **Schedule 1**, which, subject to Court approval, will resolve all of the claims asserted against the Defendant and provide a full and final settlement of this class action (the "**Action**").

3. More specifically, the Agreement provides that the Defendant will pay CDN$1.8 million (the **"Settlement Amount**") to resolve, settle and release all claims asserted against the Defendant on behalf of the Class in the Action.

4. In this motion, the Plaintiff seeks:

   a. on consent, and without objection from any Settlement Class Member, this Court's approval of the Agreement;

   b. the approval of the Plan of Allocation, Notices and Notice Plan, Claim Forms, and to set the claims bar deadline; and

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[1] Unless otherwise mentioned, capitalized terms have the meanings as set out in the Agreement or Sworn Declaration of Albert Pelletier**,** dated October 24, 2023, attached hereto as **Schedule 2**.

c. the approval of Class Counsel fees, disbursements, and ancillary relief.

5. For the reasons stated herein below, Class Counsel and the Plaintiff are of the view that the Agreement is fair, reasonable and in the best interests of the Class. In particular:

a. It is highly likely that the limitation set forth by the *Quebec Securities Act* would significantly limit the amount of recoverable damages that the Plaintiff and the Class could recover from the Defendant. In fact, the Plaintiff and the Class have obtained a Settlement Amount which exceeds that potential limitation fund; and

b. the Agreement represents a significant monetary payment to and for the benefit of the Settlement Class.

6. Class Counsel and the Plaintiff recommend that this Honorable Court approve the Agreement.

7. The legal fees and disbursements, as well as other relief requested on this motion are appropriate and well-founded on the facts and the law and Class Counsel and the Plaintiff respectfully request that relief sought be granted.

II FACTS RELEVANT TO THE APPROVAL OF THE SETTLEMENT

A. Background of the Present Class Action

8. This Class Action was authorized against the Defendant in virtue of the judgment rendered by the Honourable Mr. Justice François Duprat on August 7th, 2020 (**"Authorization Judgment"**).

9. Since authorization, the Plaintiff and the Class have had the benefit of conducting oral and documentary discovery of the Defendant which has further informed their decision to resolve this matter with the Defendant for the Settlement Amount.

10. As expressed above, the key component of the resolution is the limitation set forth by S. 225.33 of the *Quebec Securities Act*, likely limiting the amount of damages recoverable from the Defendant. It states, in relevant part:

> 225.33 Unless the plaintiff proves that the defendant, other than the issuer, authorized, permitted or acquiesced in the release of the document or making of the public oral statement containing the misrepresentation, or thefailure to make timely disclosure, while knowing it to be a misrepresentationor a failure to make timely disclosure, the damages payable are the lesser of:
>
> (…)
>
> (2) in the case of a natural person other than an expert, the greater of 50% of the aggregate of that person's compensation from the issuer and its affiliates and $25,000 or, if the person is a director or officer of an influentialperson, the greater of 50% of the aggregate of that person's compensation from the influential person and its affiliates and $25,000; and
>
> (…)
>
> For the purposes of subparagraph 2 of the second paragraph, "compensation" means compensation received during the 12-month period immediately preceding the day on which the misrepresentation was madeor on which the failure to make timely disclosure first occurred, together with the market value

> of all deferred compensation including, without limitation, options, pension benefits and stock appreciation rights, granted during the same period, valued as of the date that such compensation is awarded.

11. While there may be some dispute between the Plaintiff and the Defendant about what his actual compensation was during the relevant period, Class Counsel assess that the limitation fund under S. 225.33 would be between approximately $500,000 and $1,250,000, unless the Plaintiff can prove the Defendant released a document "knowing it to be a misrepresentation".

12. After conducting oral discovery and after reviewing the documentary disclosures of the Defendant and those of third parties, such evidence is lacking.

13. Moreover, as appears from the Court file, the Defendant has brought motions to Implead a third party alleging he was the victim of fraud and that he himself had no knowledge of this fraud.

14. The Plaintiff does not have evidence to counter this assertion.

B. The Terms of the Agreement

15. The Agreement is contingent on the approval of this Court.

16. If approved by this Court, the Agreement will result in the resolution of this Action, with prejudice, in its entirety.

17. The Agreement provides for the payment by the Defendant of the Settlement Amount, inclusive of all administration expenses, class counsel fees, disbursements and applicable taxes.

18. In Class Counsel's view, it is appropriate in this matter to allocate the Settlement Amount based on the strength of the claims of Class Members based on when they purchased their shares in Amaya.

19. The Action was based on the release of two Impugned Documents. The First Impugned document contained the following statements:

> On January 31, 2016, Mr. Baazov delivered a notice to the Lead Independent Director of Amaya's Board of Directors (the "Notice"), stating Mr. Baazov's present intention to make an all-cash proposal to acquire Amaya. As set forth in the Notice, Mr. Baazov, currently estimates his proposed offer to be CDN$21 per Common Share. Also, as set forth in the Notice, Mr. Baazov recently began preliminary discussions with a small number of potential investors; and Mr. Baazov's present intention, subject to certain contingencies, is to submit a formal proposal on or about the end of February.
>
> On February 1, 2016, Mr. Baazov issued a news release (the "News Release"), announcing his intention to acquire Amaya at a purchase price presently estimated at CDN$21.00 per Common Share. Currently, the particular form and structure of a potential transaction have not been determined and, other than as set out in the News Release, no formal discussions have commenced between Mr. Baazov and Amaya with respect to a potential transaction.

20. The above statements are not definitive, and the evidence is lacking to establish the First Impugned Document contains an actual misrepresentation. As a result, the merits of the claims of Class Members who purchased securities after the release of the First Impugned Document are weak.

21. Conversely, the Second Impugned Document, released on November 14, 2016, was far more definitive and stated:

> 2.2 State the date of the transaction or other occurrence that triggered the requirement to file this report and briefly describe the transaction or other occurrence.
>
> **On November 14, 2016, the Acquiror delivered to Amaya's Chairman of theBoard of Directors a proposal on behalf of BidCo (as defined below), not subject to any due diligence or financing conditions (the "Proposal"), to acquire 100% of the common shares of Amaya for CAD$24 per share** on the terms and subject to the conditions set forth in the Proposal (the "Proposed Transaction"). Additionally, as set forth in the Proposal, BidCo is prepared to provide a US$200.0 million deposit (the "Deposit") into escrow upon execution of a definitive agreement in respect of the Proposed Transaction; and, in the event Amaya's US$400.0 million deferred payment (the "Deferred Payment") obligation to the previous owners of Oldford Group Limited becomes due (the "Deferred Payment Date") prior to the closing of the Proposed Transaction, BidCo will cause the Deposit to be released from escrow five days prior to the Deferred Payment Date and converted into a one-year structurally subordinated debt obligation to fund the Deferred Payment, such amount to be convertible into equity following the closing of the Proposed Transaction.
>
> On November 14, 2016, the Acquiror issued a news release (the "News Release") announcing the Proposal.
>
> 2.3 State the names of any joint actors.
>
> Under applicable Canadian securities laws, the Acquiror may be deemed to be acting jointly or in concert with each of Head and Shoulders Global Investment Fund SPC - HS Special Event Segregated Portfolio, Goldenway Capital SPC- Special Event SP, **Ferdyne Advisory Inc.** and **KBC Aldini Capital Limited** (collectively, the "Equity Financing Sources").
>
> [emphasis added]

22. In Class Counsel's view there is little doubt that the Second Impugned Document contains a misrepresentation and as a result, class members who purchased securities after the release of the Second Impugned Document suffered damages and their claims are substantially stronger.

23. As a result, in Class Counsel's opinion, it is equitable and appropriate in the circumstances to allocate the Settlement Amount, after payment of all fees, expenses and disbursements, to reflect the relative strength of these two periods, and Class Counsel therefore proposes to allocate the Settlement Amount, as follows:

    a. 15% to Class Members who purchased securities between February 1, 2016 and November 13, 2016 ("**Class I**"); and

    b. 85% to Class Members who purchased their securities on or after November 14, 2016("**Class II**").

24. The allocation proposed for Class I and Class II is not binding on the Court nor is it part of the Agreement. It is Class Counsel's best estimate of a fair and equitable result in the circumstances based on the available information.

25. Notice of Class Counsel's proposal for this allocation appeared in the Press Release andNotice to Class Members, who have been given the opportunity to object to this proposal and no objections was received.

III THE CRITERIA TO APPROVE A CLASS ACTION SETTLEMENT

26. Article 590 *CCP* requires that a court approve a transaction settling a class action if the court is satisfied that the terms of the settlement are fair, reasonable and in the best interests of the class.

27. In that regard, when determining whether a transaction should be approved, courts shouldbear in mind the following:

> *[20] Le tribunal doit encourager le règlement à l'amiable en donnanteffet à la volonté des parties, à moins qu'il y ait atteinte à l'ordre public.*
>
> *[21] Le tribunal doit prendre garde de ne pas modifier significativement le contrat de transaction conclu par les parties. Le tribunal doit l'approuver tel quel ou refuser de l'entériner, quitte à renvoyer les parties négocier des modifications.*

> *[22] Le tribunal ne doit pas exiger la perfection mais décider si enfin de compte, les avantages pour les membres l'emportent sur les inconvénients*.[2]
>
> [our emphasis]

28. The reasonability and fairness of proposed settlements are determined further to a review of the following criteria:

    a. the terms and conditions of the settlement;

    b. the benefit to the class;

    c. the chances of success;

    d. the importance and nature of the administered proof;

    e. the requirement to obtain authorization pursuant to s. 225.4 of the *Quebec Securities Act*

    f. counsel's recommendation and experience;

    g. the anticipated cost and time to obtain recovery;

    h. the number and nature of objections to the settlement;

    i. the parties' good faith and absence of collusion; and

    j. the support of the Plaintiff.[3]

A. The Terms and Conditions of the Agreement

29. The Agreement provides for the payment by the Defendant in the amount of CDN$1,800,000, all inclusive.

30. This amount will be payable 10 days after the Judgment Approving the Agreement has been issued and the time for any appeal therefrom has expired.

31. This Settlement Amount is reasonable given the limitations provided for in the *Quebec Securities Act* and the information obtained by the Plaintiff and Class Counsel in the pursuit of this Action.

B. The Benefit to The Class

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[2] *Markus c. Reebok Canada inc.*, 2012 QCCS 3562, Plaintiff"s Book of Authorities ("**BoA**"), tab 1, at paras. 20 to 22; see also *Halfon c. Mosse International Inc.*, 2017 QCCS 4300, BoA, tab 2, at para. 23 and *Option Consommateurs c. Fédération des caisses Desjardins du Québec*, 2011 QCCS 4841, BoA, tab 3, at paras. 26-27.

[3] *Markus c. Reebok Canada inc.*, 2012 QCCS 3562, BoA, tab 1, at para. 23; *Options consommateurs c. Infineon Technologies a.g.,* 2013 QCCS 1191, BoA, tab 4, at para. 41; *Option consommateurs c.Infineon Technologies a.g.,* 2014 QCCS 4949, BoA, tab 5, at para. 49 and *Pellemans c. Lacroix,* 2011 QCCS 1345, BoA, tab 6, at para. 20.

32. The proposed Agreement is beneficial to the Settlement Class in that it will put an end to the litigation as against the Defendant in exchange for immediate fair compensation that exceeds the limitation provided for by S. 225.33 of the *Quebec Securities Act*.

C. The Chances of Success

33. In Class Counsel's view, this matter presented risks with respect to the nature of the misrepresentations and the amount the Class could obtain as recovery given the limitationprovided for by the *Quebec Securities Act*.

34. The proposed Agreement required compromise by the Parties and is the result of a balancing act between the risks and the benefits at the various stages of the litigation.

D. The Importance and Nature of the Administered Proof

35. In the course of investigating and prosecuting this Action, Class Counsel has become familiar with the facts alleged in this case as well as the Defenses put forward by the Defendant.

36. In conducting an examination of the Defendant as well as reviewing documents providedby him, as well as documents obtained in a related matter,[4] Class Counsel are of the view that the proof supports the relief sought in this Application.

37. As a result of Class Counsel's exhaustive work on the matter, Class Counsel was able toevaluate the risks based on an appropriate evidentiary basis and to negotiate theAgreement.

E. The Anticipated Cost and Time to Obtain Recovery

38. The practical value of an expedited resolution of this Action is a significant factor to consider.

39. The Agreement will resolve this Action in its entirety.

40. If the Agreement is not approved, this Action will proceed and Class Members will not bepaid until it is concluded, if successful.

41. Based on Class Counsel's experience, it expects that it would have taken approximately 3 to 4 years before the issues were finally adjudicated and, if successful, the Class Members would be able to recover any monetary compensation from the Defendant.

42. As stated by Justice Prévost, S.C.J. in *Pellemans c. Lacroix*, as to the probable courseof high-profile cases:

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[4] Class Counsel was also Class Counsel in the matter involving *Pierre Derome* v. *Amaya Inc. et al*, file no.500-06-000785-168.

> *[24] Si l'affaire devait aller à procès, le jugement ne serait vraisemblablement prononcé que dans environ 20 ou 24 mois, avec la possibilité d'un appel à la Cour d'appel et, peut-être, à la Cour suprême du Canada. Et ce, sans compter le temps et l'argent qui seraient investisdans les autres recours connexes.*
>
> *[25] En somme, le rejet du règlement proposé reporterait de cinq à dix ans tout espoir pour les membres d'un remboursement significatif de leurs investissements, sans garantie d'un résultat favorable.*
>
> *[26] Dans les circonstances, la transaction apparaît juste, équitableet dans le meilleur intérêt des membres du groupe. Elle sera approuvée.*[5]

F. Counsel's Recommendation and Experience

43. This Action is a collaborative effort on the part of Faguy & Co. and Berger Montague Canada Inc. (formerly Morganti and Co.), which have extensive experience and expertise in securities class actions in Quebec and across Canada.

44. Faguy and Co. was *ad litem* counsel and Morganti and Co. also part of the Class Counsel consortium for the first class action to be authorized in Quebec under the heightened requirement of s. 225.4 of the *Quebec Securities Act*, which also became one of if not the largest secondary market securities settlements in Canada.

45. Class Counsel recommended that the Plaintiff accept the proposed settlement since it is fair, reasonable, in the best interest of the Class, promotes judicial efficiency and accessto justice as well as promotes the free flow of information in capital markets.

G. The Number and Nature of Objections to the Agreement

46. Notice of the Approval Hearing was distributed in accordance with the Order rendered by this Honourable Court on September 13, 2023, as appears from the sworn statement of the Administrator, attached hereto as **Schedule 9**.

47. There have been no objections to the proposed Settlement Agreement, the Plan of Allocation, Class Counsel Fees or otherwise, as appears from the Administrator's Objections Report attached hereto as **Schedule 10**.

H. The Parties' Good Faith and the Absence of any Collusion

48. This resolution is the product of arm's length and protracted adversarial negotiation.

49. The resolution in principle occurred after protracted negotiation.

50. The Agreement is the product of that negotiation as well as mutual concessions.[6]

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[5] *Pellemans c. Lacroix,* 2011 QCCS 1345, BoA, tab 6, at paras. 24-26.
[6] *Option Consommateurs c. Infineon Technologies, a.g.,* 2013 QCCS 1191, BoA**,** tab 4, at para. 40.

I. Support of the Plaintiff

51. The Plaintiff supports and recommends the approval of the Agreement which he considers fair and reasonable.[7]

J. Conclusion

52. In light of the complexity of the issues in the Action and the result achieved, the Agreement is fair and reasonable and in the best interests of the Class.

53. Class Counsel and the Plaintiff respectfully submits that the Agreement should be approved.

IV PLAN OF ALLOCATION

54. The Plan of Allocation attached hereto as **Schedule 4** creates a claims-based process for Claimants (as defined in the Plan of Allocation) to seek compensation from the settlement fund, net of administration and other expenses.

55. As appears from the Sworn Statement of Albert Pelletier (Schedule 2), the Plaintiff's retained expert indicated that he only found evidence that the securities of Amaya that were damaged during the Class Period were Amaya's common shares;

56. The Plan of Allocation categorizes Claimants and adjusts the value of their claims in accordance with Class Counsel's views of the merits of Class I and Class II's claims.

57. The Plan of Allocation will require Claimants to file a claim with the details of their trading in Amaya securities to be used by the claims administrator to first determine the different categories of purchases made and then, for each category, determine the Claimants' losses.

58. The Plan of Allocation, at paragraph 7, provides for a mechanism to exhaust the allocation in each portion of the Class (Class I or Class II) with a reversion for any remainder to members of the other subclass and divided and paid out on a *pro rata* basis.

59. Regarding the scope of the claims process, the claims administrator will review claims pursuant to the terms of the Plan of Allocation and determine a Claimant's share of the net settlement fund. Because of the costs of distribution, claims assessed at less than $50.00 will not be paid out.

60. If there is a dispute over a claim, the court appointed Referee will adjudicate any such dispute.

V NOTICES, NOTICE PLAN AND CLAIMS DEADLINE

61. Class Counsel proposes that the Class be provided with a Notice of Settlement Approval, should this Honourable Court grant the conclusions sought in this

[7] As appears from the Sworn Statement of Denis Gauthier, attached hereto as **Schedule 3**.

Application, by the dissemination of the Press Release and Notice, attached hereto as **Schedule 5**.

62. Class Counsel suggests that the dissemination of the foregoing Notices and Press Releases follow a Notice Program similar to what was approved by this Honourable Court in its Order of September 13, 2023. The Notice Program is attached hereto as **Schedule 6**.

63. Class Counsel also submits that this Honourable Court approve the Claim Forms attached hereto as **Schedule 7** and set the claims bar deadline as sixty (60) days from the publication of the Press Release and Notice in accordance with the Notice Program.

VI CLASS COUNSEL FEES

A. Applicable Criteria

64. Fair and reasonable class counsel fees should be approved by the Court.

65. As stated by the Honorable Justice Chaput, S.C.J. in *Guilbert c. Sony BMG Musique (Canada) inc.*:

> *[34] The measure of what is fair and reasonable is stated in the Code [of Professional Conduct of Lawyers, CQLR c B-1, r 3.1]:*
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> > *8. Determination and payment of fees [now s. 102]*
> >
> > *3.08.01. The advocate must charge and accept fair and reasonable fees.*
> >
> > *3.08.02. The fees are fair and reasonable if they are warranted by the circumstances and correspond to the professional services rendered. In determining his fees, the advocate must in particular take the following factors into account:*
> >
> > *(a) experience;*
> >
> > *(b) the time devoted to the matter;*
> >
> > *(c) the difficulty of the question involved;*
> >
> > *(d) the importance of the matter;*
> >
> > *(e) the responsibility assumed;*
> >
> > *(f) the performance of unusual professional services or professional services requiring exceptional competence or celerity;*
> >
> > *(g) the result obtained;*

(h) the judicial and extrajudicial fees fixed in the tariffs.

3.08.03. The advocate must avoid all methods and attitudes likely to give to his profession a profit-seeking or commercial character.[8]

66. The criteria governing the setting of fees can be summarized as such:

"[TRANSLATION]

Finally, an exceptional power among all others, at the end of the trial, the judge determines extrajudicial fees for the attorney for the representative, including in the case of an out-of-court settlement, para. 2, Act respecting the class action):

32. … The court must hear the Fonds before deciding the payment of costs, determining the fees of the representative's attorney, or approving a transaction on costs or fees.

Thus, this type of judicial review is carried out with the opinion of the Fondswhen it has provided financial aid, and its presence is justified by the objective of recovering the amounts of money to which it is entitled. Of course the management of the individual proceeding does not provide for such a fee fixing mechanism. As conceived, the court's power of exception is discretionary and is not limited to approving a settlement between the parties regarding the fees. Any question as to the determination of extrajudicial fees falls under its jurisdiction, including a request to amend orcontest from one of the members. The judge seized of the application for the setting of fees takes into account the criteria in the Code of ethics of advocates, such as the importance and nature of the matter, including the time and effort devoted thereto, preferably by simply applying a formula using a predetermined percentage of the amount awarded. (pp. 37-38)

Barring error or omission as in Clavel v. Productions musicales Donald K. Donald inc., the Court generally shows deference and simply approves the fees as claimed. Agreements fixing fees at a percentage of the amount awarded (15% to 33%) are common and have been found in the case lawto be fair and reasonable. The dominant tendency, however, has been to base the assessment of fees on the general factors set out in the Code of ethics of advocates, as in any other case, sometimes using a multiplier to take into account the scope and difficulty of the case, ultimately to justify and approve an agreement based on a percentage (pp. 174-175)."[9]

[our emphasis]

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[8] *Guilbert c. Sony BMG Musique (Canada) inc.*, 2007 QCCS 432, **BoA,** tab 7, at para. 34; see also *Pellemans c. Lacroix*, 2011 QCCS 1345, **BoA,** tab 6, at para. 51.

[9] *Guilbert c. Sony BMG (Canada) inc.*, 2007 QCCS 432, BoA, tab 7, at para. 45 citing Pierre Claude Lafond, *Le recours collectif, le rôle du juge et sa conception de la justice*, (Cowansville, Qc.: Yvon Blais, 2006) at 37-38, 174-175.

67. As particularized below, Class Counsel respectfully submits that its legal fees are fair and reasonable and should be approved by this Honourable Court.

B. Class Counsel's Mandate

68. The starting point for the reasonableness in Class Counsel's fee request is to examine thereasonableness of the retainer agreement entered into between Class Counsel and the Representative Plaintiff.

69. Retainer agreements benefit from a presumption of validity and should only be set aside if they are not in the interests of class members, are against the law or contravene public order:

> [50] La convention d'honoraires bénéficie donc en quelque sorte, d'une présomption de validité. Elle ne sera écartée que dans la mesure où il estdémontré qu'elle n'est pas juste et raisonnable pour les membres dansles circonstances de l'affaire, ou pour l'un des motifs de nullité du contrat prévu au Code civil du Québec. Dans le cas contraire, elle sera appliquée intégralement:
>
> > [64] Lorsque le tribunal est d'avis que l'entente proposée est juste et raisonnable et qu'elle sert, à la fois, les intérêts des représentants et ceux des membres du groupe visé, il doit l'approuver. Il ne lui appartient pas de la modifier. Il ne doit pas substituer son jugement àl'accord des parties. Il peut refuser de l'approuver s'il juge qu'elle n'est pas dans le meilleur intérêt des membres du groupe ou s'il est d'avis qu'elle contrevient à la loi ou à l'ordre public
> >
> > [citation omitted].[10]

70. In a similar vein, the Court of Appeal recently stated in *A.B. c. Clercs de Saint-Viateur du Canada*, that while mandate agreements don't obviously bind a judge, they do benefit from a presumption of validity:

> [51] La convention d'honoraires bénéficie d'une présomption de validité etne peut être écartée que si son application n'est pas juste et raisonnable pour les membres « dans les circonstances de la transaction examinée ».[11]

71. As stated above, contingency fee agreements providing for a percentage of the recovery obtained, ranging from 15% to 33%, are considered fair and reasonable by the case law.[12]

72. The mandate agreement ("**Mandate**") entered into with Mr. Gauthier[13] is identical to the mandate agreements that have previously been approved and declared fair and reasonable by this Honourable Court in:

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[10] *Pellemans c. Lacroix*, 2011 QCCS 1345, BoA, tab 6, at para. 50.
[11] *A.B.* c. *Clercs de Saint-Viateur du Canada*, 2023 QCCA 527, BoA, tab 11, at para. 51.
[12] *Guilbert c. Sony Music BMG Canada Inc.*, 2007 QCCS 432, BoA, tab 7, at para. 45; *A.B.* c. *Clercs de Saint-Viateur du Canada,* BoA, tab 11, at para. 58.
[13] Schedule 3.

a. *Landry c. Concordia International Corp*. by Mr. Justice Gagnon;[14]

b. *Derome v. Amaya* by Madame Justice Courchesne;[15] and

c. *Catucci* v. *Valeant Pharmaceuticals* et al. by Mr. Justice Kalichman (as he then was).[16]

73. The Mandate states that in the event that the Action is successfully resolved, Counsel will be compensated in the amount of 30% of the benefit recovered, plus disbursements and all applicable taxes.[17]

74. Percentage fee agreements have long since been recognized by Québec law, particularly in the context of class actions and Class Counsel have the right to expect their agreements will be honored, as stated by the Court of Appeal:

> [57] Les conventions d'honoraires à pourcentage sont très répandues en matière d'action collective. Ce type de conventions présente des avantagesconsidérables, notamment en ce qu'il favorise « l'accès à la justice pour des citoyens qui autrement n'en auraient pas les moyens »[44]. Il ne saurait être question ici de remettre en cause la validité et l'utilité de ce modèle de rémunération. Les avocats devraient être encouragés à accepter des mandats en matière d'action collective en sachant que le risque accepté sera compensé, le cas échéant. À cet égard, les avocats sont en droit de s'attendre que l'entente concernant leurs honoraires soit respectée.[18]

75. When determining whether to approve a fee request from Class Counsel, Courts should take the Class Members' interests into account, but this should not be at counsel's expense. As stated by this Honourable Court:

> *[66] Pour le tribunal, veiller sur l'intérêt des membres ne consiste pasà prendre leur part au détriment indu des avocats qui travaillent pour le groupe, et encore moins à donner raison inconsidérément à tous les mouvements d'humeur. [...]*
>
> *[67] Dans certains cas, l'intérêt des membres peut consister à garder lesavocats motivés à persévérer même quand les procédures sont longues, ardues et risquées, au point où leur rémunération est nulle durant des moiset des années. Le paiement d'honoraires à un stade interlocutoire fait partie du coffre à outils à cet effet.*[19]

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[14] *Landry c. Concordia International Corp*., 2018 QCCS 4641, BoA, tab 8, at para. 58.
[15] *Derome c. The Stars Group Inc.,* 2020 QCCS 2316, BoA, tab 9.
[16] *Celso Catucci* et al. v. *Valeant Pharmaceuticals International Inc.* et al., November 16, 2020 [unreported], BoA, tab 15.
[17] Schedule 3.
[18] *A.B.* c. *Clercs de Saint-Viateur du Canada*, 2023 QCCA 527, BoA, tab 11, at para. 57, (citation omitted).
[19] *Option Consommateurs c. Infineon Technologies, a.g.,* 2013 QCCS 1191, BoA, tab 4, atparas. 66-67.

76. In *Option consommateurs c. Infineon Technologies, a.g.*, the plaintiff, an association devoted to promoting and defending consumers' interests, discussed the importance of motivating class counsel to advance such lawsuit, which the Court accepted:

> *9. It is important that contingency fee agreements are respected, and that the percentage contingency fees agreed to between class counsel and representative plaintiffs be honoured in order to ensure predictability and thereby promote access to justice, especially for consumers who almost invariably do not have sufficient resources to mount an individual lawsuit in circumstances such as exist in the Proceedings. I am concerned that, if the courts set an arbitrary dollar amount as the highest fee achievable by class counsel for public policy reasons, this might create a disincentive which could amount to conflict of interest between class counsel and class members, and jeopardize the relationship between class counsel and their representative plaintiff clients.*
>
> *10. Since such an arbitrary fee will be reported as a precedent in jurisprudence, it will be public knowledge. In particular, defence counsel willbecome aware of such an arbitrary fee… In cases, such as the Proceedings, where Class Counsel seek interim fees and file contingency fee agreements as exhibits, some defendants may be motivated to decrease the amount of money that they are willing to offer to settle a class action because class counsel are at or near the maximum arbitrary fee that they are likely to be awarded.*
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> *11. Percentage contingency fee agreements create valuable incentives forclass counsel, as they encourage class counsel to, among other things, achieve the highest settlements possible in order to generate the largest percentage fee. If class counsel are faced with an arbitrary maximum fee, then once they achieve sufficient settlements to get them at or near that maximum arbitrary fee, class members may think that class counsel will settle cheaply with any remaining defendants to close down the case. This conflicts with the class members' interest in maximizing recovery.*
>
> *12. In summary, to impose a maximum arbitrary fee may create a disincentive that could be harmful for future class actions.* [20]
>
> [our emphasis]

77. As stated by Strathy J. (as he then was) in *Abdulrahim v. Air France*:[21]

> *[9] In class action litigation, the court must also consider the goals of class proceedings, particularly in terms of access to justice. The fee of class counsel must be both fair and reasonable. It should not only reward counsel for meritorious efforts, but it should also encourage counsel to take on difficult and risky class action litigation. The risk undertaken by the lawyer, and the success achieved, are important*

[20] O*ption Consommateurs c. Infineon Technologies, a.g.*, 2014 QCCS 4949, BoA, tab 5, at para.137.
[21] *Abdulrahim v. Air France*, 2011 ONSC 512, BoA, tab 12, at paras. 9-10.

> *considerations in determining the fee: Maxwell v. MLG Ventures Ltd. (1996), 30 O.R. (3d) 304, [1996] O.J. No. 2644 (Gen. Div.); Windisman v. Toronto College Park Ltd., above; Serwaczek v. Medical Engineering Corp., above; Parsons v. Canadian Red Cross Society (2000), 49 O.R. (3d) 281, [2000] O.J. No. 2374 (S.C.J.).*
>
> *[10] The courts have recognized that the objectives of the C.P.A. – judicial economy, access to justice and behaviour modification – are dependent, in part, upon counsel's willingness to take on class proceedings. This, in turn, depends on the incentives available to counsel to assume the risks and accept the financial burden of carrying class proceedings. A premium on fees is the reward to class counsel for accepting this risk and taking on meritorious but difficult matters: Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., [2005] O.J. No. 1117 at paras. 59-61 (S.C.J.); Parsons v. Canadian Red Cross Society, above, at 287.*
>
> [our emphasis]

78. Justice Strathy's comments were adopted by this Honourable Court in *Option Consommateurs c. Infineon Technologies.*[22]

79. The Representative Plaintiff support the legal fee request by Class Counsel and have also stated that he believes hat securities class actions provide access to justice to investors and that class counsel must be incentivized to bring actions such as the present one forward.[23]

80. As stated by Mr. Justice Belobaba "(…) it is only through a robust contingency fee system that class counsel will be appropriately rewarded for the wins and losses over many files and many years of litigation and that the class action will continue to remain viable as ameaningful vehicle for access to justice."[24]

C. The Risk Assumed by Counsel

81. Although the element of risk is not specifically identified at s. 102 of the *Code of Professional Conduct*, courts have held that they cannot disregard the fact that attorneys work on a case for a number of years without any guarantee of success.[25]

82. The risk assumed by Class Counsel is directly related to the level of complexity of a claim.

83. All of the risks of the Action as a whole are relevant to an assessment of risk for the purpose of determining the within application for fees and disbursements.

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[22] *Option Consommateurs c. Infineon Technologies, a.g.,* 2012 QCCS 3506, BoA, tab 13, at para. 10; *Option Consommateurs c. Infineon Technologies, a.g.,* 2013 QCCS 1191, BoA, tab 4, at para. 59 and *Option Consommateurs c. Infineon Technologies, a.g.,* 2014 QCCS 4949, BoA, tab 5, at para. 134.
[23] Affidavit of D. Gauthier, Schedule 3.
[24] *Middlemiss v. Penn West Petroleum*, 2016 ONSC 3537, BoA, tab 14, at para. 19.
[25] *Guilbert c. Sony BMG Musique (Canada) inc.*, 2007 QCCS 432, BoA, tab 7, at para. 41; *supra* note 11, at para. 65.

84. The Plaintiff filed a claim pursuant to Title VIII, Chapter II, Division II of the *Quebec Securities Act*. As such,at the outset, the Plaintiff was faced with the necessity to demonstrate that his claim was brought in good faith and that there was a reasonable possibility that the claim would be resolved in their favor pursuant to s. 225.4 of the *Quebec Securities Act*.

85. This requirement is a heightened burden for authorization when compared to a regular class action. The Plaintiff's evidentiary and legal burdens at authorization were therefore increased and the chances of success correspondingly decreased.

86. Moreover, securities class actions often require the hiring of experts at the inception of a matter to satisfy their burden and bring "some credible evidence" in support of their claims.

87. Incurring such an expense so early in the proceedings massively magnifies the risk where class counsel can be required to expend significant sums even before a case is even authorized.[26]

88. The procedural path giving rise to this action, the substantive merits required to obtain authorization under the *Quebec Securities Act* and the nature of the substantive issues themselves add complexity and risk involved in securities class actions.

89. As stated by this Honourable Court in *Pellemans c. Lacroix*, 2011 QCCS 1345:[27]

> *[101] Lorsque, comme en l'instance, l'avocat accepte dès le départ d'assumer la responsabilité des coûts et des risques liés à l'exercice du recours collectif et à son rejet éventuel, à l'exclusion du représentant, il apparaît justifié que l'ampleur de ces risques soit reflétée dans l'honoraire à pourcentage négocié avec son client. Il faut s'attendre à une certaine adéquation entre l'importance des risques assumés par l'avocat, d'une part, et le pourcentage qui sera éventuellement payé par les membres, le cas échéant, d'autre part.*
>
> *[102] En l'absence d'une telle entente, il est raisonnable de présumer que dans de nombreux dossiers, un membre refuserait de se porter représentant aux fins de l'exercice du recours collectif. Ainsi, c'est l'accès même à la procédure du recours collectif, recours unique, qui se verrait compromis à une époque où de plus en plus d'intervenants de notre société se questionnent sur l'accessibilité à la justice.*
>
> [our emphasis]

[26] One notable example of this is *Catucci c. Valeant Pharmaceuticals International Inc*., 2019 QCCS 3622, BoA, tab 16, where Class Counsel spent more than $1,000,000 on experts and disbursements at authorization, in addition to the millions more in fees, and sought over $771,000 in costs arising from the authorization judgment.

[27] *Pellemans c. Lacroix*, 2011 QCCS 1345, BoA, tab 6, at paras. 101-102.

D. Class Counsel's Time and Expense

90. Unfortunately for Class Counsel, some files are economically viable, and others are not.

91. Class counsel funded the entirety of the fees devoted to this case and received a small contribution from the *Fonds D'aide* for only a portion of the disbursements, totaling $51,161.61.

92. Class Counsel has invested over $1M in time and disbursements in this matter, as appears from Schedule 2, and the proposed counsel fee of $540,000, which is 30% of the $1.8M Settlement Amount, constitutes a substantial loss for Class Counsel.

93. Such losses are risks Class Counsel accept by taking on contingency litigation. In good conscience, they have no intention of asking this Court to revise the terms of the mandate letter they agreed to with the Plaintiff.

94. They will absorb the loss.

E. The Complexity of the File and the Specialization of Counsel

95. In many respects this file is unique. As far as Class Counsel is aware, having a lone individual defendant and seeking damages relating to a going private transaction alleging the claim relates to a strategy to artificially inflate the value of securities, are all factors which have not been dealt with before in Canadian law in a class action context.

96. As mentioned above, Class Counsel specialize in such novel securities class actions.

F. The Importance of the Matter to Class Members

97. For the vast majority of Class Members, an individual action is not feasible, and this Action would be the only efficient vehicle for them to obtain access justice and pursue their claims.

G. The Result Obtained

98. As expressed above, through their diligence and hard work, Class Counsel were able to obtain a settlement which exceeds the statutory limitation provided for by the *Quebec Securities Act*. Class Counsel have worked diligently in this matter for over five (5) years, without guarantee of remuneration.

VII ORDER SOUGHT

99. Accordingly, the Plaintiff requests that an Order be granted in the form as attached as **Schedule 8**.

100. This Application for approval of an Agreement and Other Relief is well founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THIS HONOURABLE COURT TO:

GRANT the present motion; and

ISSUE the Order in the form attached hereto as **Schedule 8.**

THE WHOLE WITHOUT COSTS.

MONTREAL, this 24th day of October, 2023

Faguy & Co.

FAGUY & CO. BARRISTERS & SOLICITORS INC.
Attorneys for the Plaintiff

SUPERIOR COURT
(Class Action)
Province of Québec
District of Montréal
N°: 500-06-000859-179

DENIS GAUTHIER

Representative Plaintiff

v.

DAVID BAAZOV

Defendant

-and-

FONDS D'AIDE AUX ACTIONS COLLECTIVES

Mis-en-cause

APPLICATION TO APPROVE A SETTLEMENT AGREEMENT AND FOR OTHER RELIEF
(Articles 575, 590, 593 and 595 *CCP*)

FAGUY & CO.
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