

SUPERIOR COURT OF JUSTICE

R. F. T. W. F. N.

FRANÇOIS and ARCHIE LEACH

Plaintiffs

- and -

BMO NESBITT BURNS INC., BLACKMONT CAPITAL INC., CANACCORD CAPITAL CORPORATION, NATIONAL BANK FINANCIAL INC., SPROTT SECURITIES INC., TD

LITTLE, ATUL SHAH, MICHAEL HOFFMAN, EDAN KING, HOWARD MOKOF, KOBERL, PLECOWITZ, ERIC SEAVENS, and LORIE WAINBERG

Defendants

FACTUM OF THE PARTIES

APPROVAL OF CLASS COUNSEL FEES AND DISBURSEMENTS

(Motion returnable January 20, 2011)

PART I - NATURE OF THE MOTION

The motion is for an order approving class counsel fees of Siskind LLP and Siskind &...

Plaintiffs.

3. The legal fee request encompasses all of the law firms who provided legal services in respect of the Ontario and Michigan proceedings. The law firms who will be compensated from the requested award are:

- (b) Juroviesky Ricci LLP ("JR");
- (c) Frank Haron Weiner and Navarro LLP ("FHWN");
- (d) Bernstein Litowitz Berger Grossman ("BLBG");

Ontario action. The legal fees for the Québec action are subject to a separate approval motion in Québec.

PART II - SUMMARY OF THE FACTS

... of FMF Group, limited to FMF Group March 2005 ... of 100% or between ... securities of FMF Group are a hybrid security consisting of a common share and a subordinated note, and are known as income participating securities ("IPSS"). The Plaintiffs alleged that the Prospectus and FMF Group's post-IPO disclosures contained numerous misrepresentations, and that all the Defendants, including the underwriters, ought to have known of those ... the IPSS fell by 76.1%.

litigation and class actions, F.R.W.N., was then retained to assist with the litigation in Michigan. A

Dimitri Lascaris of Siskinds, who has been admitted to the Bar of the State of New York since

in the prosecution of the Michigan action.

fee basis. Each Plaintiff executed a retainer agreement which provided that the law firms would

Affidavit of Tim Gould, sworn January 10, 2007 (hereafter "Gould")

venuta Affidavit | at 17.

Affidavit of Rebecca Bekhor, sworn January 10, 2007 (hereafter "Bekhor")

Affidavit of Ursula Sagan, sworn January 4, 2007 (hereinafter "Ursula")

concluded. The gross settlement fund is in excess of C\$28 million. At the insistence of Class Counsel, none of the settlement monies were paid by the issuer, FME Group. The settlement is being funded by: (a) the issuer's insurers; (b) the Defendant, Michigan Priority Acceptance Corp. ("MFAC"), which is a private Michigan corporation controlled by four U.S.-based trusts that are related to the two most senior officers of FME Capital Group Ltd.; (c) the underwriters, and (d) the Defendant, BDO Seidman LLP, FME Group's auditors.

Reference: Ritchie Affidavit, paras. 61-62.

Class Period will be eligible for compensation. The amount of each Class Member's

Class Period and the

hold some or all of the IPSs that were acquired during the Class period; (b) if the Class member

purchased IPSs on both the IPO and over the TSX; whether such IPSs were commingled; and (7)

the number of IPSs purchased by all Class Members who timely file Valid Claim Forms with the

Reference: Ritchie Affidavit, paras. 126 and 130.

of Directors and Audit Committee Charter.

Reference: Ritchie Affidavit, paras. 121-125.

(C) NATURE OF THE LITIGATION

In the span of less than one year, there was considerable litigation activity in this case. Class Counsel were involved in cross-examinations and depositions in the Michigan and Ontario proceedings, and there were court appearances in each jurisdiction.

Reference: Ritchie Affidavit, paras. 15-28 and 31-38; Lascaris Affidavit, paras. 15-20 and 27-36.

claims, including interviews with numerous former employees of M-ACU and of the operating subsidiary of PAVE Group, and the review of numerous documents obtained from those witnesses.

Reference: Affidavit of A. Dominic Lascaris, SWJH, January 10, 2007 (the "Lascaris Affidavit") at 22-25.

3. No regulatory authority has disclosed an investigation of the matters contained in this litigation. Therefore, despite the cost and time commitment, it was the view of Class Counsel that the investigation was necessary where the data was not available and the connections were not

Reference: Lascaris Affidavit, para. 21.

Litigation Risks

- (b) the risk that the Court would not certify the action or parts of it;
- (c) the risk that the Court would not certify a national class, thus reducing the potential damages available;

the risk that the plaintiffs would not establish a prima facie case of a causal connection between the alleged misrepresentations and the alleged damages.

a considerable delay in compensation for Class Members;

Reference: Lascaris Affidavit, para. 27.

Novel Issues

their claims in a Michigan Court;

secondary market purchasers for statements it made after the IPO;

London or Toronto was the more appropriate venue for the case management of this

(e) whether a motion to stay the Ontario proceeding was appropriate in the circumstances;

indemnification from the issuer, is void as against public policy, or, more generally,

underwriters where a settlement is reached with an issuer, and

settlement.

Reference: Lascaris Affidavit, paras. 26

potential right of termination in the event of certain opt-out thresholds being reached.

Reference: Kitchin Affidavit, para. 34.

Lascaris Affidavit, para. 30

(D) COSTS INCURRED BY CLASS COUNSEL

different members of the counsel team were specific and complementary. For example:

similar to FME;

between two different groups of Class Members.

Reference:

Lascaris Affidavit, para. 17.

17. All counsel whose fees are relevant to this fee application have time to January 17, 2007, which is

Reference: Lascaris Affidavit, paras. 34 and 37.

not apply to the Class Proceedings Fund for assistance. If the Class had received disbursement

funding from the Class Proceedings Fund, it would now be obligated to reimburse the Fund from

support provided by the Fund and an additional payment of 10% of the amount of the settlement

monies received by the Class. If, assuming the entire risk of binding the litigation, Siskind has saved the class in excess of \$2 million.

Reference:

Lascaris Affidavit, para. 25.

19. Considerable work remains to be done by Siskind. It is anticipated that counsel will have an excess of \$2.2-million in time invested in this matter upon conclusion. The future involvement of

(Class Counsel includes:

(a) the approval of motions in Ontario and Quebec;

(b) the dismissal of the Michigan proceeding;

- (d) responding to Class Member inquiries;
- (e) reviewing any opt outs and addressing any issues that may arise relating to opt outs;

administration, including any appeals or motions to the courts, and

Reference: Lascaris Affidavit, para. 30.

Bekfor Affidavit, para. 15.

Fisher Affidavit, para. 17.

Venditti Affidavit, para. 16.

Ursula Sagan Affidavit, para. 17.

Steele Affidavit, para. 17.

Ontario action and the Ontario action, as well as with interests in the

share in the business of the company.

of clients. Their backgrounds include the following qualifications:

	<p>LLP, London Office</p> <p>Former President, Carroll Healthcare</p> <p>Former President, Diamond Aircraft</p>
	<p>President, Gould Leasing</p>

Mark Wayne Fisher, Director of Headquarters Branch, Department of	Degree in Economics
Manitoba (retired)	
Giacinto Venditti	Telecommunications Engineer Employed in several managerial capacities at
Rebecca Bekhor	Investment Advisor and Broker, Manulife Financial Canada Co.
Ray Steele, Mavrix Fund Management Inc. ("Mavrix")	Chief Operating Officer, Mavrix Chief Financial Officer, Mavrix

Manitoba (retired)
Certified Management Consultant

Reference: Leach Affidavit, paras. 2-3

Gould Affidavit, paras. 2-3

Fisher Affidavit, paras. 1-2

Bekhor Affidavit, paras. 1-2

Siskind Affidavit, paras. 1-2

stated the following, or words to similar effect, in their affidavits.

This litigation was undertaken on a contingency basis such that Siskinds would not be paid for fees or disbursements unless successful. The Retainer entered into provides that Siskinds will request a legal fee of 25% of the total value of the

I am further advised by Mr. Wright, that by agreement among Class Counsel, the Ontario Class is nominally allocated 85%, CAN\$24,353,943, of the Settlement Fund plus accrued interest, for the purposes of this fee application. The Québec

Class is nominally allocated 15%, CAN\$4,291,755, plus accrued interest, of the Settlement Fund for the purposes of their fee application. As a result, the fee application before the Ontario Court will amount to a request for fees up to, but not in excess of, 25% of the portion of the Settlement Fund nominally allocated to the Ontario Class, CAN\$6,066,460.20. Likewise, Quebec Class Counsel will make a fee request up to but not exceeding 25% of the portion of the Settlement Fund nominally allocated to the Québec Class, CAN\$1,074,438.70. I support such applications.

Reference: Leach Affidavit, paras. 10-20.

Gould Affidavit, paras. 16-20.

in their Affidavits:

This litigation was undertaken on a contingency basis such that Juroviesky & Ricci would not be paid for fees or disbursements unless successful.

...
legal fee of 35% of the total value of the settlement, plus disbursements and G.S.I. I am informed by Mr. Ricci however, and I believe in the truth of the information, that an arrangement has been made between the counsel representing the Class Members in the Michigan, Ontario and Québec proceedings by which all counsel have agreed to limit the legal fee request for all counsel to 25% of the Settlement Fund, plus disbursements and G.S.I., as discussed in detail below. I support Juroviesky & Ricci's intention to reduce the percentage of their recovery of legal fees from the percentage agreed upon in the Retainer.

...
I am further advised by Mr. Ricci that by agreement among the aforesaid counsel, the amount of the Settlement Fund, being CAN\$6,066,460.20 plus accrued interest, for the purposes of the fee application of counsel in the Ontario and Michigan proceedings, which application will be brought in the Ontario

...
CAN\$4,291,755 plus accrued interest for the purposes of the fee application of counsel in the Ontario proceedings, which application will be brought in the Ontario Court, will amount to a request for fees up to, but not in excess of, 25% of the portion of the Settlement Fund nominally allocated to the Class Members outside of Québec, being CAN\$6,066,460.20. Likewise, Quebec Class Counsel will make a fee request up to but not exceeding 25% of the portion of the Settlement Fund nominally allocated to the Québec Class, CAN\$1,074,438.70. I support such applications.

Reference: Venditti Affidavit, paras. 14, 17-18.

Fisher Affidavit, paras. 14, 17-18.

Bekhor Affidavit, paras. 13, 16-17.

Stanley Sagan Affidavit, paras. 15, 18-19.

Ursula Sagan Affidavit, paras. 15, 18-19.

Gross Affidavit, paras. 12, 15-16.

is recognized in the *Class Proceedings Act, 1992*.

Reference: *Class Proceedings Act, 1992, S.O. 1992, c.6, hereinafter "CPA"*, s.33.

24. An agreement respecting fees and disbursements shall be in writing and shall:

proceeding or not; and

otherwise.

Reference: *CPA*, s.32(1).

The Kramer accreditants entered into written fee agreements with the CPA.

(B) APPROVAL OF FEES

(i) Fees in Class Proceedings Generally

objective, courts have recognized that there must be an economic incentive for lawyers to take on an appropriate case and to pursue it diligently.

justice to those with claims that would not otherwise be brought because to do so as individual proceedings would be prohibitively uneconomic or inefficient. The provision of contingency fees where a multiplier is applied to the base fee is an important means to achieve this objective. The opportunity to achieve a multiple

the [CPA] is to fulfill its promise, that opportunity must not be a false hope.

Reference: *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 at 422 to 423 (C.A.) [hereinafter "*Gagne*"].

26. Although multiplier and multiplier methods may be used to calculate class counsel fees, the preferred method of calculating fees is as a percentage of class recovery.

In most Ontario class actions, the retainer agreement between class counsel and representative plaintiffs provides for a contingency fee calculated on a percentage of the settlement or judgment unless a suitable, compensation at the rate agreed to by the representative plaintiff should be the court's starting point in deciding a "fair and reasonable fee." First resort should not be made to the base fee and multiplier method, because of the considerable incentives class counsel and defendants have for tacit collusion in allowing class counsel's base

method (if agreed to by the representative plaintiff and class counsel) is specified in the retainer agreement, there are four specific concerns judges should consider. First, the court should examine whether there is any reason to think that the compensation provided for by the retainer agreement does not represent a fair and reasonable return to class counsel given what was known *ex ante* about the strength of the case, the costs of making the case, and the likelihood of success. This may be a difficult determination to make; nevertheless, courts should strive to make accurate determinations in this regard. Second, the court should consider whether the settlement takes the form of coupons or in-kind benefits to class members. If so, the court should discount the judgment appropriately. Third, if there is a reversionary interest to the defendant of the settlement fund, then the court should consider allowing class

distributed to class members. Finally, the court should be attuned to the

amount grossly lower than what one might consider to be the value of the claims of the class members, then the lodestar method might be more appropriately used than the percentage method (assuming the percentage method is provided for in the retainer agreement).

(S.C.L.) unreported at para. 21 citing Benjamin Alarie, Assistant

Professor of Law, University of Toronto, *Revisiting the Approach to Assessing Class Counsel Fees in Ontario Class Actions* (prepared for the 2006 Class

discussed below, the appropriateness of this fee can be confirmed through a multiplier based "cross-check". In this case, the multiplier will ultimately be in the range of or less than 3.0.

(ii) Factors to Consider in Assessing Class Counsel Fees

Reference: CPA, ss. 55(1), 55(9).

in *Serwaczek v. Medical Engineering Corp.*

Reference: *Crown Bay, supra* at 88.

Serwaczek v. Medical Engineering Corp. (1996), 3 C.P.C. (4th) 386 at 393.

assessing the reasonableness of the fee:

(c) the degree of responsibility assumed by the solicitor;

(iv) Degree of Success Achieved

benefits to Class Members through a simple, paper or electronic claim process. Absent these settlements, it is unlikely that many Class Members would receive compensation.

Reference: Ritchie Affidavit, para. 130.

37. The degree of success achieved is a relevant consideration in assessing whether the fees sought

by counsel are fair and reasonable, but total compensation or nature of payment is not the only
factor in the Court's determination of the reasonableness of access to the benefits achieved through the settlement
by a class member. In this case, Class Members should not have to incur any additional legal fees
or expenses in accessing settlement benefits

38. Deterrence is an important element of a securities class action. One distinguished commentator,

deter corporate misconduct, where "gatekeepers" (including auditors and underwriters) are named

Conroy also suggests that courts ought to reward class counsel for pursuing these non-traditional

39. In this case, Class Counsel did obtain settlement funds from sources other than the company

(MFAC, the underwriters, and the auditor) and further negotiated corporate governance changes

having value to Class Members who remain invested in FMF Group.

Generally speaking, in other cases those counsel have been providing advice to Canadian counsel and assisting in the prosecution of a Canadian action. In such circumstances, the courts have

see, in *Wilson v Servier Canada Inc.*, Justice Cumming stated:

This is the matter of the proper normative treatment in the determination and approval of class counsel fees in respect of non-class counsel (generally, but not necessarily, American legal advisors) for legal services provided to class counsel...

... the U.S. law firm is properly to be paid its fees from the counsel fees awarded to class counsel. Any amount payable to American law firm advisors in

respect to their fees should not and may be treated as a separate assessment by Canadian class counsel outside the determination of the quantum of class counsel fees.

(emphasis added)

(Ont. S.C.) [hereinafter *Servier*].

~~When a service is provided to the class, the fees should not be paid to the class.~~

Whether the legal fees of U.S. counsel are to be paid in addition to class Counsel fees in a situation where the counsel were necessary (for example, because there was litigation in the United States being advanced for the benefit of Class Members) and were in fact paid on an hourly rather than contingent basis, has not been addressed by the courts in

this case. In his application, the fees of all U.S. counsel are included within the overall fee application and are not in addition to the legal fees being requested:

Ford v. Hoffman-La Roche Ltd. (2005), 12 C.P.C. (6th) 226 at para 35 [hereinafter *Ford*].

practice in the United States, and did in fact provide the majority of legal services in respect of a

U.S. action, are being included within the Ontario fee application. The time and expense incurred by them is relevant to the issue of awarding costs.

(vi) Appropriateness of the fee sought.

should be a reward for taking on meritorious but difficult matters. In *Parsons*, the court

justice then in large part it will be dependent upon the willingness of counsel to undertake on an on or the understanding that there is a risk that the expenses incurred in time and disbursements may never be recovered. It is in this context that a court, in approving a fee arrangement or in the exercise of fixing fees, must determine the fairness and reasonableness of the counsel fee.

Reference: *Parsons, supra* at para. 13.

done simply to increase the lawyer's base fee. In *Crown Bay Ltd. Partnership v. Zurich Indemnity*

Co. of Canada, the court addressed the benefits of a percentage based fee arrangement.

important factor in determining the reasonableness of a percentage based fee arrangement is the risk of counsel to prolong the proceeding unnecessarily and of hindering settlement, especially in those cases where the chance of success is relatively small. It is not always certain. On the other hand, where a percentage fee, or some other arrangement such as that in *Nantais*, is in place, such a fee arrangement encourages rather than discourages settlement. In the case before this court the settlement averted a seven to ten day trial. Fee arrangements that reward efficiency and results should not be discouraged.

Reference: *Crown Bay, supra*, at 88.

against the retailer agreement and whether in the circumstances the fee will provide sufficient incentive for counsel to take on in-house cases in the future.

Class plus disbursements and taxes.

Reference: Leach Affidavit, para. 16.

Gould Affidavit, para. 16.

that one at the low end and three to four in the most deserving cases.

Reference: Group 1 of 425

plus disbursements and taxes. Class Counsel are not requesting that interest be paid on the legal

and for that will be earned. Similarly, Class Counsel seeks no interest on their disbursements

incurred as is provided for by section 33(7)(c) of the CPA. Lastly, Class Counsel will not make

any further requests for fees and disbursements, on behalf of the class, or future disbursements to be incurred. The fee request can be summarized as follows:

Time Billed	\$2,200,000.00
Fee	\$6,000,000.00
Disbursements	\$289,416.49
G.S.T.	\$123,900.38

with the retainer agreement entered into with the representative Plaintiffs.

multiplier basis, include:


- (a) the action involves both significant procedural and substantive risks;
- (b) Siskinds funded all of the disbursements and did not seek contribution from the representative Plaintiffs or the Class Proceedings Fund;
- (c) in the absence of the class proceeding, it is unlikely that any relief would be available to the majority of Class members;
- (d) compensation will be available to Class Members with relative ease and efficiency; and
- (e) the fee sought is consistent with the expectations of the representative plaintiff.

The Plaintiffs respectfully request:

\$6,000,000.00, plus disbursements in excess of \$289,416.49 and G.S.T. in the amount of

\$123,900.38 for a total of \$6,413,316.87.

11/11/00



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