CITATION: Drynan v. Bausch Health Companies Inc., 2020 ONSC 4379
COURT FILE NO.: CV-19-00632601-00CP
DATE: 20200804

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ROBERT DRYNAN, Plaintiff

AND:

BAUSCH HEALTH COMPANIES INC., BAUSCH HEALTH CANADA INC., VALEANT CANADA GP LIMITED, VALEANT CANADA LIMITED, VALEANT CANADA LP, Defendants

BEFORE: Justice Glustein

COUNSEL: *James Bunting, Sean R. Campbell and Carlos Sayao,* for the plaintiff

Randy Sutton, Kate Findlay, and Justine Smith, for the defendants

HEARD: July 6, 2020 with additional oral submissions on July 14, 2020

REASONS FOR DECISION

Nature of issues and overview

[1] The present action arises from an allegedly misleading marketing campaign and related misrepresentations made by the defendants to promote and sell their COLD-FX® brand of products. This includes the defendants' assertion that COLD-FX® is "A Natural Health Product, Proven by Science".

[2] The plaintiff, Robert Drynan ("Drynan") brings a motion to approve a proposed third-party litigation funding agreement between Drynan, Tyr LLP ("Class Counsel"), and Harbour Fund IV, L.P. ("HF4") dated September 24, 2019 (the "Initial Funding Agreement"), as amended by a draft letter agreement dated July 8, 2020 (the "July 8 DLA") and a draft letter agreement dated July 15, 2020 (the "July 15 DLA").

[3] I refer to the Initial Funding Agreement, the July 8 DLA, and the July 15 DLA collectively as the "Funding Agreement", as the three agreements contain the proposed terms for which court approval is sought. For the reasons I set out below, I approve the Funding Agreement.

Background

[4] At the hearing for approval of the Initial Funding Agreement on July 6, 2020, the court raised concerns that in certain circumstances of settlement or judgment, the proposed agreement

could lead to a significant percentage payment to HF4 and Class Counsel, with very little recovery for the class from proceeds of settlement or judgment.[1]

[5] In response to the court's concerns, Drynan delivered the July 8 DLA.

[6] Many of the court's concerns were addressed through the July 8 DLA, which provided that:

(i) There would be a cap of 33.3% of the Proceeds for HF4's recovery of (a) legal fees advanced (less any legal fees recovered from the defendants) and (b) 25% of the Proceeds (collectively, the "HF4 Cap");

(ii) Any "top-up" of legal fees sought by Class Counsel would be limited to a claim of 33.3% of the Proceeds, inclusive of the amount paid to HF4 under the HF4 Cap. In other words, the total recovery from the Proceeds under the HF4 Cap and any Class Counsel top-up collectively could not exceed 33.3% of the Proceeds;

(iii) Disbursements and adverse costs would be paid from the Proceeds; and

(iv) Payments by HF4 for adverse cost insurance and out-of-pocket costs would be subject to court approval at the end of the proceedings.

[7] Upon further oral submissions on July 14, 2020, the court expressed an additional concern that pre-approved payment of adverse costs from any Proceeds could also lead to a significant percentage payment to HF4 and Class Counsel, with very little recovery for the class. That concern was addressed through the July 15 DLA, which maintained the amendments in the July 8 DLA and added a further amendment that payment of any adverse costs awards from the Proceeds would be deferred until the end of proceedings and would be subject to court approval at that time.

[8] Consequently, the Funding Agreement incorporates the terms of the Initial Funding Agreement as amended by the July 8 DLA and the July 15 DLA.

Objections raised by the defendants

[9] At the initial hearing on July 6, 2020, I agreed with some of the defendants' concerns about potential overcompensation to HF4 and Class Counsel and low class recovery of Proceeds under the Initial Funding Agreement. As I discuss below, I am satisfied that those concerns have been resolved through the July 8 DLA and the July 15 DLA.

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[1] In the Initial Funding Agreement, proceeds of any successful result, including settlement or judgment, are defined as the "Proceeds" and I use this defined term in these Reasons.

[10] There are four categories of objections raised by the defendants:

(i) **Objections relating to the protection of the defendants' interests**: The defendants submit that they are not protected for recovery of adverse cost orders since the Funding Agreement does not require HF4 to post security for costs. The defendants seek an amendment to add such a term to the Funding Agreement;

(ii) **Objections relating to the litigation autonomy of the plaintiff and Class Counsel**: The defendants submit that the termination and "promise"[2] clauses in the Funding Agreement do not permit Drynan or Class Counsel to independently manage the litigation and, as such, should be struck or amended;[3]

(iii) **Objections relating to overcompensation and fairness to the Class**: The defendants submit that even with the proposed changes to the Initial Funding Agreement to address the court's concerns of overcompensation, further amendments should be incorporated into the Funding Agreement to:

(a) place a monetary cap on HF4's recovery if Drynan is successful,

(b) stagger the percentage recovery to which HF4 is entitled depending on the stage when the action is resolved, and

(c) limit pre-approval of HF4 recovery to 10%, with the balance deferred until resolution of this action; and

(iv) **Objections relating to access to justice:** The defendants submit that (a) the action has no merit and (b) Drynan did not seek funding from the Class Proceedings Fund (the "CPF"). The defendants rely on those submissions and assert that the Funding Agreement is not "necessary to achieve access to justice".[4]

Summary of conclusions on the objections

[11] For the reasons that follow, I find that:

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[2] The parties use the term "promise" for those contractual representations made by Drynan in the Funding Agreement. I adopt that term in these Reasons.

[3] The defendants initially also objected to the termination and promise clauses on the basis that Drynan did not receive independent legal advice, but the defendants advised the court that they were not pursuing that submission and had not intended to impugn the integrity of Drynan's counsel who had submitted uncontested evidence of the independent legal advice provided to Drynan.

[4] The defendants do not appear to seek any particular amendment arising from this objection, but make the general submission that the Funding Agreement does not advance the interests of justice.

(i) Security for costs is not required as a term of the Funding Agreement. Given the uncontested evidence before the court as to the strength of HF4's financial condition, the defendants' interest to recover adverse costs is protected under the Funding Agreement;

(ii) The termination and promise terms do not raise concerns about litigation autonomy. Under the Funding Agreement, any termination arises only upon reasonable conditions and must be approved by the court, and the promises made by Drynan do not shift control of the litigation to HF4;

(iii) The amendments to the Initial Funding Agreement under the July 8 and July 15 DLAs properly address the overcompensation and class recovery concerns raised by the court. The amendments proposed by the defendants are not necessary to address these concerns; and

(iv) On the evidence before the court, the Funding Agreement advances the goals of access to justice and behavioural modification under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*CPA*"). It is not necessary for Class Counsel to seek funding from the CPF. Also, the merits of the claim should not be assessed at the funding stage of the proceeding.

[12] Consequently, I approve the Funding Agreement, subject to the residual discretion of the court to address the fairness of HF4 and Class Counsel's "ultimate recovery" when a settlement or final award has been reached.[5]

[13] I first review the key terms of the Funding Agreement. I then consider the general principles governing approval of third-party funding agreements. Finally, I address the defendants' objections.

The Funding Agreement

[14] The essential terms of the Funding Agreement are as follows:

(i) HF4 will make an "HF4 Investment" to fund the litigation, which is defined as the total of:

(a) amounts paid by HF4 on an ongoing basis for (1) 80% of Drynan's legal fees in accordance with an approved budget, (2) expert fees and disbursements in accordance with an approved budget, (3) applicable

[5] As that term and process was set out by Morgan J. in *JB & M Walker Ltd./1523428 Ontario Inc. v. TDL Group*, 2019 ONSC 999, 48 C.P.C. (8th) 199 ("*TDL*"), at para. 26.

taxes, including HST, and (4) any adverse costs awards (including an award for security for costs), all up to an agreed maximum,[6] and

(b) any out-of-pocket expenses incurred by HF4, including (1) any legal opinion (including tax and regulatory opinions), (2) all costs and expenses (including legal fees) incurred by HF4 in connection with any amendment, waiver, or consent requested by or on behalf of Drynan or allowed under the Funding Agreement, and (3) all costs and expenses (including legal fees) incurred by HF4 in the enforcement or preservation of its rights under the Funding Agreement;

(ii) Upon success in the Proceedings, HF4 will receive 25% of the Proceeds and the return of its investment in legal fees, subject to the following:

(a) Payment to HF4 of 25% of the Proceeds and the reimbursement of 80% of Drynan's legal fees in accordance with the agreed budget (less any legal fees recovered from the defendants) shall not exceed in the aggregate 33.3% of the Proceeds (previously described as the "HF4 Cap");

(b) Class Counsel can request a "top-up" for fees after HF4 obtains its payment for legal fees advanced and its 25% recovery. However, if Class Counsel seeks such a "top-up", it would only seek court approval for an amount that would top-up payment to a maximum, including the HF4 Cap, of 33.3% of the Proceeds;

(c) Disbursements (including expert fees) paid by HF4 will be reimbursed from the Proceeds;

(d) Any adverse costs awards paid by HF4 would not be paid as part of the recovery of the HF4 Investment, but instead would be subject to court approval at the end of the proceedings;

(e) Any costs associated with HF4 purchasing adverse cost insurance would not be paid as part of the recovery of the HF4 Investment, but instead would be subject to court approval at the end of the proceedings; and

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[6] I approve the proposed budget, which was provided to the court in unredacted form. I adopt the approach taken by Morgan J. in *TDL*, and I am satisfied that the budget is "realistic", "flexible to meet the exigencies of the litigation", and "suitable to the needs of the case". It is appropriate not to disclose those terms in these Reasons so that the defendant "does not acquire a strategic advantage by virtue of being privy to the complete financial parameters of the funding body's commitment to the litigation": *TDL*, at paras. 17-18.

(f) Any out-of-pocket costs for HF4 would not be paid as part of the recovery of the HF4 Investment, but instead would be subject to court approval at the end of the proceedings.

[15] Further, Class Counsel for Drynan agreed at the hearing with the approach taken by Morgan J. in *TDL* that that "the fairness of [the funder's] ultimate recovery can wait for approval until a settlement or final award has been reached" (at para. 26). The same approach was endorsed by the Divisional Court in *Houle v. St. Jude Medical Inc.*, 2018 ONSC 6352, 29 C.P.C. (8th) 409 ("*Houle* Div. Ct."), at para. 44.

[16] In summary, the Funding Agreement provides for a 33.3% capped recovery from the Proceeds for the aggregate of (i) the return of the Class Counsel legal fees paid by HF4 (less any legal fees recovered from the defendants), (ii) HF4's 25% recovery on the Proceeds, and (iii) any top-up claim by Class Counsel. Disbursements paid by HF4 are to be reimbursed from the Proceeds, with HF4 reserving its right to seek payment for adverse cost insurance, adverse cost awards, and out-of-pocket expenses at the end of the hearing. The fairness of the ultimate recovery for HF4 and Class Counsel (if any additional recovery is sought by Class Counsel) will be reviewed once a settlement or final award is reached.

General principles governing approval of third-party funding agreements

[17] The test to approve a third-party litigation funding agreement was set out by Perell J. in *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321 ("*Houle* SCJ"), at para. 63. The court must be satisfied that:

> (a) the agreement must be necessary in order to provide access to justice; (b) the access to justice facilitated by the third-party funding agreement must be substantively meaningful; (c) the agreement must be a fair and reasonable agreement that facilitates access to justice while protecting the interests of the defendants; and (d) the third-party funder must not be overcompensated for assuming the risks of an adverse costs award because this would make the agreement unfair, overreaching, and champertous […]

[18] The general test for approval of a third-party funding agreement is that it "should not be champertous or illegal and it must be a fair and reasonable agreement that facilitates access to justice while protecting the interests of the defendants": *Houle* SCJ, at para. 71. Applying this test is an exercise of judicial discretion that involves the balancing of various factors to determine what is fair and reasonable in each particular case: *Houle* Div. Ct., at para. 29.

[19] Third-party litigation funding is an acceptable and appropriate way to promote the objectives of class proceedings, including promoting access to justice and behaviour modification: *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2013 ONSC 4974, 117 O.R. (3d) 150 ("*Kinross*"), at para. 34; *Houle* SCJ, at para. 77.

[20] A detailed list of factors relevant to governing approval of third-party funding agreements is set out in *Kinross*, at para. 41.

Objections raised by the defendants

[21] At paragraph 10 above, I set out the four categories of objections raised by the defendants. I address each category below.

Category 1: Objections relating to the protection of the defendants' interests (security for costs)

[22] The defendants submit that it is necessary for HF4 to post security for costs in order to protect the defendants' interests in recovering any adverse costs award in their favour. I do not agree.

[23] I first review the applicable law and then apply that law to the present case.

(i) The applicable law

[24] The defendants rely on numerous cases in which the funder agreed to post security for costs as a term of the funding agreement. However, while a court can consider that factor as an element to approve a funding agreement, security for costs is not required for approval of every funding agreement.

[25] In *Kinross*, the defendants advised Harbour Fund II, L.P. ("HF2") that they would not oppose the funding agreement provided that HF2 post security for costs (at para. 18). Perell J. approved the funding agreement, but held that it was not settled law that a funder must provide security for costs as a condition of court approval of a funding agreement. He stated, at para. 41:

> It is an acceptable term of a funding agreement to require the third party funder to pay into court security for the defendants' costs. (**Whether this should be a necessary term in every case has not been determined in the case law.**) [Emphasis added.]

[26] In *TDL*, there was no provision in the funding agreement requiring the funder, Galactic TH Litigation Funders LC ("Galactic"), to post security for costs. Galactic only agreed to (i) post security for costs if required by order of the court, (ii) indemnify the plaintiffs for any adverse costs awards, and (iii) attorn to the court's jurisdiction for enforcement (at paras. 4 and 19).

[27] Morgan J. reviewed the evidence of Galactic's financial condition. Morgan J. found that Galactic had assets in the range of $33 million US and a net equity of $29 million US. Morgan J. concluded at para. 16 that "Galactic is in a financial position to meet the obligations of this case as it goes forward".

[28] Morgan J. did not order security for costs as a condition of approving the funding agreement. He held, at para. 19:

> As indicated, Galactic has covenanted to post security if required to do so and to cover any costs awarded against the Plaintiff. […] Further, Galactic has by

> consent attorned to Ontario court jurisdiction and so will be subject to any orders issued by this court during the course of the litigation.

[29] In *David v. Loblaw*, 2018 ONSC 6469, 43 C.P.C. (8th) 418 ("*David*"), Morgan J. did not order security for costs as a term of the funding agreement involving IMF Bentham Limited ("Bentham Australia"). Under the funding agreement in *David*, Bentham Australia attorned to the jurisdiction of the Ontario courts. Bentham Australia agreed to provide security for costs if ordered to do so by the court. However, even if ordered to do so, under the funding agreement Bentham Australia would only provide an undertaking to the court.

[30] In *David*, the defendants objected to Bentham Australia posting an undertaking to pay any adverse costs (including upon a court order for security for costs) (at para. 16). Morgan J. reviewed, at para. 8, the evidence as to Bentham Australia's market capitalization, insurance policy coverage, and net cash position, and did not order security for costs. He held, at paras. 17-18:

> In addition, Defendants' counsel express concern that Bentham Australia is the company with assets, not Bentham Canada. They are worried that they may end up having to chase a foreign entity to its home jurisdiction in order to enforce any Order of this court.
>
> This latter objection does not amount to a serious obstacle. Bentham Australia has attorned to this court's jurisdiction and has waived any jurisdictional defences. In any case, Australia is a jurisdiction with a legal system as similar as any to that of Ontario, and there should be no problem seeking enforcement of an Ontario court order in the Australian courts. And while Australia may be geographically far away, counsel for Bentham has assured the court that enforcement proceedings would likely be unnecessary as his client was prepared to adhere to all Orders of this court as if both its Australian parent and its Canadian subsidiary were physically present in this province.

[31] Consequently, it was not a term of the funding agreement in *David* to provide security for costs, and the only security to be provided (if security for costs was later ordered by the court) was limited to Bentham Australia's financial strength through an undertaking.

[32] The defendants rely on the decision of Strathy J. (as he then was) in *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364 ("*Dugal*"), at para. 35, in which the court (i) refused to approve the funding agreement "without adequate security being provided" and (ii) stated that it "would consider whether the defendants should be given a direct right against the security".

[33] However, in *Dugal*, the evidence before the court was that "CFI has no assets in Canada and has provided no evidence concerning its capacity to satisfy any costs award that may be made in these circumstances" (at para. 35). Consequently, security for costs as a term of the funding agreement was necessary in *Dugal* to protect the defendants' interests, unlike a case in which the funder provides evidence of its financial capabilities (as in *TDL* and in *David*).

[34] Consequently, while *Dugal* stands for the proposition that a court can order security for costs as a term of a funding agreement to ensure that the defendant's interests are protected, such an order is appropriate only if the court is not satisfied on the evidence that the funder has the financial capacity to pay an adverse costs award.

[35] Similarly, the defendants rely on the fact that in two prior funding agreements involving other Harbour Fund entities (in *Rebuck v. Ford Canada* (2017) and *Bayens v. Kinross* (2013)), those entities posted security for costs under a staggered schedule.

[36] However, there was no evidence in either of the above Harbour Fund funding agreements of a court-ordered requirement to post security for costs. To the extent that the term was agreed upon by the parties or offered by the Harbour Fund entities (there is no evidence on the issue), those prior agreements do not stand for the proposition that security for costs is a necessary term of a funding agreement.

(ii) Application of the law to the present case

[37] Under the Funding Agreement, HF4 will post security for costs if ordered by the court. HF4 has also consented to the enforcement in any jurisdiction of any order enforcing HF4's adverse costs indemnity. However, HF4 has not agreed to post security for costs as a condition of the Funding Agreement.

[38] The uncontested evidence based on HF4's 2018 financial statements (which were current when the affidavit in respect of this funding motion was sworn) is that HF4 has committed capital of more than £350 million to invest in litigation-related activities worldwide, and over £10 million in "Partners' Capital" (assets less liabilities).

[39] The defendants submit that the court should not accept the 2018 financial statements of HF4 as evidence of financial strength. The defendants submit that the financial information is out of date, particularly in light of the COVID-19 pandemic. I do not agree.

[40] The 2018 financial statements were current at the date the affidavit was sworn by the HF4 representative. There is no evidence that HF4 was trying to "hide" any results, let alone evidence that HF4 had any poorer results in 2019 or later due to the COVID-19 pandemic.

[41] The defendants did not cross-examine the HF4 representative to test whether the 2018 financial statements reflected HF4's current financial position in light of the COVID-19 pandemic. The affidavit was sworn less than three weeks after the World Health Organization declared COVID-19 as a pandemic.

[42] The defendants filed no evidence that the financial statements do not reflect HF4's current financial status. The defendants could have requested more updated financial information through cross examination but did not do so.

[43] The defendants further object to HF4 not providing evidence of the adverse costs insurance it may obtain to pay an adverse costs award. The defendants rely on *David* in which the funder disclosed details of its insurance policy coverage of $30 million (at para. 8).

[44] However, HF4 does not state that it will necessarily obtain insurance in order to protect itself from a claim for adverse costs. Instead, HF4 relies on its uncontested financial position, which is more than sufficient to pay an adverse costs award.

[45] Consequently, the evidence is that HF4 has more than sufficient assets to pay any adverse costs award and has attorned to any jurisdiction for enforcement. The defendants' interests of recovering an adverse costs award are protected.

[46] I follow the approach in *TDL* and *David* and reject the defendants' submission that a funding agreement cannot be approved unless the funder consents to post security for costs. The protection of the defendants' interests must be considered on the facts of each case.

[47] For the above reasons, I do not order security for costs as a term of the Funding Agreement.

Category 2: Objections relating to the litigation autonomy of the plaintiff and Class Counsel (termination and promise provisions)

[48] The defendants submit that the termination and promise clauses in the Funding Agreement do not permit Drynan or Class Counsel to independently manage the litigation and, as such, should be struck or amended. I do not agree.

[49] I first review the applicable law and then apply that law to the present case.

(i) The applicable law

[50] It is settled law that termination and promise provisions in a funding agreement must be reviewed by the court to ensure that they do "not interfere with the lawyer-client relationship, the lawyer's duties of loyalty and confidentiality, or the lawyer's professional judgment and carriage of the litigation on behalf of the representative plaintiff or class members" (*Houle* SCJ, at para. 88).

[51] In *Houle* SCJ, at paras. 95-99, Perell J. struck the termination clause that allowed the funder to withdraw funding on its own re-assessment of risk. Perell J. then added a term requiring court approval for termination.

[52] In *Houle* SCJ, at paras. 90-93, Perell J. also modified or struck certain promise clauses which interfered with the autonomy of the plaintiff and class counsel.

[53] By way of contrast, in *David*, Morgan J. approved the termination and promise provisions in the funding agreement, since (i) court approval was required to terminate the agreement and

(ii) the promise provisions did not alter the claimants' right to direct proceedings. Morgan J. held, at para. 14:

> Furthermore, several important features are present in the Agreement which add layers of fairness to the class: the claimants have sole right to direct proceedings and instruct counsel, termination of the Agreement is only with leave of the court (and if before certification the consent of class counsel is also required), Bentham will pay the costs up to the termination date (including costs of a motion to approve termination), and any assignment must be on notice to all parties and requires approval of court.

[54] If a funder seeks approval of an agreement that permits termination at any time without court approval, there could be significant concerns about the impact of such clauses on the ability of the plaintiff and class counsel to direct the litigation (as in *Houle* SCJ).

[55] However, if court approval of termination is required and the termination and promise provisions (i) do not result in the funder controlling the litigation and (ii) are reasonable to protect the interests of the funder, there is no basis to strike or amend such clauses.

(ii) Application of the law to the present case

[56] In the present case, court approval is required for any termination, unlike the situation in *Houle*. Further, any such termination would be permitted if the court finds either (i) "a material adverse decline in the prospects of success in the Proceedings" (under s. 15 of the Initial Funding Agreement), or (ii) "fault" by Drynan or class counsel, such as breaching warranties to not provide misleading information (under ss. 4 and 14 of the Initial Funding Agreement). These events of proposed termination reasonably protect the interests of HF4, while maintaining the litigation autonomy of Class Counsel and Drynan.

[57] Further, the Funding Agreement protects Drynan in the event of a termination notice from HF4. A motion must be brought to the court to approve or reject the termination, and, until the determination of such a dispute, Drynan faces no costs exposure since HF4 remains liable to pay any adverse costs award until the determination.

[58] With respect to the promise clauses, Drynan prepared a thorough comparison of the clauses in the Funding Agreement to those at issue in *Houle*.

[59] By way of example, the funding agreement in *Houle* included promises by the plaintiffs to (i) "*conduct the action* in a way that avoids unnecessary costs", (ii) "*follow* all reasonable legal advice given by Class Counsel", (iii) "*remain* parties to the action", and (iv) "*not take any steps* that would adversely affect the claims or the recoverability of the Litigation Proceeds" (*Houle* SCJ, at para. 91) (emphasis added). Those provisions raised concerns about the independence of the plaintiff and class counsel to control the litigation.

[60] In contrast to the above promises in *Houle*, the promises in the present case do not provide HF4 with control of the litigation. Using the same examples as in the above paragraph:

(i) Drynan's obligation to conduct a cost-efficient litigation is limited to "all commercially reasonable steps to avoid or minimize Adverse Costs" and is "subject to the Claimants' and Legal Representatives' obligation to act in the best interests of the Class Members" (s. 8(1)(b) of the Initial Funding Agreement);

(ii) Drynan's obligation is to "listen carefully to the advice of the Legal Representatives" (s. 5.2(e) of the Initial Funding Agreement);

(iii) Drynan has no obligation to remain a party to the action. To the contrary, s. 7.1 of the Initial Funding Agreement provides that Drynan "shall not be under any duty or obligation to continue with any Proceedings against any Defendant"; and

(iv) Drynan makes no representation that he will not take any steps that would adversely affect the claims or the recoverability of the Litigation Proceeds.

[61] At the hearing, counsel for the defendants could not provide an example of a particular termination or promise clause in the Funding Agreement that impinged on the objectivity and independence of Drynan and Class Counsel.

[62] Based on (i) the requirement for court approval to terminate the Funding Agreement, (ii) my analysis of the particular provisions above, and (iii) my review of the additional termination and promise provisions in the Funding Agreement, I do not strike or amend the termination or promise provisions in the Funding Agreement.

Category 3: Objections relating to overcompensation and fairness to the Class

[63] As I discuss above, the defendants propose three amendments to the Funding Agreement relating to alleged overcompensation and fairness to the Class:

(i) placing a monetary cap on HF4's recovery, if Drynan is successful,[7]

(ii) staggering of any percentage recovery to which HF4 is entitled based upon the stage at which this action is resolved, if Drynan is successful, and

(iii) deferring approval of any recovery sought by HF4 in excess of 10% of the Proceeds until the resolution of the action subject to the court's discretion.

[7] The defendants had also sought an amendment to the Initial Funding Agreement and the retainer agreement to clarify that any top-up sought by Class Counsel would be limited to a total of 33.3% of the Proceeds, including the HF4 Cap. That language was added as part of the July 8 DLA and remains in the July 15 DLA (as summarized at paragraph 14(ii)(b) above). The defendants agreed at the subsequent hearing on July 14, 2020 that they were satisfied that this initial concern had been resolved.

[64] I do not agree that the above amendments are required.

(i) Concerns of overcompensation arising from the Initial Funding Agreement

[65] At the initial hearing on July 6, 2020, I agreed with the defendants that the Initial Funding Agreement raised concerns of potential overcompensation to the class' detriment. While those concerns have been resolved as a result of the proposed amendments in the July 8 DLA and the July 15 DLA, I review below those issues arising under the Initial Funding Agreement.

[66] Under the Initial Funding Agreement, Drynan sought pre-approval of (i) repayment of the full HF4 Investment, and (ii) a 25% recovery for HF4.

[67] Further, the retainer agreement permitted Class Counsel to seek a separate 33.3% recovery for legal fees, as the retainer agreement and Initial Funding Agreement were not linked together.

[68] Class Counsel advised at the hearing and in its written submissions that it would only seek a top-up to a total of 33.3% of the Proceeds, including all payments to HF4 for the recovery of the HF4 Investment and payment to HF4 of 25% of the Proceeds (if there was any gap remaining between the total payment to HF4 and a 33.3% cap).

[69] At the hearing, I expressed concerns about potential overcompensation and low class recovery arising from the Initial Funding Agreement and the retainer agreement.

[70] I raised the following example with Drynan's counsel. If there was a judgment or settlement of $1 million, and if Class Counsel incurred legal costs which totaled $500,000,[8] then the court would be asked to pre-approve a funding approach that would pay Class Counsel $400,000 in legal fees and return $400,000 in legal costs to HF4 (80% of $500,000), plus return an additional $250,000 to HF4 for 25% of the $1 million proceeds, for a total return to HF4 of $650,000, or 65% of the Proceeds. Those amounts could constitute overcompensation for both HF4 and Class Counsel.

[71] In addition, under the Initial Funding Agreement, the court would pre-approve reimbursement to HF4 for its disbursements and expert fees, adverse costs paid to the defendants, payments for adverse cost insurance, and out-of-pocket costs.[9] In the example at

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[8] By using this example, I do not rely on the actual budgeted amounts for legal fees, which were provided to the court in unredacted form.

[9] Disbursements and expert fees, adverse costs paid to the defendants, and payments for adverse cost insurance were subject to a monetary cap under the Initial Funding Agreement (and remain capped in the Funding Agreement). Out-of-pocket costs were not subject to a cap under the Initial Funding Agreement (nor under the Funding Agreement).

paragraph 70 above, if those additional amounts were more than $350,000 collectively, there would be no recovery for the class.

[72] Further, based on the contingency fee retainer agreement as originally drafted, Class Counsel would be entitled to a separate 33.3% of the proceeds ($333,000).

[73] Class Counsel assured the court at the hearing that it would only seek a top-up for an amount such that the combined recovery of (i) the HF4 Investment, (ii) the 25% payment to HF4, and (iii) the top-up, would not exceed 33.3% of the Proceeds. Consequently, no top-up would be sought in the example at paragraph 70 above. However, that restriction was not expressly stated in the retainer agreement.

[74] Further, even without a top-up, the payment of $400,000 in legal fees to Class Counsel under the Funding Agreement, on a $1 million settlement, could lead to potential overcompensation for Class Counsel under the analysis at paragraph 70 above.

[75] Consequently, there was a reasonable risk that HF4 and Class Counsel could be overcompensated under the Initial Funding Agreement, with the class possibly getting no recovery from a $1 million settlement.

[76] Class Counsel also proposed an alternative funding model, with pre-approval of a 10% recovery plus return of the HF4 Investment, with the balance of the 25% recovery to be assessed by the court upon settlement or judgment. However, this alternative process did not significantly alter the concerns in the example at paragraph 70 above.

[77] Under the alternative proposal, even if HF4 only received a 10% recovery in addition to repayment for its investment, its total recovery would be greater than $500,000 ($400,000 for repayment of its investment in Class Counsel's legal fees, $100,000 for the 10% recovery, and repayment of the amounts set out in paragraph 71 above). Also, Class Counsel would still recover $400,000 for its legal fees under the Funding Agreement. Again, the class would have little or no recovery, and HF4 and Class Counsel could be overcompensated.

[78] I do not suggest that HF4 or Class Counsel sought to become enriched at the expense of the class. The prompt delivery of the July 8 DLA and July 15 DLA within days of the July 6 and 14, 2020 hearings is consistent with HF4 and Class Counsel not seeking overcompensation under the initial funding and retainer structure. However, the proposed funding and retainer structure allowed for that possibility.

[79] At the initial hearing on July 6, 2020, Drynan submitted that the court could alleviate its concerns by deciding not to approve a settlement under s. 29 of the *CPA* in the circumstances arising from the example discussed above. However, Drynan acknowledged that the only option of the court would be to reject the settlement, and the court could not adjust the fees if the Initial Funding Agreement was approved.

[80] The approval test under s. 32 of the *CPA* for fees and disbursements is independent of approval of a settlement under s. 29. Under the example I rely upon above, if, after considering

all litigation risks and other factors, the court found that $1 million would be a reasonable settlement for the class, the court should not be barred from approving the settlement only because it pre-approved a reimbursement structure without a percentage cap on recovery.

[81] Drynan sought to maintain the legal fees reimbursement proposed in the Initial Funding Agreement based on "reimbursement" cases in which the court considered and approved funding agreements that allowed for reimbursement of investments by a funder. However, the reimbursement in those cases was not for legal fees, but instead for adverse costs and/or disbursements, and with a low recovery of proceeds for the funder.

[82] In *Kinross*, the funder provided an indemnity for adverse costs, up to a prescribed maximum. The court approved the funding agreement based on a return of that investment, and a recovery of 7.5% before certification and 10% after certification.

[83] In *David*, the funding agreement provided for funding for disbursements and adverse cost awards up to a prescribed maximum. The court approved the funding agreement based on the return of payments advanced and a recovery of 10%, subject to prescribed maximums.

[84] In neither of the above cases were legal fees sought to be reimbursed. Further, funding of adverse costs awards and disbursements is consistent with the CPF model.

[85] The only case provided by Drynan in which reimbursement of legal fees was incorporated as part of an approved funding agreement was in an order dated October 24, 2017 in *Rebuck v. Ford Motor Company*, CV-16-544545-00CP (the "*Rebuck* Order"), a funding agreement involving Harbour Fund III, L.P. ("HF3"), and attached to the affidavit of HF4's representative in the present motion.

[86] In the Rebuck funding agreement, HF3 was to reimburse (i) 40% of counsel fees, and (ii) expert fees, disbursements and adverse costs awards. HF4's uncontested evidence on this motion was that the court in *Rebuck* approved a return to HF3 equal to its investment plus recovery not exceeding 10% of gross proceeds.

[87] Drynan's counsel advised the court that there was a brief endorsement of Morgan J. with respect to the *Rebuck* Order, but no reasons for decision. Further, counsel could not advise the court whether the approval of the funding agreement in *Rebuck* was opposed.

[88] Other than the *Rebuck* Order, no court has pre-approved a return on investment for a funder that includes the payment of legal fees, and there was no case before me in which such relief was sought.

[89] In *TDL*, Morgan J. relied on the maximum cap for recovery, inclusive of Galactic's recovery of 22% to 26% of proceeds and a "small top-up of 2% to 3%" for Class Counsel's legal fees (at paras. 4, 14, and 25). Since repayment of any investment (which included payment of legal fees, disbursements, and adverse costs) was not a term of the funding agreement, the total maximum recovery was known to the court. Morgan J. accepted the proposed percentage cap of 29% and held, at para. 25:

> **The amounts to which Galactic is entitled, combined with the range of legal fees to which Plaintiffs' counsel would be entitled, come to a maximum of 29% of any final settlement or award.** Although every case has its variable factors, and fees are typically evaluated at the end of a case rather than at the more initial stages as here, **it is noteworthy that this amount is within the range previously described by the court to be within the range of "presumptive validity"**: *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686, at para 10. [Emphasis added.]

[90] In *TDL*, Morgan J. also relied on the court's ability to review the fairness of recovery upon settlement or judgment. He held, at para. 26:

> Furthermore, Plaintiffs' counsel points out that **the fairness of Galactic's ultimate recovery can wait for approval until a settlement or final award has been reached.** This approach was approved by the Divisional Court in *Houle*, at paras 7, 44. [Emphasis added.]

[91] I advised Class Counsel at the initial hearing that I found the approach of Morgan J. in *TDL* to be applicable in the present case, and stated my concerns about (i) the Initial Funding Agreement without an amendment to ensure that the HF4 25% recovery, the reimbursement of HF4's investment in legal fees, and any Class Counsel top-up, all collectively fell within the presumptive validity range and (ii) the lack of clarity as to the interaction of the Initial Funding Agreement and the contingency fee retainer agreement.

(ii) Concerns of overcompensation are addressed in the July 8 and July 15 DLAs

[92] In response to the concerns raised by the court at the July 6, 2020 hearing, Class Counsel promptly obtained instructions to revise the Initial Funding Agreement.

[93] In the July 8 DLA, HF4, Class Counsel, and Drynan proposed the following terms:

(i) The recovery of HF4 will be capped such that payment to HF4 of 25% of the Proceeds and the reimbursement of 80% of Class Counsel's legal fees in accordance with the agreed budget (less any legal fees recovered from the defendants) (previously defined as the HF4 Cap) shall not exceed in the aggregate 33.3% of the Proceeds;

(ii) Class Counsel will be able to request a "top-up" of any outstanding payment after HF4 obtains its payment for legal fees and 25% recovery, but Class Counsel will only be able to seek court approval of such payment for an amount that would top-up payment to a maximum, including the HF4 Cap, of 33.3% of the Proceeds;

(iii) Disbursements (including expert fees) and adverse costs paid by HF4 (including amounts for security for costs) would be deducted from the Proceeds;

(iv) Any costs associated with HF4 purchasing adverse cost insurance would not be paid as part of the recovery of the HF4 Investment, but instead would be subject to court approval at the end of the proceedings; and

(v) Any out-of-pocket costs for HF4 would not be paid as part of the recovery of the HF4 Investment, but instead would be subject to court approval at the end of the proceedings.

[94] Further oral submissions took place on July 14, 2020 to review the July 8 DLA. I expressed a concern that payments by HF4 for any adverse cost awards (as proposed at subparagraph 93(iii) above) could still create concerns of overcompensation.

[95] By way of the same example I discuss at paragraph 70 above, if a $500,000 adverse costs award was made in favour of the defendants at a certification hearing, the class could have no recovery on a $1 million settlement under the terms of the Initial Funding Agreement as modified by the July 8 DLA, even though the total recovery under the HF4 Cap[10] would be limited to $333,000.[11]

[96] Class Counsel then obtained further instructions to remove repayment of adverse costs awards directly from the Proceeds. Under the July 15 DLA, any adverse costs awards paid by HF4 would not be paid as part of the recovery of the HF4 Investment, but instead would be subject to court approval at the end of the proceedings.

[97] Consequently, the current Funding Agreement now satisfactorily addresses the concerns about overcompensation.

[98] Under the Funding Agreement, total recovery for the HF4 Cap and Class Counsel top-up will not exceed 33.3% of the Proceeds, a cap within the range of "presumptive validity" discussed by Morgan J. in *TDL*. As is the case for funding by the CPF, disbursements funded by HF4 will be deducted from the Proceeds.

[99] Referring back to the example at paragraph 70 above, on a settlement of $1 million, with legal fees of $400,000 (at 80% of $500,000 actual legal fees), the maximum that can be claimed by HF4 for recovery of its investment in legal fees and its 25% recovery would be $333,000.

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[10] A Class Counsel top-up would not be available in this example as HF4 Cap would be entitled to the maximum of $333,000.

[11] After payment from the Proceeds of the amounts of $500,000 for adverse costs and $333,300 under the HF4 Cap (with no funds available for a Class Counsel top-up), the remaining $166,700 of the Proceeds would be further reduced under the Initial Funding Agreement by payment of disbursements, as well as payments for adverse costs insurance premiums and out-of-pocket costs if approved by the court at the end of the proceedings.

Class Counsel would not be able to seek any additional "top-up" since the maximum percentage cap would be reached.

[100] Disbursements would be then deducted from any proceeds available to the class (as would occur in funding from the CPF), and any other amounts paid by HF4 for out-of-pocket costs, adverse cost awards (including security for costs), and adverse cost insurance (if any) would have to be approved by the court.

[101] None of the above examples contemplate a partial costs or disbursements award to the representative plaintiff, which would be paid back to HF4 along with any additional amounts for legal fees up to the total amount paid. Any additional amount outside of the court-ordered (or settlement) amount would be part of the HF4 Cap.

[102] By way of example, I will assume (i) a $1 million settlement, (ii) HF4 pays $300,000 to Class Counsel for legal fees (at 80% of standard fees), and (iii) a term of the settlement is that in addition to the $1 million, the defendants pay $150,000 for costs and $50,000 for disbursements.

[103] HF4 would then receive (i) $250,000 for 25% of the Proceeds, (ii) the return of the $150,000 paid by the defendants for costs, (iii) an additional $83,000 for legal fees paid by HF4 to Class Counsel, since the HF4 Cap for 25% recovery and legal fees has a maximum available of $333,000 (33.3% of $1 million), and (iv) the return of the $50,000 for disbursements, for a total to HF4 of $533,000.

[104] If the same example as at paragraph 102 is followed on a $4 million settlement, then HF4 would receive (i) $1 million for 25% of Proceeds, (ii) the return of the $150,000 paid by the defendants for costs, (iii) an additional $150,000 since HF4 would be repaid in full for the legal fees and still be below the maximum HF4 Cap of $1,332,000 (33.3% of $400,000),[12] and (iv) the return of the $50,000 for disbursements, for a total of $1,350,000. Since the HF4 Cap would not be reached through payment to HF4, Class Counsel could seek a top-up of the difference of $182,000, so that the total HF4 Cap (if the court ordered the top-up) would reach the 33.3% maximum of $1,332,000.

[105] Again, as at paragraph 100 above, any disbursements not encompassed by the settlement would then be deducted from any proceeds available to the class, and any other amounts paid by HF4 for out-of-pocket costs, adverse cost awards (including security for costs), and adverse cost insurance (if any)[13] would have to be approved by the court.

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[12] The amount of $1,150,000 from the Proceeds would be 28.75% of the maximum $1,332,000 cap, a difference of $182,000.

[13] (to the extent these deductions are not otherwise included in the settlement amount for disbursements)

[106] Further, as in *TDL* and *Houle*, the fairness of the "ultimate recovery" for HF4 and Class Counsel would "wait for approval until a settlement or final award has been reached".

[107] Given the above amendments, the remaining objections of the defendants are not necessary to protect against overcompensation.

[108] There is no basis to maintain the defendants' first objection that the court should approve only a preliminary 10% recovery for HF4 with the balance to be determined upon settlement or final award.

[109] The Funding Agreement now sets a cap of 33.3% recovery on the total of (i) legal fees paid by HF4 (less any legal fees recovered from the defendants), (ii) any top-up request from Class Counsel (if available), and (iii) 25% recovery for HF4, with the disbursements being taken from the Proceeds, and any claim for adverse costs paid, adverse costs insurance, and out-of-pocket expenses to be addressed only on approval.

[110] Such an approach is consistent with the approach of Morgan J. in *TDL* (with recovery capped at 29% in *TDL*), and the approval of repayment of disbursements in *Kinross*.

[111] Further, it is not necessary to limit pre-approval to 10% as in *Houle*, since there is no uncertainty as to the final percentage recovery that could be sought (unlike the range of 30% to 38% in *Houle* SCJ, at paras. 32-33). In the present case, recovery of the amounts covered by the HF4 Cap is limited to 33.3% of the Proceeds, a recovery consistent with the presumptive validity case law, while still allowing for disbursements to be paid from the Proceeds, just as occurs with funding from the CPF (which funds adverse costs and certain disbursements but does not fund legal fees).

[112] Just as the CPF is entitled to (i) a 10% recovery for funding adverse costs and (ii) repayment of disbursements (in addition to class counsel seeking its presumptively valid contingency fee), HF4 in the present case can seek repayment of additional out-of-pocket costs, adverse cost awards, and payment of premiums for adverse cost insurance, which would also reduce class recovery but is subject to court approval.

[113] Similarly, there is no basis to support the defendants' second objection that recovery should be "staggered" with different percentages based on when the action is resolved. Under the "ultimate fairness" approach of Morgan J. in *TDL*, the timing of resolution of the litigation can be considered by the court (if relevant) in its review of the "fairness of [HF4 and Class Counsel's] ultimate recovery [which] can wait for approval until a settlement or final award has been reached" (at para. 26).

[114] There is also no basis to support the third objection of the defendants, *i.e.* that the court impose a monetary cap[14] in addition to the percentage cap. If the settlement or judgment results in such a positive result that the court has concerns about whether the HF4 Cap generates excessive compensation, the court can address that concern through a review of the "fairness of [HF4 and Class Counsel's] ultimate recovery" upon "settlement or final award": *TDL*, at para. 26.

[115] Consequently, the Funding Agreement in its current form is fair and reasonable to the Class and does not overcompensate either HF4 or Class Counsel. The amendments proposed by the defendants are not required to ensure fairness to the class.

Category 4: Objections based on access to justice

[116] Under this objection,[15] the defendants ask the court to consider the merits of the action. The defendants rely on earlier proposed class action litigation relating to this matter in British Columbia which was dismissed.

[117] The defendants submit that (i) there is no merit to the action and (ii) Drynan did not seek funding from the CPF. Consequently, the defendants submit that the Funding Agreement does not promote access to justice nor the goal of behaviour modification.

[118] The defendants provided no authority where the court on a funding approval motion assessed the merits of the case. I find that it is not appropriate to do so, given that merits are not a factor upon certification. In any event, Drynan advises the court that the B.C. consumer protection legislation is different in important aspects from the Ontario consumer protection legislation.

[119] Consequently, even if the merits of the case could be considered at the funding approval stage (which I do not find), the extremely limited argument before the court on this issue would not lead to rejecting the Funding Agreement on that basis.

[120] Further, in *Kinross*, Perell J. held at para. 41 that "[i]n seeking approval for a third-party funding agreement, it is not necessary to have first applied to the Class Proceedings Fund".

[121] For the above reasons, I do not find that the court should consider the merits of the case on a funding motion, nor whether a party applies for CPF funding.

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[14] (see for example the agreements in *David*, at paras. 10 and 13, *Dugal*, at para. 6, and *Marriott*, at paras. 7 and 9, in which there were monetary caps in the funding agreements based on a staggered approach of when the action was resolved)

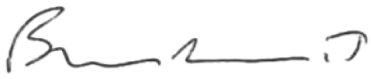
[15] (set out at paragraphs 86 to 90 of the defendants' factum)

[122] Given the significant role of third-party funding agreements to enhance access to justice and promote behaviour modification (particularly in cases of "trivial to modest" loss as discussed in *Houle* SCJ, at para. 77), I find that the Funding Agreement does enhance those goals, and I reject the defendants' objections on this issue.

Order and costs

[123] For the above reasons, I approve the Funding Agreement, subject to review of the fairness of the ultimate recovery by HF4 and Class Counsel upon a settlement or final award.

[124] The parties advised that they were not seeking costs for this motion, and I agree that such an order is appropriate.



GLUSTEIN J.

Date: 20200804

CITATION: Drynan v. Bausch Health Companies Inc., 2020 ONSC 4379
COURT FILE NO.: CV-19-00632601-00CP
DATE: 20200804

ONTARIO

SUPERIOR COURT OF JUSTICE

ROBERT DRYNAN

Plaintiff

AND:

BAUSCH HEALTH COMPANIES INC., BAUSCH HEALTH CANADA INC., VALEANT CANADA GP LIMITED, VALEANT CANADA LIMITED, VALEANT CANADA LP

Defendants

REASONS FOR DECISION

Glustein J.

Released: August 4, 2020