CITATION : Przybylska v. Gatos Silver, Inc., 2024 ONSC 2196
COURT FILE NO.: CV-22-00676682-00CP
DATE: 20240416

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IZABELA PRZYBYLSKA, Plaintiff

– and –

GATOS SILVER, INC., STEPHEN ORR, ROGER JOHNSON, PHILIP PYLE, TETRA TECH, INC., GUILLERMO DANTE RAMÍREZ-RODRÍGUEZ, KIRA LYN JOHNSON, THE ELECTRUM GROUP LLC, ELECTRUM SILVER US LLC, ELECTRUM SILVER US II LLC, Defendants

BEFORE: Justice E.M. Morgan

COUNSEL: *Anthony O'Brien and Tyler Planeta*, for the Plaintiff

Paul Martin and Sarah Armstrong, for the Defendants, Gatos Silver, Inc., Stephen Orr, Roger Johnson, and Philip Pyle

Aoife Qujnn, for the Defendants, Electrum Group LLC, Electrum Silver US LLP, and Electrum Silver US II LL

Doug Fenton, for the Defendants, Tetra Tech Inc., Guillermo Dante Ramirez-Rodriguez, and Kira Lyn Johnson

Wendy Berman, for the former Defendants, BMO Nesbitt Burns Inc., Goldman Sachs Canada Inc., RBC Dominion Securities Inc., Canaccord Genuity Corp., and CIBC World Markets Inc.

HEARD: April 10, 2024

SETTLEMENT and PRE-SETTLEMENT APPROVALS

I. The double motion

[1] The Plaintiff in this securities class action seeks settlement approval with respect to one group of Defendants and pre-settlement orders with respect to another group.

[2] In a previous ruling, the Plaintiff was granted leave to proceed against Tetra Tech, Inc. ("Tetra Tech") under Part XXIII.1, section 138.8(1) of the *Securities Act*, RSO 1990, c S.5, as amended ("*OSA*"), along with an order certifying the action as a class proceeding against Tetra Tech under the *Class Proceedings Act, 1992*, SO 1992, c 6 ("*CPA*"). At the same time, the Plaintiff discontinued her common law negligence and negligent misrepresentation claims against Tetra Tech: *Przybylska v. Gatos Silver, Inc*., 2024 ONSC 87 ("*Przybylska I*").

[3] The Plaintiff has also discontinued the claim against the underwriter Defendants, BMO Nesbitt Burns Inc., Goldman Sachs Canada Inc., RBC Dominion Securities Inc., Canaccord Genuity Corp., and CIBC World Markets Inc. (the "Underwriters"). A standstill agreement is in place with the Undrwriters: *Ibid.*, at paras. 16-17.

[4] The Plaintiff now seeks approval of the settlement with Tetra Tech and its two employees, the Defendants, Guillermo Dante Ramírez-Rodríguez and Kira Lyn Johnson (collectively, the "Tetra Tech Defendants"). Under the Settlement Agreement dated December19, 2023 ("Tetra Tech Settlement"), the Tetra Tech Defendants will pay the class C$1,000,000.

[5] In *Przybylska I*, at paras. 2-5, the underlying dispute was described as follows:

> [2] The Plaintiff commenced the action on February 9, 2022. She alleges that Gatos Silver, Inc. ("Gatos"), a reporting issuer, publicly disclosed that the mineral reserve statement for its sole producing mine was affected by error and, in the result, materially overstated. The Plaintiff alleges that she bought shares in Gatos before its disclosure about the overstated mineral reserve, under a prospectus issued in July 2021.
>
> [3] Tetra Tech is a provider of consulting and engineering services that prepared the technical report in which the alleged overstated mineral reserve was presented. The Statement of Claim alleges that the overstated mineral reserve in the technical report was incorporated in Gatos's offering and continuous disclosure documents released throughout the class period. The Plaintiff goes on to allege that statements Gatos made about the mineral reserve estimate in connection with its prospectus distributions and in its continuous disclosure filings were misrepresentations.
>
> [4] Tetra Tech consented to Gatos's use of the technical report, and certified that Gatos's prospectuses fairly and accurately represented the technical report. The Claim sets out that these misrepresentations caused the Plaintiff and putative class members loss for which they are entitled to damages.
>
> [5] The Plaintiff further alleges that two related expert defendants employed by Tetra Tech, the Defendants, Guillermo Dante Ramírez-Rodríguez and Kira Lyn Johnson, directly prepared and approved the mineral reserve statement, supervised its preparation, or had other substantive involvement in its preparation. The Statement of Claim assets that Tetra Tech, together with Ramírez-Rodríguez and Johnson, are liable for damages for misrepresentation in the primary and secondary securities markets, under the OSA, and at common law.

[6] In addition, in a Settlement Agreement dated April 2, 2024 ("Gatos Settlement"), the Plaintiff has reached a proposed settlement with the remaining Defendants to this litigation, Gatos Silver, Inc., Stephen Orr, Roger Johnson, Philip Pyle ("Gatos") and The Electrum Group LLC, Electrum Silver US LLC, and Electrum Silver US II LLC ("Electrum"), together with the Underwriters against whom the action has been discontinued (collectively, the "Gatos Defendants"). Under this newly proposed settlement, the Gatos Defendants will pay the class members US$3,000,000.

[7] In order to put the Gatos Settlement into effect, the Plaintiff here seeks a number of preliminary orders:

> (a) leave under Part XXIII.1, section 138.8(1) of the *Securities Act*, RSO 1990, c S.5, as amended ("*OSA*") to commence an action against the Gatos Defendants and the Electrum Defendants under section 138.3(1) of the *OSA*;
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> (b) leave to discontinue claims for unjust enrichment, common law negligence and common law negligent misrepresentation;
>
> (c) certification of the action against the Gatos Defendants for settlement of the *OSA* claims (under section 130 and Part XXIII.1 of the OSA) asserted against them and for settlement purposes only;
>
> (d) appointing RicePoint Administration Inc. ("RicePoint") as the administrator of the settlement proceeds under the Gatos Settlement and Tetra Tech Settlement.
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> (e) approving the form, content and method of dissemination of the First Notices;
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> (f) approving the Claim Form and the process for class members to make a claim for compensation;
>
> (g) prescribing an objection procedure; and
>
> (h) other ancillary orders.

II. Tetra Tech Settlement approval

[8] The key terms of the Tetra Tech Settlement are:

> (a) the Settlement finally resolves the Action against the Tetra Tech Defendants;
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> (b) the Settlement Amount of C$1,000,000 will be the sole monetary contribution by the Tetra Tech Defendants in the settlement of the Action against them;
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> (c) the Tetra Tech Defendants will be given customary releases;
>
> (d) the approval of the Settlement is not contingent on approval of a plan of allocation, or approval of Class Counsel Fees; and

(e) no portion of the Settlement Amount will revert to Tetra Tech, except in the event the Settlement Agreement is terminated in accordance with its terms.

[9] Under section 27.1(5) of the *CPA*, a settlement must be found to be fair, reasonable, and in the best interests of the class in order to be approved: *Dabbs v. Sun Life Assurance,* (1998), 40 OR (3d) 429 (Gen Div), aff'd (1998), 41 OR (3d) 97 (CA), leave to appeal to SCC refused Oct. 22, 1998. The burden of establishing that the settlement meets this test lies on the Plaintiff here: *Nunes v. Air Transat A.T. Inc*., [2005] OJ No. 2527 (SCJ).

[10] Having said that, the Tetra Tech Settlement was reached through arm's length negotiations and is being presented for approval by experienced class counsel. There is therefore a strong presumption of fairness and reasonableness of the settlement terms: *Loewenthal v Sirius XM Holdings, Inc.*, 2021 ONSC 4482, at para. 11.

[11] Justice Winkler set out the overriding principle of settlement approval in *Parsons v. Canadian Red Cross Society* (1999), OJ No. 3572 (SCJ), at para. 79:

> It is well established that settlements need not achieve a standard of perfection. Indeed, in this litigation, crafting a perfect settlement would require an omniscience and wisdom to which neither this court nor the parties have ready recourse. The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the class as a whole.

[12] Given the early stage of the action at which the settlement negotiations took place, the Plaintiff sought and received extraordinary disclosure from the Tetra Tech Defendants. This material was evaluated by class counsel with the assistance of a geology expert. The full disclosure has allowed a more accurate assessment of the merits of the claim.

[13] While the Plaintiff and class counsel maintain that there was a misrepresentation for which liability lies against the Tetra Tech Defendants, they have determined that there is a risk that the Tetra Tech Defendants may be able to prove on a balance of probabilities that they conducted a reasonable investigation. They have gone on to consider that even if they do not establish a reasonable investigation, the proportionate liability of the Tetra Tech Defendants with respect to the secondary market misrepresentation claims is still open to question.

[14] Class counsel has further assessed that there is a risk that the damages claimed may be considered to be an overcompensation, possibly by as much as 25%. Such a decrease would reduce class counsel's estimated range of total primary market damages from, approximately, the US$3.7 million to US$7 million range to the US$3.15 to US$6 million range. As for the secondary market liability, it is likely that it will be capped at $1 million as the liability limit under section 138.1 of the *OSA*.

[15] Further, these damages estimates are based on 100% participation by the class. Given the passage of time, the possible loss of records, the potential winding up of corporate class members, and the eventual passing or predictable inattention of individual class members, that level of participation is unlikely. Class counsel has also assessed that there is some risk that aggregate damages may not be awarded, in which case claims would have to be proved by class members on

an individual basis. That would, of course, raise further participation problems and would significantly increase the time and expense of a final resolution.

[16] Class counsel estimate it would take at least another three years to bring the action to trial against the Tetra Tech Defendants. There is also the prospect of an appeal and other procedural steps, making an even longer time frame a distinct possibility. They are of the view that the Tetra Tech Settlement has the advantage of providing class members with access to compensation at a relatively early stage of the litigation. I agree with that point of view.

[17] Given the risks associated with this type of securities class action, the potential limits on damages to be recovered by the class, and the careful negotiation and assessment of the matter by experienced class counsel, it is my view that the Tetra Tech Settlement is fair, reasonable, and in the best interest of the class. Notice of the settlement has been distributed to the class members in accordance with the approved notice plan, and class counsel advise that no comments or objections have been received.

[18] I see no reason not to approve the Tetra Tech Settlement.

III. Gatos Settlement pre-approval steps

[19] Like the Tetra Tech Settlement, the Gatos Settlement was negotiated at arm's length, with the same experienced counsel representing the parties and with the assistance of the same experienced mediator. As a prelude to the Gatos Settlement approval motion scheduled for two months from now, the Plaintiff seeks a number of orders.

[20] The Plaintiff's claim includes a claim for secondary market misrepresentation pursuant to section 138.3 of the *OSA*. That can only be brought with leave of the court pursuant to section 138.8 of the *OSA*. To grant leave, the court must be satisfied that: (a) the action is being brought in good faith; and (b) there is a reasonable possibility that the action will be resolved at trial in favour of the Plaintiff.

[21] The claims asserted against Gatos also include claims under section 130 and of the *OSA* (primary market liability), as well as at common law under the rubric of negligence and negligent misrepresentation. In addition, the Plaintiff has brought a claim in unjust enrichment against Gatos.

[22] The Electrum Defendants comprise a privately held natural resources investment company with shareholdings in Gatos during the relevant class period. They acted as investment advisors with experience in precious metals resources. The claims against the Electrum Defendants are brought pursuant to section 130 and Part XXIII.1 of the OSA, and in common law negligence and negligent misrepresentation. The Plaintiff has also brought claims for unjust enrichment against Electrum Silver US LLC and Electrum Silver US II LLC in respect of the Second Offering (as that term is defined in the Second Fresh as Amended Statement of Claim).

[23] The purpose of the leave requirement is to provide a robust deterrent screening mechanism, which prevents cases without merit from proceeding: *Theratechnologies Inc v 121851 Inc*., 2015 SCC 18, at paras 38-39. As with the claim against Tetra Tech, the record gives me no reason to think that the Plaintiff has brought the claim against the Gatos Defendants for any reason other than that she "holds an honest belief that she] has an arguable claim, and for reasons that are

consistent with the purpose of the statutory cause of action and not for an oblique or collateral purpose": *Green v Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, at paras 354-356, varied on other grounds 2014 ONCA 90, aff'd 2015 SCC 60.

[24] In meeting the leave test, the Plaintiff must also offer "a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim." *CIBC*, at paras. 120-22. Thus, on a motion for leave to proceed under section 138.8, claimants must adduce some credible evidence to support the merits of the claim, although the evidentiary threshold is relatively low.

[25] The record establishes that Gatos's mineral reserve statement for its sole operating mine was inextricably tied to Gatos's expected future cash flows and their expected duration, and thus Gatos's share price. In fact, the evidence establishes that the mineral reserve statement was at the core of the value proposition that Gatos offered its investors. When Gatos announced its erroneous preparation of its reserve statement, it effectively called the quality of that reserve statement into doubt. As a result, the share price reacted swiftly and fell dramatically.

[26] The record contains ample evidence of a misrepresentation by the Gatos Defendants. This includes expert opinions by several geologists, as well as Gatos's own post-correction disclosures confirming the fact and size of the overstatement, and process changes that it has made to avoid the errors happening again. In the circumstances, there is no real question that the Plaintiff has brought her claim in good faith and that, for the purpose of effecting a settlement and on the low bar of the leave test, she has a reasonable prospect of success in establishing her claims.

[27] In order to facilitate the settlement, the Plaintiff has proposed discontinuing the common law claims against the Gatos Defendants. I see no reason not to grant the Plaintiff's request to do so. This will not prejudice the interests of the class members. There was a similar discontinuance of common law claims in the context of the settlement with the Tetra Tech Defendants. In any case, class members who desire to pursue common law claims against any of the Defendants have the opportunity to opt out of the action.

[28] As part of the settlement package, the Plaintiff also seeks certification of her claim as a class action. The Gatos Defendants have consented to certification for the purpose of seeking the Court's approval of the Gatos Settlement.

[29] Following the criteria set out in section 5(1) of the *CPA*, I find that:

> (a) the Claim discloses causes of action against the settling Defendants for misrepresentation under Part XXIII, section 130 of the *OSA*, and/or Part XXIII.1, section 138.3(1) of the *OSA*;
>
> (b) there exists an identifiable settlement class, defined as follows:
>
> > All persons and entities (other than Excluded Persons), wherever they may reside or be domiciled, who:
> >
> > > (i) purchased Gatos securities under the Impugned Prospectuses and in the distributions to which they related; or

(ii) acquired Gatos securities during the Class Period on any Canadian exchange (including, without limitation, the Toronto Stock Exchange) or any Canadian alternative trading system.

For the purposes of this class definition:

"Class Period" means the period from October 28, 2020 until January 25, 2022 at 6:52 p.m. Eastern Standard Time.

"Excluded Persons" means Gatos, Stephen Orr, Roger Johnson, Philip Pyle, the Tetra Tech Defendants, the Electrum Defendants and the Underwriters; the respective past and present subsidiaries, affiliates, officers, directors, senior employees, partners, legal representatives, heirs, predecessors, successors and assigns of Gatos, Tetra Tech, the Electrum Defendants, and the Underwriters; and the immediate family members of Stephen Orr, Roger Johnson, Philip Pyle, Guillermo Dante Ramirez-Rodriguez and Kira Lyn Johnson; provided, however, that any "Investment Vehicle" shall not be excluded from the class.

"Investment Vehicles" means any investment company, pooled investment fund, or separately managed account (including, but not limited to, mutual fund families, exchange traded funds, funds of funds, private equity funds, real estate funds, hedge funds, and employee benefit plans) in which the Underwriters, or any of them, have, has, or may have a direct or indirect interest, or as to which its affiliates may serve as a fiduciary or act as an investment advisor, general partner, managing member, or in any other similar capacity, but in which any of the Underwriters alone or together, with its, his, or her respective affiliates, is not a majority owner or does not hold a majority beneficial interest.

"Impugned Prospectuses" means Gatos's Base Prep Prospectus dated October 27, 2020 and Supplemented Prep Prospectus dated October 27, 2020, and Gatos's Short Form Base Shelf Prospectus dated July 12, 2021 and Prospectus Supplement dated July 15, 2021.

(c) the claims of the class members as against the settling Defendants raise the following common issue:

Did the Impugned Documents (as that term is defined in the Second Fresh as Amended Statement of Claim) contain misrepresentations within the meaning of the *OSA*?

(d) a class proceeding is the preferable procedure for resolution of the above common issue; and

(e) the proposed representative Plaintiff,

(i) will fairly and adequately represent the interests of the Class;

(ii) has a plan, in the form of the Gatos Settlement and ancillary documents, that sets out a workable method for the advancement of the action on behalf of the putative class, including provision of notice to class members; and

(iii) does not have an interest in conflict with the interests of the other class members.

[30] As a prelude to the Gatos Settlement being implemented, the Plaintiff proposes that a Short-Form Notice and Long-Form Notice be disseminated as follows:

Short-Form First Notice:

1. A national press release approved by the Gatos Defendants will be issued in English and French through Canada Newswire; and

2. Sent to Institutional Shareholder Services Inc. (ISS).

3. The Short-Form First Notice will be mailed, electronically or physically, as may be required, to those persons and entities who have previously contacted Class Counsel for the purposes of receiving notice of developments in the action.

Long-Form First Notice:

1. Electronic publication of the Long-Form First Notice will occur, in English and French, on the websites of Class Counsel at https://www.cfmlawyers.ca/active-litigation/gatossilver-inc-tsx-gato/ and https://www.siskinds.com/class-action/gatos-silver/ ('Class Counsel Websites').

2. The Long-Form First Notice will be sent to the Canadian brokerage firms in the proprietary databases of the Administrator requesting that the brokerage firms either send a copy of the Long-Form First Notice to all individuals and entities identified by the brokerage firms as being Settlement Class Members, or to send the names and contact details of all known Settlement Class Members to the Administrator (who shall subsequently send the Long-Form First Notice to the individuals and entities so identified). To the maximum extent possible, the Long-Form First Notice shall be sent electronically to the recipients under this paragraph.

3. The Long-Form First Notice will be mailed, electronically or physically, as may be required, to those persons included in the lists provided by Gatos and described at section 5.6 of the Settlement Agreement.

[31] The Short-Form Notice directs readers to the Long-Form Notice. The Long-Form Notice advises class members of:

(a) the existence of the Gatos Settlement and its key terms;

(b) the certification of the action as a class proceeding, solely for settlement purposes;

(c) the date for the hearing of the motion for approval of the Gatos Settlement;

(d) their right to attend the hearing of the motion for approval of the Gatos Settlement, and to object to its terms;

(e) their right to object to Plaintiff's counsel's proposed fee request;

(f) their right to object to the proposed Plan of Allocation; and

(g) the process for filing a claim for compensation from the settlement funds.

[32] The Plaintiff also seeks a number of ancillary orders as part of the pre-settlement approval package.

[33] The ancillary orders include the appointment of RicePoint as administrator of the two settlements. They also include the appointment of Plaintiff's counsel as class counsel, as well as approval of the objection procedure and approval of the Claim Form to be submitted by participating class members.

[34] The content and distribution plan for the Short Form Notice and Long Form Notice appear to be appropriate under the circumstances, as do the various ancillary orders requested by the Plaintiff.

[35] I see no reason not to approve the entire package of Gatos Settlement pre-approval documentation contained in the record before me.

IV. Disposition

[36] The Tetra Tech Settlement is hereby approved.

[37] Leave to proceed under section 138.8 of the *OSA* is granted as against the relevant Gatos Defendants.

[38] Certification under section 5(1) of the *CPA* is granted as against the Gatos Defendants. The class is defined as in paragraph 29(b) above and the common issue is as set out in paragraph 29(c) above.

[39] The proposed Short Form Notice and Long Form Notices referenced in paragraphs 30-31 above are hereby approved.

[40] Plaintiff's counsel is appointed as class counsel.

[41] The Plaintiff shall have orders to go as submitted.

[42] The Gatos Settlement approval motion will be held before me on June 28, 2024 at 2:15 p.m.

Date: April 16, 2024 **Morgan J.**