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FROM: The Honourable Madam Justice H. A. Rady

PAGES: 14 pages

DATE: September 24 2008

RE: **CANADIAN COMMERCIAL WORKERS INDUSTRY PENSION PLAN -and- BIOVAIL CORPORATION, EUGENE MELNYK, BRIAN CROMBIE, JOHN MISZUK AND KENNETH HOWLING**

FILE NO: 48172 CP

MESSAGE: Please see attached Reasons for Judgment of Justice Rady.

If you have any questions, please contact Janice Kosnik at 519-660-3027

COURT FILE NO.: 48172CP

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
CANADIAN COMMERCIAL WORKERS INDUSTRY PENSION PLAN	Charles M. Wright and Monique L. Radlein for the Plaintiff
Plaintiff	
- and -	
BIOVAIL CORPORATION, EUGENE N. MELNYK, BRIAN H. CROMBIE, JOHN R. MISZUK, AND KENNETH G. HOWLING	Sean Campbell for the Defendants
Defendant	
	HEARD: September 15, 2008

RADY J.:

[1] Subject to court approval, the parties have concluded a settlement agreement which resolves the claims of the Class Members, provides for payment of the settlement amount to Class Members and for the adoption and implementation of certain corporate governance provisions which are memorialized in the settlement agreement.

[2] This motion is for an order that the settlement be approved as fair, reasonable and in the best interests of the class pursuant to s. 29 of the *Class Proceedings Act, 1992*.

History of the Litigation

[3] In 2004, a number of proposed class actions were filed in the United States against Biovail, an Ontario corporation whose common shares are listed and publicly traded on both the Toronto Stock Exchange and the New York Stock Exchange. The actions were consolidated by the United States District Court for the Southern District of New York ("SDNY") and lead plaintiffs and their solicitors were appointed for the consolidated action. One of the lead plaintiffs was the Ontario Teachers' Pension Plan Board.

[4] In September 2004, the defendants moved to dismiss the plaintiffs' consolidated, amended class action complaint. However, the motion was denied in December 2004.

[5] Canadian Commercial Workers Industry Pension Plan ("CCWIPP") commenced this action against Biovail by statement of claim issued September 21, 2005. CCWIPP is Canada's largest multi-employer pension plan covering employees of many different employers in all ten provinces. During the class period from February 7, 2003 to March 2, 2004, CCWIPP purchased a substantial number of Biovail's shares over the Toronto Stock Exchange ("TSX").

[6] The factual basis of the claims in the U.S. and Canadian actions are similar, each relying on the following allegations:

(a) Biovail is a pharmaceutical company which develops, manufactures and markets its own products;

(b) In April 2003, Biovail announced that it would launch two new products – Cardizem LA and Wellbutrin XL. Revenue projections for each new product were disclosed;

(c) In launching Cardizem LA, (a drug used to treat hypertension) Biovail used a plan called the "PLACE" program (Proving LA through Clinical Experience). Under this program physicians were said to be improperly paid for writing prescriptions. The plaintiff alleges that this program had the intent and effect of artificially

inflating early sales of Cardizem LA and that there was no genuine scientific purpose behind the program;

(d) The plaintiff further alleges that Biovail experienced recurring difficulties in its manufacturing processes that made their projected sales figures difficult or impossible to meet. These difficulties were not disclosed to the public; rather, the plaintiff alleges that various accounting measures or misleading communications were designed to hide these problems from the investing public;

(e) The plaintiff alleges that Biovail attempted to conceal the reason for its third-quarter 2003 earnings shortfall by falsely blaming a fatal truck accident. The defendants stated that $20 million worth of Wellbutrin XL was lost as a result of the accident. The plaintiff alleges that the total product on the truck was overstated by $15 million and that the accident did not impair sales figures to the extent suggested by the defendants;

(f) The truck accident was disclosed in an October 2003 press release which also indicated that analysts' earnings expectations would not be met. The market reacted unfavourably and Biovail's stock price dropped on the TSX;

(g) In March 2004, Biovail announced that its results had fallen short of expectations. At that time, Biovail admitted that the value of the Wellbutrin XL involved in the accident was lower than earlier stated and also admitted that an unexplained back order of Cardizem LA (referred to in an earlier report as a basis for not meeting earnings expectations) had actually never existed;

(h) Overall, Biovail's stock price on the TSX dropped from a high of CAD$67.75 to $24.26 following the March 2004 announcement.

[7] After filing the Canadian action, Canadian Class Counsel met with their U.S. counterparts. U.S. Class Counsel advised that they intended to seek certification of a class which comprised all purchasers of Biovail common stock regardless of where the purchasers resided or with what exchange they dealt. Canadian Class Counsel were concerned about how Canadian residents would be treated in any settlement that might be concluded. In particular, they were concerned that in some prior U.S. Class actions "foreign" claimants had been paid at a discount to U.S. residents. Canadian Class

Counsel were assured, however, that if a settlement were reached, Canadian residents would be treated equally, a sensible proposition it seems to me given that the Ontario Teachers' Pension Plan Board was a lead plaintiff in the U.S. action. As a result, it was determined that the Canadian action would be held in abeyance pending a determination by the SDNY with respect to Class certification.

[8] Documentary discovery and depositions followed in the United States and a motion for Class Certification was filed in the U.S. Action on February 28, 2006.

[9] Concurrent with the production and filing of the certification materials in the U.S. Action, the defendants commenced an action styled "*Biovail v. S.A.C. Capital Management et al*". This action, which has been referred to the materials as the "Hedge Fund Action", alleged that the decline in Biovail stock price, which lead plaintiffs alleged was caused by the defendants' fraud, was in fact caused by a short seller conspiracy among hedge funds and certain analysts who had intentionally caused the share price to fall so that they could trade on that basis and thereby benefit from the declining share price. The defendants took various steps to publicize the proceedings including an appearance on the television program "60 Minutes".

The Proposed Settlement

[10] Ultimately, a settlement was reached in the U.S. action following protracted settlement negotiations involving two mediations conducted by a former judge in one instance and by an experienced and respected mediator on the second occasion. The parties also continued negotiations between the mediations.

[11] The U.S. action was settled pursuant to which the defendants agreed to pay US$138 million. Biovail's D&O insurance was significantly depleted by defence costs and as a result, Biovail was to contribute approximately US$85 million to the settlement. In addition, Biovail undertook to undergo corporate governance reform, the terms of which were to be negotiated separately.

[12] Canadian Class Counsel were contacted by the U.S. Class Counsel and counsel for the defendants shortly thereafter and before negotiation of the terms of the corporate governance reforms. There followed extensive negotiations between Canadian Class Counsel and the parties to the U.S. action regarding the specific terms of the U.S. Settlement and the corporate governance enhancements, which Canadian Class Counsel considered to be a critical part of the settlement consideration.

[13] The settlement was contingent on the approval of this court and the SDNY.

[14] By order dated April 17, 2008, I certified this action for settlement purposes only and ordered that notice be disseminated to the class. The order for notice and hearing provided for the implementation of two notice programs, namely publication of a summary notice of pendency of class action, proposed settlement and settlement hearing; and a mail distribution of a long form notice of pendency of class action and proposed settlement, motion for attorney's fees (in the U.S. action) and settlement fairness hearing.

[15] The notices advised Class Members of the proposed settlement, the proposed plan of allocation and the request for an award of U.S. attorney's fees and reimbursement of expenses. The notices further advised Class Members of their right to object or seek exclusion from the class and explained that this right was to be exercised by July 8, 2008.

[16] Over 90,000 copies of the notice and proof of claim and release forms were sent to shareholders identified by Biovail's transfer agent and potential class members identified by brokers, nominees and others. English and French forms of the notice and proof of claim and release forms were also posted on the website of Canadian Class Counsel, U.S. Class Counsel and the settlement administrator's website. The publication notice was published in the national edition of the Wall Street Journal, the Globe and Mail and La Presse and was transmitted over the Business Wire on May 16, 2008.

[17] As already noted, the settlement agreement provided that the defendants pay US$138 million to Class Members. That amount was deposited into escrow on May 9, 2008 and has been earning interest for the benefit of the class since that time.

[18] On August 8, 2008, an approval hearing took place in the U.S. Action. Justice Lynch of the SDNY approved the U.S. settlement. He noted that although one objection was filed in connection with the request for an award of U.S. attorney's fees, no objection was filed with respect to the fairness of the settlement itself. Only two persons requested exclusion from the class. Justice Lynch dismissed the single objection filed in respect of the award of U.S. attorney's fees.

[19] I pause here to note that Canadian Class Counsel's fees and disbursements are not to be paid from the settlement amount but are to be paid separately by the defendants in an amount to be agreed upon or ordered by this court but, in any event, are not to exceed one million Canadian dollars all inclusive.

[20] Counsel have developed a plan of allocation and Canadian Class Counsel are satisfied that the methodology treats differently situated class members fairly. Canadian Class Counsel believe that the plan of allocation is a fair and reasonable method to allocate the net settlement fund among Class Members. No distinction is drawn for allocation purposes between members of the Canadian and U.S. classes.

[21] In addition to payment of the settlement amount, Biovail has also contracted to undergo certain corporate governance reforms which include the following:

(a) Amend the Board of Directors' charter to provide that a majority of the directors shall be independent;

(b) Have all directors serving on the Compensation, Nominating and Corporate Governance Committee be independent directors;

(c) Have all shareholder proposals evaluated by a committee of independent directors; and

(d) Have the Board implement a plan requiring the CEO and CFO to agree in writing to disgorge to the company any bonus or other incentive-based or equity-based compensation under certain enumerated circumstances of malfeasance.

[22] The settlement is intended to resolve any and all claims that could have been asserted in the Canadian and U.S. Actions. No objections to the proposed settlement have been received from Canadian class members.

Assessment of the Proposed Settlement

[23] Section 29(2) of the *Class Proceedings Act* provides that a settlement of a class proceeding is not binding unless approved by the court. Once approved, a settlement binds all Class Members pursuant to s. 29(3) of the *Class Proceedings Act.*

[24] A settlement must be fair and reasonable and in the best interests of the class as a whole.

[25] The following are factors for a court to consider in determining whether to approve a settlement:

1. the presence of arms' length bargaining and the absence of collusion;
2. the proposed settlement terms and conditions;
3. the number of objectors and nature of objections;
4. the amount and nature of discovery evidence or investigation;
5. the likelihood of recovery or likelihood of success;
6. the recommendations and experience of counsel;
7. the future expense and likely duration of litigation;
8. information conveying to the court the dynamics of and the positions taken by the parties during the negotiations;

9. the recommendation of neutral parties, if any; and

10. the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation.

[26] See for example, *Dabbs v. Sun Life Assurance Company of Canada,* [1998] O.J. No. 1598 and the substantial body of case law citing *Dabbs* with approval.

[27] The function of the court in reviewing a settlement is not to reopen and enter into negotiations with litigants in the hope of improving the terms of settlement: *Dabbs v. Sun Life Assurance Company of Canada, supra.*

[28] Turning then to the factors enumerated above, Courts have recognized that the practical value of an expedited recovery is a significant factor for consideration. In addition to the legal and factual risks, a practical concern favouring settlement includes the potential that a case would take several years to reach trial and exhaust all appeals.

[29] There is little question that actions for securities misrepresentations are risky. In this action, the plaintiff faced the risk that it would not be able to establish the following:

1. that certain of the key representations or omissions were materially false and misleading;

2. loss causation (i.e. the defendants' actionable wrong caused a loss); and

3. detrimental reliance.

[30] On these issues, the plaintiff had the following specific concerns::

(a) While the plaintiff alleges that the defendants made misleading statements concerning Cardizem LA, Biovail claims to have been quite careful in the labelling of the product, and the public record suggests that at least some analysts understood and commented on the fact that they did not have evidence to support some of their

public statements (and therefore the stock price was not inflated due to such statements);

(b) One of the central allegations in the actions is that the defendants misled investors as to the purported success of the launch of Cardizem LA by misrepresenting the number of prescriptions written for the drug. The defendants would argue that those statements were not materially false or misleading. In support of this argument, the defendants would cite the fact that prescription numbers for Cardizem LA were regularly reported by industry sources and were included in many analysts' reports, and to the fact that, when *The Wall Street Journal* and *Barron's* published extensive articles in July 2003 detailing the facts about the PLACE program, including that Biovail was paying doctors to write prescriptions for Cardizem LA in potential violation of federal anti-kickback statutes, there was no material drop in the price of Biovail common stock. While the plaintiff would argue that the reason that the price of the stock did not drop was because of the Biovail's false assurances to investors that the program was legal, Class Counsel also had to acknowledge that there was a material risk that a Court could conclude that the alleged misrepresentations were not material;

(c) Analysts were commenting negatively on Biovail's reporting and accounting practices prior to the Class Period, and therefore new allegations that came to light did not severely impact the stock price;

(d) Establishing loss causation in this action also posed a serious risk:

(i) The central allegations in the action revolved around the launch of Cardizem LA, including allegations that Defendants misrepresented the efficacy of the drug and boosted prescriptions by secretly paying doctors. However, the price of Biovail stock did not drop:

(A) when the truth about the efficacy of the drug was noted by analysts during the Class Period;

(B) when *The Wall Street Journal* and *Barron's* reported during the Class Period that Biovail had been paying doctors to write prescriptions for Cardizem LA, or

(C) in response to the daily and weekly reports issued during the Class Period which revealed the number of prescriptions actually written for the drug.

(ii) Additionally, while the price of Biovail stock dropped precipitously in October 2003 in response to certain disclosures, the defendants would argue that none of those disclosures referred to Cardizem LA or any of the alleged misrepresentations. Thus, there was no statement directly relating to the alleged misrepresentations that the plaintiff could point to in order to establish loss causation; and

(iii) Even if the plaintiff were able to establish that Biovail's problems with Cardizem LA was a cause of the third-quarter earnings miss, the announcement of the results for the quarter contained disclosures of other negative news that was not related to the alleged misrepresentations. Thus, the plaintiff could not have recovered for the entirety of the drop that followed the announcement, and the presence of the "confounding" news added to the risk that plaintiff would not be able to recover any (or a material amount) of the losses attributable to that announcement.

(e) Biovail's Hedge Fund Action was also a significant complicating factor. First, because the defendants had filed the action and publicly staked their position on the claim they asserted in that action, achieving a settlement became more difficult. The pendency of Biovail's Hedge Fund Action would also make establishing loss causation more difficult, because it would require the plaintiff to establish not only that disclosure of the misrepresentations by defendants caused the drop in the price of the stock, but also that the drop was not related to the activities of the purported hedge fund conspirators.

[31] While no discoveries or examinations were completed in the Canadian Action, as noted, substantial documentary discovery and depositions were conducted by U.S. Class Counsel prior to settlement. U.S. Class Counsel were able to share with Canadian Class Counsel important information and documents enabling Canadian Class Counsel to conduct their due diligence and ultimately recommend this settlement to the plaintiff and the court.

[32] U.S. and Canadian Class Counsel consulted and retained experts to assist in the development and assessment of various terms of the settlement agreement, including both the settlement amount, the plan of allocation and the corporate governance enhancements. In particular, Canadian Class Counsel retained a leading expert in the area of corporate governance, Dr. Richard Leblanc. Corporate governance reform was of particular concern to CCWIPP and is an important consideration for the court, in assessing the adequacy of the settlement, bearing in mind the policy objectives of the *Class Proceedings Act* and, in particular, behaviour modification.

[33] The court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within the range of reasonableness. The range of reasonable has been described in *Dabbs* in the following way:

> All settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.

[34] It is apparent from the material before me that settlement negotiations were protracted and adversarial. They spanned two years and the relief obtained certainly points to an arm's-length process and the absence of collusion.

[35] Canadian Class Counsel were able to obtain significant concessions on the issues of corporate governance which, as already noted, is an important policy objective of the CPA. The affidavit filed in support of this motion deposes that class counsel are of the view that the corporate reforms agreed here are the most extensive that they have achieved to date.

[36] Certainly, Canadian Class Counsel is experienced in these matters and their opinion carries considerable weight with the court.

[37] In my view, the settlement amount of US$138 million represents a perhaps modest but reasonable portion of the potentially recoverable damages assessed by one damages expert to be as high as approximately $746 million. The settlement allows the class to benefit from the remaining proceeds of Biovail's D&O insurance policy, a wasting asset that would certainly be consumed by further litigation while also requiring Biovail itself to contribute a significant amount to the settlement. However, the settlement permits Biovail to continue its important work in the formulation, clinical testing and manufacture of pharmaceutical products for the treatment of chronic conditions.

[38] In light of the risks, the possible range of damages recoverable and the substantial benefit available to class members now, this settlement falls within the range of reasonableness described above. Notably, no objections to this settlement have been brought forward.

[39] For all of the foregoing reasons, I am satisfied that this settlement should receive court approval at this time.

Justice H. A. Rady

Released: September 24, 2008

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SUPERIOR COURT OF JUSTICE

CANADIAN COMMERCIAL WORKERS INDUSTRY PENSION PLAN

- and –

BIOVAIL CORPORATION, EUGENE N. MELNYK, BRIAN H. CROMBIE, JOHN R. MISZUK, AND KENNETH G. HOWLING

REASONS FOR JUDGMENT

RADY J.

Released: September 24, 2008