Court File No. CV-17-512508-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

SHIRLEY HOULE AND ROLAND HOULE

Plaintiffs

- and -

ST. JUDE MEDICAL, INC. and ST. JUDE MEDICAL CANADA, INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

PLAINTIFFS' AND CLASS COUNSEL'S COMBINED FACTUM FOR SETTLEMENT AND FEE APPROVAL

(Motion before Perell J., returnable August 1, 2019)

Date: July 25, 2019

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TABLE OF CONTENTS

PART I - OVERVIEW

1. The Plaintiffs and Class Counsel bring these motions to: (1) approve the $5,000,000 Settlement Agreement[1] entered into between the parties on April 18, 2019; and (2) approve Class Counsel's legal fees and disbursements in the total amount of $1,371,675.00. Additionally, the Plaintiffs ask this Court to appoint Epiq Class Action Services as the Claims Administrator, appoint the Honourable Colin Campbell as the Referee, approve a *cy-près* distribution of any unallocated or unclaimed amounts from the settlement fund to the Heart and Stroke Foundation of Canada, and to approve an honorarium for each of the Plaintiffs in the amount of $5,000.00.

2. This action relates to lithium batteries in implantable cardioverter defibrillators (ICDs) and cardiac resynchronization therapy devices (CRT-Ds) (both are referred to as ICDs or Defibrillators herein) manufactured by St. Jude Medical Inc. and distributed in Canada by St. Jude Medical Canada, Inc. The batteries could potentially form lithium clusters, causing the battery to short, and rapidly deplete. The Patient Class are those people who were implanted with ICDs containing the compromised batteries.

3. All Provincial Health Insurers (PHIs) have consented to the Settlement Agreement,[2] which was negotiated at arms length over the course of nearly a year. The Settlement is structured to ensure that those Class members who have the strongest legal claims, or who suffered the most, obtain the largest share of the relief, but it ensures that all Class members receive some

[1] Settlement Agreement, Affidavit of John Kingman Phillips for Settlement Approval (JKP Affidavit (SA)), **Motion Record (MR), Vol 1, Tab 3(A)**. The Settlement is made up of $4,000,000 in Class compensation, $250,000 contribution to administration expenses, and $750,000 in costs of the proceeding.

[2] Consent to the Settlement Agreement executed by Provincial Health Insurers (PHIs' Consent), JKP Affidavit (SA), **MR, Vol 1, Tab 3(M).**

compensation. The Settlement Agreement reflects a fair and rational assessment of the damages suffered by the Class weighed against the risks of prolonged and uncertain litigation. Achieving a settlement at an early stage means that compensation will be paid out promptly to a Class consisting heavily of persons who are elderly and have serious health conditions.

4. The fees requested by Class Counsel are fair and reasonable, reflecting appropriate remuneration for the results obtained, the risks assumed, and the work completed. This action is not funded by a litigation funder, so Class Counsel bore the risk of any adverse costs award, and paid all disbursements.[3] Class Counsel is requesting approval of a fee equal to 27% of the $4,250,000 settlement fund, which is equivalent to a multiplier of less than 1.5% on Class Counsel's docketed time.[4] This is a discount from the 33% contingency fee agreement between the Plaintiffs and Class Counsel[5], given the early stage at which a settlement was achieved. The settlement includes a payment of $750,000 by the Defendants for costs of the proceeding, which will be applied to reduce the total amount of the legal fees that would otherwise be payable out of the settlement fund.[6]

5. For the reasons set out below, the Plaintiffs and Class Counsel submit that the settlement is fair, reasonable, and in the best interests of the Class, and request that this Court approve the Settlement Agreement and the requested counsel fees. In addition, they request an honorarium for

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[3] Affidavit of John Kingman Phillips for Counsel Fee Approval (JKP Affidavit (CFA)) at para 22, **MR, Vol 2, Tab 5 at 348.**

[4] JKP Affidavit (CFA) at paras 23-25, **MR, Vol 2, Tab 5 at 349.**

[5] JKP Affidavit (CFA) at para 21, **MR, Vol 2, Tab 5 at 349.**

[6] JKP Affidavit (SA) at para 6, **MR, Vol 1, Tab 3 at 17.**

each of the Plaintiffs in the amount of $5,000.00 for the exceptional efforts made in prosecuting this case for the benefit of the Class.

PART II – FACTS

A. BACKGROUND

6. The motion records filed on the certification motion set out in detail the key facts about this litigation. What is provided below is a summary of those facts to refresh the Court's memory, and additional facts of importance for the purposes of these motions.

7. Shirley Houle (Shirley) received warning letters from her cardiac clinic and other sources in October 2016 advising that the battery in her Defibrillator may be susceptible to sudden and rapid depletion. Shirley is pacemaker dependent and if her Defibrillator stopped functioning, she would be at risk of a serious cardiac event, potentially threatening her life. Shirley had already experienced two frightening events when her Defibrillator did not function, causing her to faint. Learning that her Defibrillator might stop working without notice left her terrified and distraught. The anxiety was prolonged – continuing until her Defibrillator was replaced.[7]

8. On the advice of her cardiac surgeon, on March 12, 2017, Shirley underwent an explant procedure during which her Defibrillator was replaced because of her pacemaker dependency and to assuage her ongoing anxiety about the risk of experiencing a failure of her Defibrillator.[8] After unexpectedly waiting 3 days for her surgery, Shirley was discharged the same day as her revision surgery took place.

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[7] Affidavit of Shirley and Roland Houle at para 6, **MR, Vol 2, Tab 4 at 311.**

[8] Affidavit of Shirley and Roland Houle at para 6, **MR, Vol 2, Tab 4 at 311.**

9. A defibrillator replacement surgery (a generator change) is minor day surgery, taking about 30 minutes. An incision is made over the existing incision site, the Defibrillator is disconnected from the leads into the heart and a new device is inserted in its place and connected to the leads.[9]

10. Recognizing that Shirley was one of thousands of other Canadians affected by the battery defect, Shirley and her husband, Roland Houle (Roland), independently sought out counsel who could advise whether a class action was feasible.[10]

11. In December 2016, Shirley and Roland retained Margaret Waddell, then of Phillips Gill LLP but now with Waddell Phillips Professional Corporation (Waddell Phillips), and Paul Miller, later with Howie, Sacks & Henry LLP (HSH), to act as their counsel and, to bring this action.[11]

B. PROCEDURAL STEPS TAKEN

12. Shirley and Roland issued a Statement of Claim commencing this action on March 30, 2017, shortly after Shirley's explant surgery. In their claim, they allege that the Defendants were negligent in designing and manufacturing the Defibrillators, and that they breached their duty to warn the Class of the known risk of the Defibrillators experiencing sudden and rapid battery depletion due to the formation of lithium clusters. The Statement of Claim was subsequently amended in June 2017 with additional particulars about the alleged failure of the Defendants in their duty to warn.[12]

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[9] Ellenbogen Report, para. 10, Affidavit of Dr. Kenneth Ellenbogen, **Certification Motion Record, Vol 2, Tab 6(A) at 332.**

[10] Affidavit of Shirley and Roland Houle at para 7, **MR, Vol 2, Tab 4 at 312.**

[11] Affidavit of Shirley and Roland Houle at para 10, **MR, Vol 2, Tab 4 at 313.**

[12] Amended Amended Statement of Claim dated September 28, 2018, **Second Supplementary Certification Motion Record, Tab 4.**

13. On November 22, 2017, the Plaintiffs served their Certification Motion Record, which included expert reports from a battery physics expert, Dr. Ulrich von Sacken, and an American-based cardiac surgeon and expert on ICD devices, Dr. Kenneth Ellenbogen. In response, on March 8, 2018, the Defendants served an expert report from a Canadian-based cardiac specialist, Dr. Derek Exner, and a voluminous record demonstrating that ICD devices can have many and varied potential defects which may be subject to recall and advisories.[13]

14. Four separate cross-examinations were completed in three different cities[14]:

(a) Dr. Ellenbogen was examined in Washington, DC on May 26, 2018;

(b) Shirley was examined on May 29, 2018 in Toronto;

(c) Dr. Von Sacken was examined on May 31, 2018 in Toronto; and

(d) Dr. Exner was examined on June 4, 2018 in Calgary.

15. The parties answered undertakings, and proceeded to prepare for the certification motion, which was originally scheduled to be heard on October 15, 2018. Class Counsel delivered their factum for the certification motion, together with a supplementary motion record, on October 2, 2018.

16. The certification motion was adjourned several times as the parties were contemporaneously engaged in settlement negotiations. Ultimately, after nearly a year of

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[13] Dr. Derek Exner's Report, Affidavit of Dr. Derex Exner, **Responding Certification Motion Record, Vol 1, Tab 1(B).**

[14] JKP Affidavit (CFA) paras 31-33, **MR, Vol 2, Tab 5 at 351**. Full transcripts of the cross-examinations were filed in the Plaintiffs' Supplementary Certification Motion Record.

negotiations, the parties reached a settlement of this action on April 18, 2019 and executed the Settlement Agreement.[15]

C. CERTIFICATION ORDER AND NOTICE TO THE CLASS

17. This action was certified, on consent and for settlement purposes, on April 23, 2019 (the Certification Order).[16] Shirley and Roland were appointed as the Representative Plaintiffs.

18. Two classes were certified and defined as:

(a) The *Patient Class* consisting of (i) all persons who are resident in Canada as at the date of the Certification Order or, if deceased at or before the date of the Certification Order, who were residents in Canada at the date of death, (ii) who were implanted in Canada with one or more of the Defibrillators, and (iii) who do not opt out of this action; and

(b) The *Derivative Class* consisting of all dependants of Patient Class Members asserting the right to sue the Releasees independently or derivatively by reason of their familial relationship to a Patient Class Member, including pursuant to the *Family Law Act*, RSO 1990 c F 3 or similar legislation in any other Province or Territory in Canada.

19. The Certification Order certified the following common issues:

(a) Were the Defendants negligent in failing to ensure that there were no defects in the Defibrillators?

(b) Were the Defendants negligent in failing to warn the Class of a risk of premature battery depletion with the Defibrillators in a timely fashion?

(c) If so, are the Defendants liable in damages to the Patient Class, the Derivative Class or the Provincial Health Insurers?

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[15] SA, JKP Affidavit (SA), **MR, Vol 1, Tab 3(A)**.

[16] Consent Certification Order of Justice Perell dated April 23, 2019, **Book of Authorities of the Moving Parties (BA), Tab 1.**

20. Epiq Class Action Services (Epiq) was appointed as the Claims Administrator to effect notice of certification and of the hearing for settlement and counsel fee approval.[17] It has set up a dedicated website for this proceeding and fulfilled its notice obligations under the Notice Protocol approved in the Certification Order. Epiq has responded to hundreds of inquiries from Class Members.[18]

21. Epiq mailed a short-form notice of the certification of this action (the Certification Notice) to the last known address of the 8,937 Class Members. Class Members were identified for this direct notice by records provided to Epiq by the Defendants. The Certification Notice advised Class Members that they had an opportunity to opt-out of the action until the end of day on July 19, 2019. Information about these motions for approval of the Settlement Agreement and approval of Class Counsel's fees, including their scheduled hearing on August 1, 2019, was included as part of the Certification Notice.[19] Epiq also arranged for the Certification Notice to be published in newspapers in accordance with the Notice Protocol.

22. Class Counsel have updated their respective websites to provide additional information to the Class about the Certification Order and this motion for settlement and counsel fee approval.[20] In addition, Class Counsel published a national press release, in English and French, advising of the certification of this action, opt-out rights, and this motion for settlement approval. The reach

[17] JKP Affidavit (CFA) at para 10, **MR, Vol 2, Tab 5 at 345.**

[18] JKP Affidavit (CFA) at para 15, **MR, Vol 2, Tab 5 at 346.**

[19] JKP Affidavit (CFA) at para 11, **MR, Vol 2, Tab 5 at 345.**

[20] JKP Affidavit (CFA) at para 13, **MR, Vol 2, Tab 5 at 346.**

of the press release exceeded 3 million potential readers.[21] The Defendants have posted the Certification Notice on Abbot's website[22] (Abbott acquired St. Jude in 2017).

23. Epiq is tracking opt-outs and will provide Class Counsel and counsel for the Defendants with a final report on all valid opt-outs by no later than July 29, 2019. As of today's date, Epiq has received 20 valid opt-outs.[23]

24. Class Counsel and Epiq have answered any questions or concerns that Class Members have raised about the action, opting out, or the settlement. Class Counsel is also tracking any objections to these motions and will bring such objections to this Court's attention at the oral hearing. To date, only six objections to the settlement[24] and one objection to class counsel fees[25] have been received. The Certification Order allows Class Members until July 29, 2019 to provide written objections to Class Counsel.

D. SETTLEMENT NEGOTIATIONS

25. Beginning in late May 2018, Class Counsel and counsel for the Defendants began negotiating a settlement of this action while proceeding, in parallel, to advance the action to

[21] JKP Affidavit (CFA) at para 13, **MR, Vol 2, Tab 5 at 346.**

[22] JKP Affidavit (CFA) at para 14, **MR, Vol 2, Tab 5 at 346.**

[23] JKP Affidavit (SA) at para 77, **MR, Vol 1, Tab 3 at 36.**

[24] JKP Affidavit (SA) at para 78-79, **MR, Vol 1, Tab 3 at 36.**

[25] JKP Affidavit (CFA) at para 18, **MR, Vol 2, Tab 5 at 347.**

certification.[26] At the same time, the Defendants effected mitigation strategies to reduce the risk of the Defibrillators' batteries depleting without adequate notice to the Class.

26. Key issues to be addressed before reaching an agreement included:

(a) The obligations of the Defendants to provide pre-certification access to information;

(b) The size of the Class and which Class Members should be entitled to compensation – i.e. should those Class Members who did not undergo explant procedures be entitled to compensation and should only those who were arguably not provided with a timely warning be compensated?

(c) The actual risk to Class Members of the Defibrillator batteries malfunctioning and whether this was any different than ordinary risks associated with ICD devices, which the Class had already accepted;

(d) The date that a potential duty to warn was triggered;

(e) The effect of mitigation measures taken by the Defendants;

(f) The number of Defibrillators that actually experienced premature battery depletion due to the lithium cluster issue and what evidence existed to prove this;

(g) The number of Class Members who were explanted because of the battery issue;

[26] JKP Affidavit (SA) at paras 24-28, **MR, Vol 1, Tab 3 at 23.**

(h) Quantification of damages suffered by Class Members in different categories and the amount payable for costs;

(i) The appropriate compensation payable to the PHIs and the scope of the release that they would provide;

(j) The language to be included in a Release;

(k) Appropriate litigation risk and expected take-up rate discounts;

(l) The effect of a large number of opt-outs on a potential settlement; and

(m) The notice protocol to be put in place, how it would be paid, and whether direct or indirect notice was appropriate.[27]

27. All of these issues, and many more, needed to be worked out prior to the execution of a settlement agreement. There was no certainty that a resolution acceptable to all parties would be reached until very close to the end of the negotiations.

28. Ultimately, on April 18, 2019, the parties executed the Settlement Agreement, after Class Counsel obtained instructions and confirmation from the Plaintiffs and all of the PHIs that the terms of the Settlement Agreement were acceptable.

[27] JKP Affidavit (SA) at paras 29-44, **MR, Vol 1, Tab 3 at 24-28.**

E. KEY TERMS OF THE SETTLEMENT AGREEMENT

29. The key terms of the Settlement Agreement are set out below.

(1) Settlement Quantum

30. The Settlement Agreement provides that the Defendants shall pay the Class $5,000,000 in exchange for a full and final release. The $5,000,000 payment breaks down as follows:

(a) $4,000,000 is compensation for the Class Members and the PHIs. The Class Members will receive $3,582,750 and the PHIs will receive $417,250;

(b) $250,000 is a payment towards the costs of claims administration (including the costs of the Claims Administrator and the Referee); and

(c) $750,000 is for costs of the action, which will be paid towards the legal fees of Class Counsel, as approved by the Court, in accordance with the Plaintiffs' contingency fee retainer agreement (the Retainer Agreement).

31. Any additional amounts payable for Class Counsel fees, HST, and disbursements will be deducted from the $4,000,000 payment, pro-rata between the PHIs, the Class, and claims administration fees will be deducted from the Class' allocation.[28]

[28] JKP Affidavit (SA) at paras 6-7, **MR, Vol 1, Tab 3 at 17-18.**

(2) Different Categories of Claimants

32. There are several subclasses of Class Members that have different potential claims against the Defendants and therefore are to receive different amounts of compensation:

(a) The strongest claims are for those Patient Class Members whose Defibrillators actually experienced premature battery depletion as a result of shorting from lithium cluster formation and who were implanted after the Defendants' duty to warn arguably arose, which Class Counsel concluded was December 1, 2013.[29] Each of these Class Members underwent a revision surgery on an urgent basis, and some may have suffered injuries from the Defibrillator not functioning or may have experienced complications as a result of the surgery.[30]

(b) Next, there are those Patient Class Members, like Shirley, who had elective explant surgery after the October 2016 Health Canada warning, up until the time that the Defendants implemented mitigation strategies beginning on August 8, 2017.[31]

(c) There are Patient Class Members whose Defibrillators experienced premature battery depletion as a result of shorting from lithium cluster formation before the duty to warn arguably arose, whose claims would therefore be based on negligent manufacture or

[29] A review of the available evidence from the FDA suggests that, at least by December 1, 2013, the Defendants knew that the Defibrillators had lithium cluster issues, as they initiated a Corrective Action and Preventative Action Procedure on December 18, 2013

[30] JKP Affidavit (SA) at para 9 (a), **MR, Vol 1, Tab 3 at 18.**

[31] JKP Affidavit (SA) at para 9 (a), **MR, Vol 1, Tab 3 at 18.**

design. While it would be harder to prove liability, these Class members suffered real injuries, just like category (a).[32]

(d) After this, there are those Patient Class Members who were implanted after December 1, 2013 and who continue to have their Defibrillators or had them explanted for reasons unrelated to the lithium cluster formation issues. These Class Members should have been warned about the increased risk of a defective battery prior to implantation to allow them the opportunity to make an informed election about whether to implant a Defibrillator or a different ICD device.

(e) There are Patient Class Members who had their Defibrillators implanted prior to December 1, 2013 who continue to have their Defibrillators or who had them explanted for reasons unrelated to the lithium cluster formation issues. Their claims rest on assertions of negligent manufacture and design rather than on breach of an alleged duty to warn. [33] These claims were considered to be the weakest, both because their ICDs are nearing their expected life and have functioned as required, and because the claim would be founded primarily on a claim of negligent manufacture or design but the ICDs have actually performed as intended.

(f) Finally, there are the Derivative Class Members who may have lost a Patient Class Member or incurred expenses while caring for a Patient Class Member.[34]

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[32] JKP Affidavit (SA) at para 9 (a), **MR, Vol 1, Tab 3 at 18.**

[33] JKP Affidavit (SA) at para 9 (b), **MR, Vol 1, Tab 3 at 18.**

[34] For the purposes of this settlement, Derivative Class Members claims for Ontario *Family Law Act* loss of care, guidance and companionship, other than in the case of deaths, have been incorporated into the

33. The Defendants have advised that from their records, there are up to 340 Eligible Explant Claimants. Of these, 155 fit into category (a) of the definition. Category (i) of the definition includes patients whose Defibrillators were replaced due to premature battery depletion where there is no indication that the depletion was related to a cause other than a short circuit that may have been due to the formation of lithium clusters. There may, therefore, be less than 155 Class Members who are eligible under this category. The remaining 185 Eligible Explant Claimants fall into category (b), to St. Jude's knowledge. Given the results of a 2018 study and the statistical frequency of the lithium cluster arising (both discussed below), Class counsel has estimated that, even with the broad category (a) definition around 255 (75%) will unfortunately qualify as Eligible Explant Claimants. For settlement purposes, no distinction has been made with respect to the quantum of compensation to be received by Eligible Explant Claimants as they all underwent the same explant and device replacement procedure.

34. For those who experienced serious personal injury or death (if any), there is access to an uncapped Extraordinary Injury Fund.[35]

35. Both Patient Class Members and Derivative Class Members who incurred documented expenses of over $100 may obtain up to $500 in compensation from the Extraordinary Injury Fund.[36]

(3) The Distribution Protocol

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compensation paid to the Patient Class, as the costs of administering such claims separately would outweigh the benefits;

JKP Affidavit (SA) at para 9 (c), **MR, Vol 1, Tab 3 at 19.**

[35] JKP Affidavit (SA) at para 69, **MR, Vol 1, Tab 3 at 35.**

[36] JKP Affidavit (SA) at para 69, **MR, Vol 1, Tab 3 at 35.**

36. The Distribution Protocol is designed to facilitate the highest payment to those with the strongest claims and largest potential damages claims, in accordance with the various categories of Class Members' claims described above. A "waterfall" approach to distribution is contemplated, with the largest amount at the bottom of the waterfall going towards the Eligible Explant Claimants.[37]

37. Due to the operation of provincial and territorial legislation providing statutory rights of action for PHIs, these entities are entitled to first payment from the Net Settlement Fund. The Saskatchewan *Purdue*[38] decision establishes that PHIs have their own rights and interests in litigation that must be treated as separate claims from those of the Class Members. The PHIs will be paid $417,250.[39]

38. A pool of $500,000 provides for compensation for Eligible Non-Explant Claimants who had their Defibrillators implanted prior to December 1, 2013. The distribution of this amount will be on a pro-rata basis, capped at $100 per claimant. The total Class Members fitting within this category is approximately 5,200, so if the take-up rate is as high as 96%, each Class Member in this category would receive the full $100. Any funds remaining in this pool flow to the benefit of Eligible Explant Claimants. So, for example, if the take-up rate is 55%, $286,000 would be paid and $214,000 falls into the Eligible Explant Claimants pool.

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[37] Settlement Agreement, Schedule G - Distribution Protocol, JKP Affidavit (SA), **MR, Vol 1, Tab 3(A) at 108-109**.

[38] *Perdikaris v Purdue Pharma Inc.*, 2018 SKQB 86, **Book of Authorities of the Moving Parties (BA), Tab 1.**

[39] JKP Affidavit (SA) at paras 38-43, **MR, Vol 1, Tab 3 at 27.**

39. A pool of $1,100,000 provides up to $500 for Eligible Non-Explant Claimants who had their Defibrillators implanted on or after December 1, 2013. The distribution of this amount will also be on a pro-rata basis, capped at $500 per claimant. The number of Class Members fitting within this category is approximately 3,400. A take-up rate of 64% or less will result in these Class Members receiving the full $500. If every Class Member fitting within this category files a claim, the amount paid will be about $325 per person. At a 55% take-up rate, $165,000 would flow to the Eligible Explant Claimants pool.

40. An uncapped Extraordinary Injury Fund then provides compensation in certain specific situations for Class Members who may have experienced complications with explant surgeries, died, or who incurred significant out of pocket expenses. The Referee Guidelines establish specific criteria and quanta for each category of proven extraordinary injury as determined by the Referee.[40] This is designed to ensure that sufficient money is available to those who may have more significant damages relative to other Eligible Explant Claimants.

41. Based on the evidence available, few claims are expected to be made on the Extraordinary Injury Fund. A Canadian study of the Defibrillators completed in 2018 reported no major complications from device revisions in 118 patients out of a study group of 2679, which is approximately 30% of the Class.[41] There are no known deaths in Canada caused by lithium cluster formations in the Defibrillators.

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[40] Settlement Agreement, Schedule F - Referee Guidelines, JKP Affidavit (SA), **MR, Vol 1, Tab 3(A) at 104-107**.

[41] J. Davis et al, "Canadian Registry of Electronic Device Outcomes: The Abbott Battery Performance Alert, A Multicentre Registry", (2018) 34 *Canadian Journal of Cardiology* at 138, JKP Affidavit (SA), **MR, Vol 1, Tab 3(H)**.

42. After these categories of compensation are paid from the Net Settlement Fund as well as the claims administration costs exceeding $250,000, the balance is to be distributed, pro-rata, to the Eligible Explant Claimants.[42] As described above, the records and information provided to Class Counsel from the Defendants suggest that the number of Class Members who will be found to have valid claims within this category is estimated by Class Counsel at 255. Assuming that Class Counsel's fee request is approved, that all money earmarked for Eligible Non-Explant Claimants is paid in full, that claims administration costs do not exceed $450,000, and that $100,000 is paid under the Extraordinary Injuries Fund, and assuming a take-up rate of 55%, Class Counsel estimates that the amount payable to Eligible Explant Claimants will be about $9,500 per person.[43] This amount will increase if the take-up rate in the non-explant categories leave undistributed funds, and/or the take-up rate in this category is lower than 55%.[44]

43. Based on its past experience, Epiq has estimated the take-up rate could be as high as 55% given the use of a direct mailing notice program. This is consistent with the findings of University of Montreal Professor Catherine Piché who completed an empirical study of class action take-up

[42] Settlement Agreement, Schedule G - Distribution Protocol, JKP Affidavit (SA), **MR, Vol 1, Tab 3(A) at 108-109**.

[43] The math is calculated as: $5,000,000 settlement, minus $450,000 claims administration costs, minus $1,371,675 for counsel fees and disbursements, minus $500,000 for pre-December 2013 Non-Explant Patient Class Members, minus $1,100,000 for post-December 2013 Non-Explant Patient Class Members, minus $100,000 for the Extraordinary Injuries Fund, equals **$1,328,325**, divided by 140 Explant Patient Class Members (255 Class Members at a take-up rate of 55%), which equals **$9,488**.

[44] If the take-up rate for the Non-Explant Class Members is 55%, this will result in a surplus of $214,000 and $165,000 to the Eligible Explant category of Class Members ($379,000). The total amount for the Eligible Explant Class Members would then be $1,707,325. This would work out to $6,695.39 per Eligible Explant Class Member if all 255 Eligible Explant Class Members make claims or $12,195.18 each if 55% of them (140) make claims.

rates in actions completed between 2004-2016.[45] Her study of 55 Quebec class actions revealed an average take-up rate of 54.76% in all cases and a take-up rate of 52.33% of cases that were settled.

44. The structure of the Distribution Protocol is designed to ensure that all Class Members obtain some degree of compensation, but that the Eligible Explant Patient Class Members obtain the greatest proportion of recovery. No settlement funds should remain undistributed at the end of the claim period except from stale dated cheques and any administrative hold-back residual amounts. This will be paid *cy-près* to the Heart and Stroke Foundation of Canada, a national non-profit organization dedicated to promoting cardiac health in Canada.[46]

F. EFFORTS OF THE REPRESENTATIVE PLAINTIFFS

45. The Houles made an exceptional contribution to this action throughout. Without them this action would not have proceeded at all. Of the more than 8,900 Class Members, only the Houles sought to commence a class action. They retained Class Counsel to commence this action and made significant contributions in publicizing this action through participation, in particular, in a national television news broadcast. The Houles agreed to, and did subject their private lives and personal health information to public scrutiny in order to ensure that this action was certified. This

[45] Catherine Piché, "Class Action Value", (2018) 19 *Theoretical Inquiries* 261 at 291-292, **BA, Tab 2.**

[46] Heart and Stroke Foundation Website Information, JKP Affidavit (SA) at para 74-75, **MR, Vol 1, Tab 3(S) at 36**.

included swearing several affidavits in support of this action – upon one of which Shirley Houle was cross-examined at length during an emotional day of testimony.[47]

46. A modest honorarium of $5,000 each for Shirley and Roland Houle is requested by the Plaintiffs and supported by Class Counsel for their exceptional efforts in this litigation.

G. CLASS COUNSEL'S EFFORTS

47. Class Counsel has moved this action forward at an expeditious pace since they were first retained in December 2016. This included:

(a) Gathering background information on the Houles and their potential claims against the Defendants;

(b) Completing extensive legal and factual background research prior to instituting the action and updating this research as new developments and information became available;

(c) Drafting and issuing a Statement of Claim and Amended Statement of Claim as the litigation progressed;

(d) Developing a litigation strategy, in consultation with the Houles, for moving the action to a certification motion;

[47] Affidavit of Shirley and Roland Houle at paras 25-26, **MR, Vol 2, Tab 4 at 321;** JKP Affidavit (CFA) at paras 46-47, **MR, Vol 2, Tab 5 at 356-357**.

(e) Seeking out litigation funding, in accordance with the Retainer Agreement, negotiating a proposed litigation funding agreement, moving to have it approved by the Court, and arguing an appeal from the funding decision;

(f) Participating in case management conferences to set a timetable and keep the litigation on track for certification;

(g) Communicating with the Class through Class Counsels' websites, social media, and by answering direct inquiries;

(h) Collecting medical records of a sampling of Class Members;

(i) Retaining, instructing, and funding experts;

(j) Preparing materials for the certification motion and developing a litigation plan to move the action from certification to common issues trial and individual trials, as required;

(k) Completing cross-examinations of the Defendants' affiants and preparing and participating in the cross-examination of Shirley and the Plaintiffs' experts;

(l) Engaging in protracted settlement negotiations with the Defendants and PHIs starting in May 2018 and continuing until April 2019;

(m) Preparing, but not delivering, a replevin motion regarding Shirley's ICD;

(n) Completing the factum for a certification motion;

(o) Retaining, instructing, and supervising Epiq as the Claims Administrator;

(p) Retaining the Honourable Colin Campbell as the Referee;

(q) Completing multiple drafts of the Settlement Agreement; and

(r) Preparing materials for this settlement approval hearing and attending the approval hearing.[48]

48. While Class Counsel sought litigation funding, and had a preliminary agreement in place, the agreement was not approved by this Court. Consequently, Class Counsel assumed the risks of this litigation and provided the Plaintiffs with an undertaking to indemnify them against adverse costs awards and to pay for all disbursements.[49] Class Counsel have expended approximately $740,000 worth of time and have borne all the risks of this litigation.[50]

49. Class Counsel requests that its Retainer Agreement be approved and that legal fees in the amount of $1,147,500, plus HST and disbursements, be approved. This represents a contingency fee of 27% (a deduction of 6% from the Retainer Agreement's 33% contingency fee) or a multiple of 1.41 (or less) on the time actually expended, and to be expended, by Class Counsel.[51]

PART III – ISSUES AND THE LAW

A. ISSUES BEFORE THE COURT

50. The following issues are to be determined:

(a) Is the Settlement Agreement, in all of the circumstances, fair, reasonable and in the best interests of the Class as a whole?

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[48] JKP Affidavit (CFA) at paras 26 - 45, **MR, Vol 2, Tab 5 at 350 - 355.**

[49] JKP Affidavit (CFA) at paras 41 - 42, **MR, Vol 2, Tab 5 at 354.**

[50] JKP Affidavit (CFA) at paras 41 - 42, **MR, Vol 2, Tab 5 at 354.**

[51] JKP Affidavit (CFA) at paras 44 - 45, **MR, Vol 2, Tab 5 at 355.**

(b) Should the Settlement Agreement be binding upon the subrogated and/or statutory claims of the Provincial Health Insurers?

(c) Should Epiq Class Action Services be appointed as the Claims Administrator for distribution of the Settlement Funds? Is the Honourable Colin Campbell an appropriate party to appoint to referee the entitlement of Class members to a share of the Settlement Funds?

(d) Is the Heart and Stroke Foundation of Canada an appropriate *cy-près* beneficiary of any undistributed settlement funds?

(e) Should the Plaintiffs receive honoraria for their efforts in bringing this action to a successful resolution? If so, is $5,000 each fair compensation?

(f) Are the fees and disbursements sought by Class Counsel fair and reasonable in all the circumstances of this case?

B. SETTLEMENT APPROVAL

General Principles

51. Section 29(2) of the *CPA* provides that "a settlement of a class proceeding is not binding unless approved by the court."[52] In order to obtain approval of a settlement under section 29(2), the court should be satisfied that, "in all the circumstances, the settlement is fair, reasonable and

[52] S 29(2), *Class Proceedings Act, 1992*, SO 1992, c 6.

in the best interest of the class as a whole."[53] The "key question is whether the settlement falls within a zone of reasonableness."[54]

52. In making an assessment of whether a settlement is reasonable and in the best interests of the class, the court may consider the following factors: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation.[55]

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[53] *Hodge v. Neinstein*, 2019 ONSC 439 at para 37, **BA, Tab 3**;
Cass v. WesternOne Inc., 2018 ONSC 4794 at para 85, **BA, Tab 4**;
Fantl v. Transamerica Life Canada, [2009] OJ No 3366 at para 57, **BA, Tab 5**;
Baxter v. Canada (Attorney General) (2006), 83 OR (3d) 481 (SCJ) at para 10, **BA, Tab 6**;
Parsons v. Canadian Red Cross Society, [1999] OJ No 3572 (SCJ) at para 69, **BA, Tab 7**;
Dabbs v. Sun Life Assurance, [1998] OJ No 1598 (Gen Div) at para 9, **BA, Tab 8.**

[54] *Sheridan Chevrolet Cadillac v. T.Rad Co*., 2018 ONSC 3786 at para 4, **BA, Tab 9**;
Seed v. Ontario, 2017 ONSC 3534 at para 11, **BA, Tab 10**;
Clegg v HMQ Ontario, 2016 ONSC 2662 at para 31, **BA, Tab 11**;
Dabbs v Sun Life Assurance Company of Canada, [1998] OJ No 2811 (Gen Div) at 8 aff'd (1998) 41 OR (3d) 97 (CA), **BA, Tab 12**.

[55] *Hodge v. Neinstein*, 2019 ONSC 439 at para 38, **BA, Tab 3**;
Cass v. WesternOne Inc., 2018 ONSC 4794 at para 85, **BA, Tab 4**;
Fantl v. Transamerica Life Canada, [2009] OJ No 3366 at para 59, **BA, Tab 5**;
Lavier v MyTravel Canada Holidays Inc., 2011 ONSC 1222 at para 21, **BA, Tab 13**;
Parsons v. Canadian Red Cross Society, [1999] OJ No 3572 at para 71, **BA, Tab 7**.

53. These factors are a "guide in the process and no more" and it is likely that, in the circumstances of any given case, one or more of the factors will have greater significance or should be afforded greater weight than the others.[56]

54. When analyzing the reasonableness of a settlement, the court engages in two analytical exercises – a risk analysis, and a structural analysis of the settlement. First, the court, without making findings of fact on the merits of the action, uses the factors listed above to compare the settlement with the results likely to be obtained at trial. The court weights the advantages and disadvantages of settlement against the risks of litigation and considers whether the settlement secures an adequate advantage for the class in surrender of its litigation rights against the settling defendants.[57] Second, the court uses the factors to examine the fairness and reasonableness of the terms of the settlement and the distribution scheme proposed.[58]

55. The parties to the settlement must "provide sufficient information to permit the court to exercise an objective, impartial and independent assessment of the fairness of the settlement in all the circumstances."[59] The court does not require "evidence sufficient to decide the merits of the issue"; however, it must "possess adequate information to elevate its decision above mere

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[56] *Parsons v. Canadian Red Cross Society*, [1999] OJ No 3572 at para 73, **BA, Tab 8**;

Cass v. WesternOne Inc., 2018 ONSC 4794 at para 85, **BA, Tab 4**;

[57] *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd*., [2005] OJ No 1118 (SCJ) at para. 142, **BA, Tab 14**.

[58] *Hodge v. Neinstein*, 2019 ONSC 439 at para 42, **BA, Tab 3**;

Welsh v. Ontario, 2018 ONSC 3217 at para 68 rev'd 2019 ONCA 41 on other grounds, **BA, Tab 15**.

[59] *Cass v. WesternOne Inc.*, 2018 ONSC 4794 at para 87, **BA, Tab 4**;

Dabbs v Sun Life Assurance Company of Canada, [1998] OJ No 2811 (Gen Div) at para 15, **BA, Tab 8**.

conjecture."[60] The information provided to the court in support of a settlement ought not to be "boiler-plate" in nature and must not simply amount to a request of blind trust from the court.[61]

56. Settlement through compromise at an early stage in litigation furthers the judicial economy objective of class proceedings[62] and has the practical benefit of expediting payment to class members.[63] Settlements allow the parties to resolve issues for themselves and are "much preferred to a judge made determination with which neither or even one of the parties might be pleased."[64] In addition, as noted be Strathy J in *Osmun*, if a settlement is not approved:

> …there is no obligation on parties to resume discussions and it may be that the parties have reached their limits in negotiations and will backtrack from their positions or abandon the effort. This result would be contrary to the widely-held view that the resolution of complex litigation through settlement is encouraged by the courts and favoured by public policy.[65]

57. While the court must seriously scrutinize a settlement and ensure that "class members interests are not being sacrificed",[66] there is, nevertheless, "a strong initial presumption of fairness when a proposed settlement, which was negotiated at arm's length by counsel for the class, is

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[60] *Cass v. WesternOne Inc.*, 2018 ONSC 4794 at para 87, **BA, Tab 4**;

Ontario New Home Warranty Program v. Chevron Chemical Co., [1999] OJ No 2245 (SCJ) at para 92, **BA, Tab 16**.

[61] *Sheridan Chevrolet v Furukawa Electric at al*, 2016 ONSC 729 at para 16, **BA, Tab 17**.

[62] *Bancroft-Snell v Visa Canada Corporation*, 2015 ONSC 7275 at para 49, **BA, Tab 18**;

2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corporation, 2014 ONSC 5812 at para 35, **BA, Tab 19**.

[63] *Silver v. Imax Corp*., 2016 ONSC 403 at para. 24, **BA, Tab 20**;

Charette v. Trinity Capital Corporation, 2019 ONSC 3153, **BA, Tab 21**.

[64] *Seed v Ontario*, 2017 ONSC 3534 at para 14, **BA, Tab 10**.

[65] *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643 ("*Osmun*") at para. 34 aff'd 2010 ONCA 841, **BA, Tab 22**.

[66] *Hodge v. Neinstein*, 2019 ONSC 439 at para 40, **BA, Tab 3**.

presented for court approval."[67] While a settlement's recommendation by experienced and reputable counsel is not "dispositive", the recommendation by such counsel is "certainly a factor in its favour".[68] As stated by Horkins J in *Wein*, "[w]here the parties are represented, as they are in this case, by reputable counsel with expertise in class action litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking his or her reputation and experience on the recommendation."[69]

58. The standard is not "perfection" and all class members need not be treated equally under a settlement.[70] To reject a settlement, and require ongoing litigation by the parties, "a court must conclude that the settlement does not fall within a zone of reasonableness."[71]

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[67] *Nunes v. Air transat A.T. Inc*., [2005] OJ No 2527 at para 7, **BA, Tab 23**;
Kafai v. Nature's Touch Frozen Foods Inc., 2019 ONSC 167, **BA, Vol 1, Tab 24**;
Osmun v. Cadbury Adams Canada Inc., 2010 ONSC 2643 at para 31, **BA, Tab 22**;
Serhan (Trustee of) v. Johnson & Johnson, 2011 ONSC 128, **BA, Tab 25**;
Cass v. WesternOne Inc., 2018 ONSC 4794 at para 89, **BA, Tab 4**.

[68] *Dabbs v Sun Life Assurance Company of Canada*, [1998] OJ No 2811 (Gen Div) at para 32, **BA, Tab 8**;
Cass v. WesternOne Inc., 2018 ONSC 4794 at para 90, **BA, Tab 4**.

[69] *Wein v Rogers Cable Communications Inc.*, 2011 ONSC 7290 at para 20, **BA, Tab 26**;
Romeo v. Ford Motor Co., 2019 ONSC 1831 at para 16, **BA, Tab 27.**

[70] *Hodge v. Neinstein*, 2019 ONSC 439 at para 40, **BA, Tab 3**;
Cass v. WesternOne Inc., 2018 ONSC 4794 at para 85, **BA, Tab 4**;
Nunes v. Air transat A.T. Inc., [2005] OJ No 2527 at para 7, **BA, Tab 23**;
McCarthy v. Canadian Red Cross Society [2007] O.J. No. 2314 (SCJ) at para 17, **BA, Tab 28**;
Fraser v. Falconbridge Ltd., [2002] OJ No 2383 (SCJ) at para 13, **BA, Tab 29**.

[71] *Nunes v. Air transat A.T. Inc*., [2005] OJ No 2527 at para 7, **BA, Tab 23**;
Kafai v. Nature's Touch Frozen Foods Inc., 2019 ONSC 167, **BA, Tab 24**;
Osmun v. Cadbury Adams Canada Inc., 2010 ONSC 2643 at para 31, **BA, Tab 22**.

59. The court is not to rework the settlement or to reopen negotiations between the litigants. While the court may indicate areas of concern and provide the parties with an opportunity to address any concerns, the court cannot unilaterally modify the terms of a negotiated settlement.[72]

Risks of the Litigation and Benefits of Early Settlement

60. Medical device class actions are complex and risky. Class Counsel was acutely aware of Justice Lax's 2012 decision in *Andersen v. St. Jude Medical, Inc.*, an action involving the same defendants as this case[73] That action involved claims of negligent manufacture of a synthetic coating for prosthetic heart valves and annuloplasty rings, and alleged that St. Jude failed in its duty to warn the class when it allegedly knew of the propensity of the synthetic coating to cause heart infections. The action was certified in 2003 and did not reach the common issues trial until 2010. In 2012, after 138 days of hearing evidence at trial, and eight days of oral submissions, Justice Lax found in favour of St. Jude.

61. Liability is not presumed simply because a medical device is defective, even if the defect is dangerous. There must be a clear and demonstrable breach of the requisite standard of care and proof of causation of damages. [74] The *Andersen* case demonstrates that even if an action is certified, there is no guarantee of success.

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[72] *Welsh v. Ontario*, 2019 ONCA 41 at para 11, **BA, Tab 15**;

Romeo v. Ford Motor Co., 2019 ONSC 1831 at para 16, **BA, Tab 27**;

Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd. [2005] O.J. No. 1118 (SCJ) at para 127, **BA, Tab 14**;

Cass v. WesternOne Inc., 2018 ONSC 4794 at para 86, **BA, Tab 4**;

Dabbs v. Sun Life Assurance, [1998] OJ No 1598 (Gen Div) at para 10, **BA, Tab 8**.

[73] *Andersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660 ("*Andersen*"), **BA, Tab 31**.

[74] *Vester v Boston Scientific Ltd*., 2015 ONSC 7950 at paras 4-7, **BA, Tab 32.**

62. In the present action, the prospects of success at trial for the vast majority of the Class was low – particularly for those Class Members who do not fall within the Eligible Explant category, and for those who were implanted prior to the duty to warn arising.

63. The risk of losing at trial for all Class members was not insignificant.[75] Particularly:

(a) The batteries were approved for use in the Defibrillators by the FDA. The science behind lithium cluster formation is complex and it appears that the particular circumstances of each individual Class Member's Defibrillator may contribute to the likelihood of lithium clusters forming, including the orientation of the device and the frequency of use. Therefore, proving negligent design and manufacture was considered challenging, with a high probability of failure.[76]

(b) The lithium cluster formation issues does not substantially increase the overall risk to individual Class Members implanted with an ICD.[77] The Defendants would argue that Class Members assumed the overall risk of premature battery depletion when they were implanted with their Defibrillators. The Defendants' expert, Dr. Exner, reported that it is the standard of care for physicians to advise patients, prior to implanting a Defibrillator, of the risks of device failure, which includes premature battery depletion, with such risks to be balanced against the benefits of having an ICD device.[78] Lithium cluster formation is not the only cause of premature battery depletion, and all Class Members knew, or ought

[75] JKP Affidavit (SA) at para 44, **MR, Tab 3.**

[76] JKP Affidavit (SA) at para 45, **MR, Vol 1, Tab 3 at 28.**

[77] JKP Affidavit (SA) at paras 56-57, **MR, Vol 1, Tab 3 at 28.**

[78] Dr. Exner Report at p 8-9, question 7, JKP Affidavit (SA), **MR, Vol 1, Tab J at 155-156**.

to have known, that there was a general risk of premature battery failure in any ICD. This is one of the most commonly reported issues with ICD devices of all makes and models. Early battery depletion is reported to occur in up to 10% of ICD devices.[79] While the risk of premature battery depletion arguably fractionally increased as a result of the lithium cluster formation issues, it is an open question whether that increase in the risk of premature battery depletion would have changed most Class Members' physicians' overall assessment of the risk of implantation. This would have entailed a battle of experts, with uncertain outcomes.

(c) The threshold to prove compensable damages for mental distress, as set out by the Supreme Court in *Mustapha*[80] and *Saadati*[81], is high. While many of the Class Members likely suffered anxiety of some form after receiving the October 2016 Health Canada Advisory, studies conducted by the Plaintiffs' expert, Dr. Ellenbogen, demonstrate that it is unlikely that most Class Members would suffer extreme and prolonged anxiety, or anxiety meeting the criteria of a diagnosable mental illness.[82] Individual trials would be required to establish such an injury. Class Members who do not fit within the Eligible Explant category and who cannot meet the *Saadati* mental injury threshold would have no viable claim for damages, even if the Defendants breached their duty to warn.

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[79] Dr. Exner Report at p 12, question 11, JKP Affidavit (SA), **MR, Vol 1, Tab J at 159**.

[80] *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 ("*Mustapha*"), **BA, Tab 33**.

[81] *Saadati v. Moorhead*, 2017 SCC 28 ("*Saadati*"), **BA, Tab 34**.

[82] Mitesh S. Amin and Kenneth A. Ellenbogen, "The Effect of Device Advisories on Implantable Cardioverter-defibrillator Therapy", (2010) 12 *Curr Cardio Rep* 361, **BA, Tab 35**;

Douglas P. Gibson, et al., "Decision-making, emotional distress, and quality of life in patients affected by the recall of their implantable cardioverter defibrillator", (2008) 10 *Europace* 540 **BA, Tab 36**.

(d) The Defendants achieved prompt and effective mitigation of the risk arising from the lithium cluster issue by developing a battery performance alert – first for home monitoring devices and then through a firmware update to the Defibrillators themselves.[83] Timely warning of premature battery depletion risk caused by lithium cluster formation is now available to the Class.

64. If the Defendants were found liable for a breach of the duty to warn, but not for negligent design and manufacture, only those Class Members who were implanted after the duty to warn arose and were subsequently explanted due to battery failure caused by lithium cluster shorting or prophylactic removal on a doctor's advice would have suffered compensable injuries absent proof of a *Saadati / Mustapha* level of mental anguish by Non-Explant Class Members. Each Class Member would have to prove causation (i.e. that the battery failed because of lithium clusters and not for another reason, or that replacement was medically required). They would also need to prove individual damages.

65. Based on their approach in *Andersen*, and their positions taken during the negotiations, the Defendants are known to be willing to contest liability strenuously.[84] A trial would entail a significant battle between multiple experts, in many different fields of expertise.

66. A trial would be unlikely to commence until several years from now. The Class Members are, by definition, individuals who have serious heart conditions. The vast majority are likely to

[83] JKP Affidavit (SA) at paras 19-20, **MR, Vol 1, Tab 3 at 21.**

[84] JKP Affidavit (SA) at para 63, **MR, Vol 1, Tab 3 at 33.**

be elderly. Settlement at an early stage helps ensure that Class Members will receive settlement cheques now rather than years from now, and after the rigours of proving individual damages.

Eligible Explant Identification and Causation Issues

67. A 2018 study of 2,679 of the Defibrillators implanted between 2010 and 2017, found that only 20 patients required revision of their Defibrillators due to all forms of premature battery depletion. No clinically adverse events were identified as a result of the premature battery failure. There were 366 patient deaths (roughly 13.7% of the study group), none of which were attributed to premature battery depletion.[85] Information provided in the Health Canada October 2016 advisory is consistent with this. The Advisory identified that the failure rate was approximately 1 in 500 (0.21%), that no deaths had occurred, and that there were only 26 episodes of syncope (fainting) or presyncope reported as a result of premature battery depletion.

68. Class Counsel anticipates that at an estimated premature battery depletion incident rate due to lithium cluster formation may range between 0.2% (the amount reported in Health Canada Advisory based on St. Jude's disclosure at the time) to 0.7% (the results suggested from the 2018 study). If the rate is 0.7%, there would be 63 events from a Class of 8,937. At 0.2%, there would be only 18 such events.[86] Hence, providing for compensation to up to 155 Class members under Eligible Explant Class category (i) significantly over compensates the Class.

69. Recalling that up to 10% of Defibrillators may have premature battery failure, and given that, statistically, there should be between 18 to 63 Class Members who experienced premature

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[85] See J. Davis et al, "Canadian Registry of Electronic Device Outcomes: The Abbott Battery Performance Alert, A Multicentre Registry", (2018) 34. *Canadian Journal of Cardiology* at 138, JKP Affidavit (SA), **MR, Vol 1, Tab 3(H) at 142**.

[86] JKP Affidavit (SA) at para 17, **MR, Tab 3 at 21**.

battery depletion as a result of lithium cluster formations, it is likely that most of the potential Eligible Explant Claimants likely did not experience a battery failure because of lithium clusters.

70. However, identifying which Class Members' batteries actually failed due to lithium cluster formation may be impossible, even after determining from medical records that the cause of a failure was premature battery depletion. Defibrillators not returned to St. Jude are likely no longer available to be interrogated. Statistically, few of those returned to St. Jude are likely to have evidence of lithium clusters. Hence, the Settlement will provide substantial compensation to many Class Members who underwent replacement surgery, without attempting the difficult, if not impossible task of definitively proving the failure was caused by lithium cluster formation.

Mitigation Steps Taken by the Defendants

71. An important factor that influenced Class Counsel's approach to the compensable claim period for non-explant Patient Class Members were the mitigation steps taken by the Defendants. Following the October 2016 advisory, the Defendants took a number of steps to mitigate the risks caused by premature battery depletion from lithium clusters. The most significant remedial step was to implement a Battery Performance Alert in August 2017 that, through the Merlin-at-Home system, detects and notifies physicians about abnormal battery performance in a Defibrillator indicative of potential premature battery depletion.[87] This means that Class Members with home monitoring should not have to wait for a vibratory alarm to receive a warning that a Defibrillator

[87] JKP Affidavit (SA) at para 19, **MR, Vol 1, Tab 3 at 21.**

was at risk of a sudden failure due to battery depletion. The Merlin-at-Home monitoring system was provided to most Class Members and was free of charge.[88]

72. In April 2018, the Defendants released a firmware update to implement the Battery Performance Alert algorithm directly into the firmware of the ICDs.[89] The firmware update includes an algorithm that identifies abnormal battery conditions in Defibrillators that were at risk of premature battery depletion. A vibratory alert will notify Class Members if the Defibrillator's firmware detects an abnormal battery condition. The April 2018 firmware update ensures that the Defibrillators are continuously self-monitoring for battery depletion issues.[90]

73. These improvements should help to alleviate any residual anxiety experienced by Class Members remaining after meeting with their health care professionals, and having received confirmation that an explant surgery is contra-indicated. Class Counsel concluded that with the introduction of the August 2017 Battery Performance Alert, the Defendants had fairly remediated the risk arising from premature battery depletion.

Information Available to Class Counsel

74. The Defendants provided extensive information to Class Counsel in the course of the negotiations, including information about the size and nature of the Class, and total known explant surgeries arising from battery failures.[91] The settlement quantum was not agreed to until this key information was made available. Once Class Counsel knew the number of Class Members fitting

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[88] FDA Safety Communication, October 11, 2016, JKP Affidavit (SA), **MR, Vol 1, Tab 3(D) at 122**.

[89] JKP Affidavit (SA) at para 22, **MR, Vol 1, Tab 3 at 22.**

[90] St. Jude Battery Performance Alert, JKP Affidavit (SA), **MR, Vol 1, Tab 3(K) at 170**.

[91] JKP Affidavit (SA) at para 31, **MR, Vol 1, Tab 3 at 24.**

into the various proposed categories, it was comfortable identifying appropriate ranges within which to settle this action.

75. Due to the nature of Canadian and American regulatory oversight, significant public information was also available about the Defendants' knowledge and operations on issues relevant to liability. Additionally, there is ample academic literature addressing defibrillator recalls and battery issues, and their effects on patients. Dr. Ellenbogen also was a source of a wealth of information, as was Dr. Exner's cross-examination evidence. Core information was readily available, and early productive settlement discussions were possible as a result. Whatever specifics were needed for settlement purposes were requested from the Defendants and, ultimately, provided.

Class Counsel's Recommendation and Experience of Class Counsel

76. Class Counsel strongly recommends the proposed settlement and has concluded that the Settlement Agreement is fair and reasonable, and in the best interest of the Class as a whole. It will compensate Class Members who would likely not be able to prove compensable claims at a trial, and provides fair compensation to those who would.[92]

77. Margaret Waddell and Paul Miller, are highly experienced in class actions and mass tort litigation. They have successfully negotiated settlements of numerous class actions and have the knowledge, wisdom, and experience to identify not only an appropriate quantum for settlement,

[92] JKP Affidavit (SA) at para 5, **MR, Vol 1, Tab 3 at 17.**

but also how to craft a settlement agreement to balance the interests of Class Members and ensure all are treated equitably.[93]

Arm's Length Negotiations

78. The fact that negotiations in this action commenced in May 2018 and did not conclude until April 2019 is evidence of the arm's length nature of the negotiations between the parties. When settlement negotiations did not produce a satisfactory resolution prior to October 2018, Class Counsel completed its certification factum and was fully prepared to proceed to a contested certification hearing.[94]

Quantum of the Settlement is Reasonable

79. The quantum of the Settlement Agreement is in a reasonable range for the nature of the Class' injuries, and may plausibly represent as good as or a better outcome than would be achievable at trial. Class Counsel arrived at the settlement quantum for this case based upon the number of Class Members that fit roughly within each of the various identifiable categories surrounding the December 1, 2013 duty to warn date and the general nature of impacts that the increased risk of rapid and premature battery depletion had on the Class Members, discounting for litigation risk and likely take-up rates.[95]

80. There is not yet a large body of case law for medical device class action settlements. The settlement in the *Guidant* defibrillator case is the most directly on point. The settlement in that case was for $3,072,000. Each of 224 eligible explanted class members were entitled to receive a

[93] JKP Affidavit (SA) at para 4, **MR, Vol 1, Tab 3 at 17.**

[94] JKP Affidavit (CFA) at paras 39-40, **MR, Vol 2, Tab 5 at 353.**

[95] JKP Affidavit (SA) at para 69, **MR, Vol 1, Tab 3 at 35.**

payment of $6,000, inclusive of derivative claims, and there was an extraordinary injury fund.[96] No compensation was paid to the balance of the class. $500,000 in costs was paid towards the class counsel's legal fees.

81. One somewhat comparable case is the *Burnett Estate* class action that was settled in British Columbia.[97] The *Burnett Estate* action was a companion action to the Ontario *Andersen* action that failed at trial. 286 individuals were implanted with defective heart valves in British Columbia. A settlement for $2,130,000 (apparently inclusive of legal fees and the balance of administrative costs)was reached, with $1,830,000 going towards a compensation fund, $225,000 to an income loss fund, $50,000 for a psychological injury fund, and $25,000 applying to the costs of notice. A formula was put in place establishing compensation for class members based upon their respective experiences of damage to their heart. Under the terms of the settlement, each Class Member was entitled to $500 of base compensation. This would likely be the extent of recovery for 254 of the 286 Class Members (representing $127,000 of the total settlement). The remaining $1,703,000 was to be distributed to 31 potential Class Members that actually experienced paravalvular leak from their Silzone-coated heart valves, with the majority ($1,007,692.30) likely going to the 5 identified claimants who suffered deaths or major heart damage requiring re-operation (including explantation to remove the defective embedded heart valve).

82. The circumstances of this action differ significantly from *Burnett Estate* justifying a much reduced quantum of recovery per Eligible Explant Claimant, but confirming $500 as a fair quantum for those with no corrective surgery. The evidence and information provided to date suggests that

[96] A copy of the Settlement Agreement will be included in a supplementary affidavit
[97] *Burnett Estate v. St. Jude Medical, Inc.*, 2009 BCSC 82, **BA, Tab 37**, with additional reasons reported at 2009 BCSC 1651 ("*Burnett Estate*"), **BA, Tab 38**.

there have been no Class Members who suffered clinically significant injuries as a result of a defective Defibrillator, with very few reporting syncopal episodes. In addition, heart valves and annuloplasty rings are not intended to be replaced; Defibrillators, on the other hand, are expected to be replaced in 5-7 year increments. Explantation and implantation surgeries are required, as a matter of course, for Class Members who outlive their Defibrillators' expected battery life and the surgery is relatively minor. The *Burnett Estate* action was settled, wisely it turns out, before the *Andersen* action went to trial.

83. Other potentially comparable medical device settlements are the *McSherry*[98] and the *Jones*[99] class actions, both involving defective hip implants that lead to painful complications and a need for revision surgeries and consequential rehabilitation. The settlement provided for up to $97,500 for uncomplicated revision surgery and additional amounts for a total of up to $172,500 depending on complications, how many revisions were required (unilateral versus bilateral), and how long the surgery occurred after implantation. Class Members who did not have revision surgeries prior to a specified date were entitled to $600. An Extraordinary Expense Fund of up to $6,000 per claimant for out-of-pocket expenses and subrogated health care recovery costs of up to $15,000 per claimant was provided.

84. There are important differences between the *McSherry* and *Jones* actions and the present action. A defective hip implant is painful and disabling,[100] impacting the ability of the affected individual to walk or perform basic tasks. Such defects may directly interfere with work and social activities. On the other hand, the Defibrillators, even if potentially defective, did not directly cause

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[98] *McSherry v Zimmer GmbH*, 2016 ONSC 4606 ("*McSherry*"), **BA, Tab 39**.

[99] *Jones v. Zimmer GMBH*, 2016 BCSC 1847 ("*Jones*"), **BA, Tab 40**.

[100] *Jones v. Zimmer GMBH*, 2016 BCSC 1847 at para 6, **BA, Tab 40**.

any physical pain except, perhaps, in rare incidents of syncope or presyncope – and in such situations the pain was caused not by the Defibrillators but by their failure to correct a pre-existing medical condition. A Defibrillator explantation procedure is much less intrusive than a hip replacement and Defibrillators are designed to be replaced on a regular basis. While any surgical procedure may be painful and uncomfortable, Defibrillator replacement surgery and hip replacement surgery are on opposite ends of the spectrum.

85. A recent more comparable case is the *Roveredo*[101] surgical mesh class action settlement, which was approved by Belobaba J in 2013. That breach of duty to warn claim settled for $1,375,000, with a Class of between only 12-15 Class Members. After legal fees, the Class Proceedings Fund levy, and administration costs were deducted, Class Members were anticipated to receive between $15,000 to $40,000 each from the settlement. Belobaba J remarked that this amount was "significant compensation" in the circumstances.[102] There was a risk of significant injury and medical complications for Class Members who had devices that could "buckle". Only implanted individuals who were able to prove that their devices had buckled received compensation.

86. The compensation to Eligible Explant Claimants in this case is less than in the *Roveredo* action – although recovery in the present action is provided to an over-inclusive subclass rather than only to those for whom the defect actually materialized. Compensation of around $9,500 is expected for all qualifying Class Members in the Eligible Explant category who submit claims, and the Referee may award up to $12,500 in additional damages if there are post-explant

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[101] *Roveredo v. Bard Canada*, [2013] O.J. No. 5127 ("*Roveredo*"), **BA, Tab 41**.

[102] *Roveredo v. Bard Canada*, [2013] O.J. No. 5127 at para 13, **BA, Tab 41**.

complications.[103] These amounts are within the same ballpark as the "significant compensation" provided in *Roveredo*, given the comparative levels of pain and discomfort.

87. Another case informing Class Counsel of the appropriate compensation payable to the Eligible Explant Claimants' is the *Elliot* class action.[104] That case involved an outbreak of *C. difficile* at an Ontario hospital which led to the deaths of 91 patients with 132 other patients recovering after experiencing symptoms ranging from mild to severe diarrhea, nausea, vomiting, dehydration, severe pain, fever, and colitis.[105] Baltman J approved a settlement which provided for up to $3,000 per class member that experienced up to 30 days of *C. difficile* symptoms, $10,000 for those that experienced 31 to 90 days, and $15,000 for those that had symptoms last 90 days or more (including those placed on a "Mortality List").[106] The routine surgeries completed by the Class Members, while inconvenient, premature, and sometimes painful, are not on the same scale as the experiences of those suffering from a serious, and potentially fatal, *C. difficile* infection.

88. $500 to the non-explant failure to warn Class Members is generous. A comparator is *Cardozo v. Becton, Dickinson and Company*.[107] In that case, false reports of sexually transmitted diseases were received by some of the class and damages were sought for all class members who received unreliable test results, and had to be retested. The settlement provided $400 for a retest, and an additional $100 if there was a delay in treatment of infection. Those treated wrongly because of false positives also received $500.

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[103] Settlement Agreement, Schedule "F" - Referee's Guidelines, JKP Affidavit (SA), **MR, Vol 1, Tab 3(A)**.

[104] *Elliot v. Joseph Brant Hospital*, 2013 ONSC 124 ("*Elliot*"), **BA, Tab 42.**

[105] *Elliot v. Joseph Brant Hospital*, 2013 ONSC 124 at paras 7-8, **BA, Tab 42**.

[106] *Elliot v. Joseph Brant Hospital*, 2013 ONSC 124 at para 21, **BA, Tab 42.**

[107] *Cardozo v. Becton, Dickinson and Company*, 2005 BCSC 1612 ("*Cardozo*"), **BA, Tab 43.**

89. In *Cardozo*, the Class suffered not only distress from being informed of the faulty results, but also were subjected to further tests and the anxiety of awaiting the results. Here, the Class were told in the Advisories that the incidence of this defect was rare, and surgery was not recommended in most cases. Class members had already assumed the risk of potential device malfunction, including battery failure.

90. The more recent case of *Hunt v Mezentco Solutions Inc.*[108] is also on point regarding psychological injury compensation. There, nearly 1200 class members were underdosed with chemotherapy drugs. The settlement was for $1.8M to the patient class ($1,500 each). There, the Class' anxiety arose from fear of potentially ineffective cancer treatment, where each Class member actually was underdosed. Again, there was both psychological and arguably physical harm suffered by the class.

91. The present settlement is not inconsistent with the existing medical device settlement approval case law. While the quantum payable to Class Members requiring surgical intervention is not as high as the *Burnett Estate*, the *McSherry / Jones*, or the *Roveredo* class actions, there are good reasons for the difference in quantum. The fact that Defibrillators, unlike most other implantable medical devices, are designed routinely to be replaced cannot be overemphasized when assessing the reasonableness of the settlement. Similarly, the high incidence of failures for multiple reasons, including battery failure, is a risk already assumed by the Class. Most Class Members would have tenuous claims under the *Saadati / Mustapha* threshold for damages for anxiety or mental distress. Assessing the litigation risk of proceeding to trial, and comparing the

[108] *Hunt v Mezentco Solutions Inc.*, 2017 ONSC 2140, **BA, Tab 44.**

results in other class action settlements (while acknowledging some critical differences), the settlement is fair and reasonable and ought to be approved.

92. Significantly, a number of other class actions have been commenced against alleged defective ICD device manufacturers and distributors and languished for many years. For example, the *Guidant* class action was certified in 2009[109] and did not settle until December 2013. The *Medtronic* class action was certified in 2007[110] and is as yet unresolved.

Class Communications

93. From the start, Class Counsel and the Plaintiffs publicized the fact of this action. Shirley appeared on a television news broadcast, information about the action appeared in numerous news sources[111], and Class Counsel maintained regular updates to their websites advising of the status of the action.[112] The Class was provided with the short-form notice by mail to their last known address, prior to this settlement approval hearing.[113] The short-form notice sets out the key terms of the Settlement Agreement, the nature of this action, and how to get more information. The Class was provided with full access to the Settlement Agreement, including the Schedules, through both Class Counsel and Epiq's websites.

94. More than 300 Class Members contacted Epiq and Class Counsel to obtain more information and to have their questions answered.[114]

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[109] *Lambert v. Guidant Corporation*, 2009 CanLII 23379 (ON SC) ("*Guidant*"), **BA, Tab 45**.

[110] *Peter v. Medtronic, Inc*., 2007 CanLII 53244 (ON SC), **BA, Tab 46.**

[111] JKP Affidavit (CFA) at para 9, **MR, Vol 2, Tab 5 at 345.**

[112] JKP Affidavit (CFA) at para 6, **MR, Vol 2, Tab 5 at 344.**

[113] JKP Affidavit (CFA) at para 11, **MR, Vol 2, Tab 5 at 345.**

[114] JKP Affidavit (CFA) at para 15, **MR, Vol 2, Tab 5 at 347.**

Opt-Outs and Objectors

95. Epiq has received 21 valid opt-outs, most of which, where a reason for opting out is given, state that the individuals do not wish to participate in the action because they have had no complications with their Defibrillators. Several other opt-outs are from estates of Class Members who advise that the Class Members' death was unrelated to the Defibrillators and that no issues were experienced during the lifetime of the Class Member.[115]

96. To date, Class Counsel has received six written objections to the settlement[116]:

(a) One Class Member advised that he was dissatisfied with the proposed $100 payment for Class Members implanted prior to December, 2013, and indicated that he would be attending at court to speak to the matter.[117]

(b) Another Class Member objected to the quantum of the settlement. His objection relies upon the inaccurate assumption that the settlement fund would be divided among the Class on a pure pro-rata basis, leading to payments of approximately $400 per person. His objection is also based on the mistaken assumption that the Defibrillators do not perform their intended function. This Class Member misunderstood a conversation between his wife and Margaret Waddell, in which Ms. Waddell explained that Eligible Explant Patients could receive a payment in the range of $10,000.[118]

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[115] JKP Affidavit (SA) at para 77, **MR, Vol 1, Tab 3 at 36.**

[116] JKP Affidavit (SA) at paras 78-80, **MR, Vol 1, Tab 3 at 36-37.**

[117] Objections of Michael Hawke, JKP Affidavit (SA), **MR, Vol 1, Tab 3(U)**.

[118] Objection of Scott McConachie, JKP Affidavit (SA), **MR, Vol 1, Tab 3(V)**.

(c) A third class member objects to the settlement failing to distinguish between Eligible Explant Patients whose Defibrillators stopped functioning without any warning and those who were explanted after receiving advance notice of premature battery depletion, as he is of the view that the former will have suffered greater mental distress from their experience. This distinction, while basically inaccurate, would be virtually impossible to establish, since the Defibrillators are programmed to provide a vibratory alert when the battery is running low, and one would have to simply accept the word of the Class member that the vibratory alert did not work. Such a distinction is an invitation to fraudulent claims for higher compensation. A distribution protocol based upon such a distinction would be untenable.[119]

(d) A fourth objection came from the wife of a class member who considers the settlement too low based on the stress and upset she and her husband have suffered.

(e) The fifth simply states the settlement quantum is too low.

(f) The sixth also considers the settlement too low, and without establishing that her son's death relates to the lithium cluster issues, or even an ICD battery failure, sets out his estate expenses.

97. Class Counsel will provide any additional written objections received by them to the Court after the July 29, 2019 deadline elapses, as set out in the Certification Order.

[119] Objection of Jim Millson, JKP Affidavit (SA), **MR, Vol 1, Tab 3(W)**.

B. PROVINCIAL HEALTH INSURERS

98. In *Purdue*, at first instance, the Saskatchewan Court of Queen's Bench refused to approve a settlement agreement because there was no direct evidence that "all provincial and territorial PHIs [had] approved the settlement in accordance with their subrogation legislation."[120] *Purdue* suggests that when the subrogated rights of the PHIs are affected, consultation with the PHIs is required before a class action settlement may be approved. The subrogated rights of the PHIs must be treated as independent interests from the class and their consent must be sought before a court binds them to a settlement.[121]

99. Class Counsel was alert to this decision, and the PHIs were actively involved in the settlement negotiations. Class Counsel sought the consent of the PHIs and involved the PHIs throughout the various stages of the settlement negotiations. The formal Settlement Agreement was not executed until all PHIs communicated their consent to Class Counsel to the terms of the proposed settlement.[122]

100. Class Counsel has received formal written consent to the Settlement Agreement from each of the PHIs.[123]

C. NOTICE PROTOCOL

101. The Plaintiffs seek approval of the Notice Protocol contained in the Settlement Agreement (the "Settlement Notice") and approval to pay notice costs from the Settlement Fund, in accordance

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[120] *Perdikaris v Purdue Pharma Inc.*, 2018 SKQB 86 ("*Purdue*") at para 52, **BA, Tab 1**.

[121] *Perdikaris v Purdue Pharma Inc.*, 2018 SKQB 86 at para 56, **BA, Tab 1**.

[122] JKP Affidavit (SA) at paras 38 -43, **MR, Vol 1, Tab 3 at 27.**

[123] PHIs' Consent, JKP Affidavit (SA), **MR, Vol 1, Tab 3(M)**.

with Sections 19(1) and 20 of the *CPA.*[124] Section 22 of the *CPA* provides this Court has wide discretion to approve a notice plan and to order how notice to the class is to be paid.[125]

102. The requirement to provide notice is not a mere technicality or a formality and the notice must be meaningful and effective.[126] The wording of the notice must take into account the particular context and situation of the class members and be informative, accurate, balanced, and independent, allowing the class members to fully understand how the action affects their rights.[127] The notice must maximize the likelihood that class members will actually receive the notice and a direct mailing to each class member is preferable to advertising or other forms of indirect notice. Nevertheless, the *CPA* provides the court wide discretion to approve a notice plan and what constitutes appropriate notice to the class is dependent upon the circumstances of the particular case and the purpose of the notice.[128]

103. The short-form notice of certification and notice of this settlement and fee approval hearing was mailed to the last known address of each Class Member within 15 days of the Certification Order.[129] Epiq advises that of the 8,937 notices mailed, 1,902 were returned to sender (roughly 21%). 20 notices were sent by email, where a Class Member's email address was known. Epiq is

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[124] S 19(1) and 20, *Class Proceedings Act, 1992*, SO 1992, c 6.

[125] S 22, *Class Proceedings Act, 1992*, SO 1992, c 6

[126] *Fantl v. ivari*, 2018 ONSC 4443 at para 3, **BA, Tab 47**;
Lépine v. Société Canadienne des postes, 2009 SCC 16 at paras 42-43, **BA, Tab 48**.

[127] *Fantl v. ivari*, 2018 ONSC 4443 at paras 11-12, **BA, Tab 47**.

[128] *Fantl v. ivari*, 2018 ONSC 4443 at para 13, **BA, Tab 47**.

[129] JKP Affidavit (CFA) at para 11, **MR, Vol 2, Tab 5 at 36.**

undertaking an internet search to locate, where possible, updated addresses for those Class Members whose addresses are out of date.

104. A national press release was published in English and in French by Class Counsel on May 6, 2016. This press release advised of the Certification Order, key features of the Settlement Agreement, and opt-out rights for Class Members. Links to Class Counsel's websites are provided in the press release.[130] Another press release will be made if the settlement is approved.

105. Class Counsel has published updates to their websites advising of the Certification Order, key features of the Settlement Agreement, and opt-out rights for Class Members. In addition, links to the short and long form certification and settlement approval hearing notices and a full copy of the Settlement Agreement are provided.[131] Further updates will be made if the settlement is approved, including posting the approval order, Notices and claim form.

106. The Settlement Agreement contemplates a similar notice protocol to what was in place for the Certification Notice. Notice is primarily achieved by directly mailing the Settlement Notice to the Class Members' last known valid addresses and by email to any Class Members who have provided an email address to Class Counsel or to Epiq. This provides a meaningful and effective notice of the settlement to 80% of the Class Members – and possibly more if updated contacts are discovered. Additional notice through a press release, website postings, and through newspaper publication, will be employed to get notice to the balance of the Class. In addition, Class Counsel will post the fact of the settlement, with links to their webpages, on their LinkedIn and Twitter

[130] JKP Affidavit (CFA) at para 13, **MR, Vol 2, Tab 5 at 346.**

[131] JKP Affidavit (CFA) at para 13, **MR, Vol 2, Tab 5 at 346.**

accounts, and encourage Class Members to share the information widely, including with their cardiac clinics.

107. As with a notice of certification,[132] the costs associated with a notice plan advising of a settlement ought to be proportional to the settlement. Here almost 80% of the Class Members are receiving direct notice. The costs associated with getting notice to the remaining 20% is estimated to be around $100,000. Expending more of the Class Members' money to try to reach the remaining Class Members directly would be disproportionate.

108. Class Counsel anticipates that the robust notice program proposed will contribute to high take-up rates.

D. DISTRIBUTION PLAN

109. As part of any class action settlement, the representative plaintiffs and class counsel must develop a plan for distributing the proposed settlement to the class. The court's authority to approve a distribution plan derives from its jurisdiction to approve a settlement.[133] Section 26(1) of the *CPA*[134] empowers the court to "direct any means of distribution that it considers appropriate."[135]

110. A distribution plan is appropriate for court approval "if it is fair, reasonable, and in the best interest of the class."[136] As with a settlement, a distribution plan need not be perfect; however, it

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[132] S 17(3), *Class Proceedings Act, 1992*, SO 1992, c 6.

[133] *Mancinelli v. Royal Bank of Canada*, 2018 ONSC 4192 at para 49, **BA, Tab 49**.

[134] S 26(1), *Class Proceedings Act, 1992*, SO 1992, c 6.

[135] *Eidoo v. Infineon Technologies AG*, 2015 ONSC 5493 at para 25, **BA, Tab 50**.

[136] *Mancinelli v. Royal Bank of Canada*, 2018 ONSC 4192 at para 49, **BA, Tab 49**;

must "fall within a zone of reasonableness."[137] The court is to review the distribution plan on an objective standard, accounting for "the inherent difficulty in crafting a universally satisfactory settlement."[138] A distribution plan does not need to treat all class members identically and it may be appropriate to distinguish between different types of claimants.[139] When determining what is fair and reasonable, the court may consider "what is economical and practical on the facts of a particular case."[140]

111. The Distribution Plan is addressed above at paragraphs 36-42 and provided in the Settlement Agreement at Schedules G and H. It includes provisions for unexpected claimants, including claims by Derivative Class Members where a Patient Class Member died or experienced complications following surgery. The Distribution Plan accounts for the possibility that there may be Class Members who are not included in the Class Members List provided by the Defendants pursuant to the Certification Order.

112. The Distribution Plan does not treat all Class Members identically. Not all Class Members have suffered identical damages or have equally strong legal claims. Therefore some reasonable

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Zaniewicz v. Zungui Haixi Corporation, 2013 ONSC 5490 at para 59, **BA, Tab 51**.

[137] *Mancinelli v. Royal Bank of Canada*, 2018 ONSC 4192 at para 50, **BA, Tab 49**;
Rosen v. BMO Nesbitt Burns Inc., 2016 ONSC 4752 at para 12, **BA, Tab 52**;
Leslie v. Agnico-Eagle Mines, 2016 ONSC 532 at para. 8, **BA, Tab 53.**

[138] *Mancinelli v. Royal Bank of Canada*, 2018 ONSC 4192 at para 50, **BA, Tab 49**;
Parsons v. Canadian Red Cross Society, [1999] OJ No 3572 (SCJ) at para 80, **BA, Tab 7**.

[139] *Mancinelli v. Royal Bank of Canada*, 2018 ONSC 4192 at para 51, **BA, Tab 49**;
Eidoo v. Infineon Technologies AG, 2015 ONSC 5493 at para 25, **BA, Tab 50**.

[140] *Mancinelli v. Royal Bank of Canada*, 2018 ONSC 4192 at para 49, **BA, Tab 49**;
Pro-Sys Consultants Ltd. v. Infineon Technologies AG, 2014 BCSC 1936 at para 34, **BA, Tab 54**;
Markson v. MBNA Canada Bank, 2012 ONSC 5891, **BA, Tab 55**.

and justifiable distinctions are appropriate. A simple pro-rata distribution to all Class Members does not capture important differences between those Class Members whose Defibrillators actually failed or who replaced their Defibrillators following the October 2016 Advisory.

113. The distinctions in the Distribution Plan provide for a number of different circumstances and ensure that those who suffered most, or who accumulated the largest expenses, have preferential treatment in the distribution.

E. CLAIMS ADMINISTRATION AND REFEREE

114. A claims administrator is appropriate if it is reputable and experienced in administrating class action settlements, and if the claims administrator's proposed fees are reasonable.[141] A further factor in favour of such an appointment may be the proposed claims administrator's earlier involvement and familiarity with the action.[142]

115. Epiq is an experienced and well-respected Claims Administrator. Class Counsel sought a number of proposals prior to selecting Epiq for this action. Epiq's proposed fees are reasonable and, in the opinion of Class Counsel, represent the best value to the Class.

116. Class Counsel chose the Honourable Colin Campbell as the claims Referee. Mr. Campbell has extensive litigation and case management experience in his capacity as both a judge for 15 years with the Superior Court of Justice of Ontario and as a lawyer for over 30 years. His office (Amicus Chambers) offers services in both English and French. He is more than capable of making

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[141] *Green v. Tecumseh Products of Canada Limited*, 2016 BCSC 217 at para 49, **BA, Tab 56**.

[142] *Donohue v Baja Mining*, 2016 ONSC 1569 at para 38, **BA, Tab 57**.

reasoned and impartial decisions on the eligibility of Class members to an award under the Distribution Protocol, as may be required.

F. *CY-PRÈS* DISTRIBUTION

117. The jurisdiction to order a *cy-près* distribution derives from the court's authority under Section 29(2) of the *CPA*.[143] While a *cy-près* distribution is not explicitly contemplated in the *CPA* as part of a settlement,[144] Section 26(4) does provide the court with broad discretion, including making a distribution to non-class members, that "may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members."[145]

118. A *cy-près* award is appropriate when: (1) it is not practical to distribute the benefits in any other manner; (2) a direct distribution would be uneconomical considering the modest damages and the fact that there is no cost effective way of locating the settlement class members; and (3) the *cy-près* distribution is directly related to the issues in the lawsuit and will directly benefit persons in similar circumstances to the class members.[146] As stated by the Law Reform

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[143] S 29(2), *Class Proceedings Act, 1992*, SO 1992, c 6;
Slark v. Ontario, 2017 ONSC 4178 at paras 35-36, **BA, Tab 58**;
Carom v. Bre-X Minerals Ltd., 2014 ONSC 2507 at para 141, **BA, Tab 59**.

[144] *Slark v. Ontario*, 2017 ONSC 4178 at para 35, **BA, Tab 58**.

[145] S 26(4), *Class Proceedings Act, 1992*, SO 1992, c 6;
Cassano v. Toronto Dominion Bank, 98 O.R. (3d) 543, **BA, Tab 60**;
Gilbert v. CIBC (2004), 3 CPC (6th) 35 (SCJ), **BA, Tab 61**.

[146] *Park v. Nongshim Co., Ltd.*, 2019 ONSC 1997 at para 93, **BA, Tab 62**;
Ali Holdco Inc. v. Archer Daniels Midland Company, 2019 ONSC 131 at para 46, **BA, Tab 63**;
Cass v. WesternOne Inc., 2018 ONSC 4794 at para 91, **BA, Tab 4**;
Serhan (Trustee of) v. Johnson & Johnson, 2011 ONSC 128 at paras 58-59, **BA, Tab 25**.

Commission of Ontario, the purpose of a *cy-près* distribution is to approach "as nearly as possible some form of recompense for injured class members."[147]

119. Glustein J, in *Ali Holdco Inc.*, summarized the relevant principles to consider when considering approval of a *cy-près* distribution:[148]

> (i) A *cy-près* distribution must be fair, reasonable and in the best interests of the class;
>
> (ii) A reasonable number of class members who would not otherwise receive monetary relief must benefit from the order;
>
> (iii) *Cy-près* distributions are generally intended to meet at least two of the principal objectives of class actions. They are meant to enhance access to justice by directly or indirectly benefiting class members, and they may provide behaviour modification by ensuring that the unclaimed portion of an award or settlement is not reverted to the defendant;
>
> (iv) A *cy-près* distribution should be justified within the context of the particular class action for which settlement approval is being sought, and there should be some rational connection between the subject matter of a particular case, the interests of class members, and the recipient or recipients of the *cy-près* distribution; and
>
> (v) A *cy-près* distribution should not be used by class counsel, defence counsel, the defendant, or a judge as an opportunity to benefit charities with which they may be associated or which they may favour. To maintain the integrity of the class action regime, the indirect benefits of the class action should be exclusively for the class members.

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[147] Ontario Law Reform Commission, *Report on Class Actions*, Vol 2. (Toronto: Ministry of the Attorney General, 1982) at 573 cited in *Carom v. Bre-X Minerals Ltd.*, 2014 ONSC 2507, **BA, Tab 59**.

[148] *Ali Holdco Inc. v. Archer Daniels Midland Company*, 2019 ONSC 131 ("*Ali Holdco Inc*") at para 47, **BA, Tab 63** (citations omitted) citing *Slark v. Ontario*, 2017 ONSC 4178 at paras 36-40, **BA, Tab 58**;

Park v. Nongshim Co., Ltd., 2019 ONSC 1997 at para 94, **BA, Tab 62.**

120. While, as a general rule, "*cy-près* distributions should not be approved where direct compensation to class members is practicable,"[149] there are circumstances where it is practical and reasonable to order a *cy-près* distribution (such as when there are limited funds available, problems identifying or verifying the status of class members). A *cy-près* distribution is particularly reasonable when a distribution plan ends after a stipulated period and there is an incomplete distribution of all of the settlement funds available.[150] In such a situation, the residue of the settlement will likely be too small to justify the costs of distribution to the Class members but should, nevertheless, be used for their benefit rather than reverting to the defendants.

121. The Settlement Agreement is structured to provide direct compensation to the Class Members of the full Net Settlement Fund, less administration costs. A *cy-près* distribution is contemplated only for the remaining funds from stale-dated cheques and *de minimus* administrative holdback.

122. The *cy-près* award contemplated in this settlement is a "mop up" award, designed to ensure that small, unclaimed or excess amounts work to the benefit of the Class. Class Counsel contemplates that any *cy-près* amount will be minimal and, consequently, the administration costs of distributing the small remaining amount to Class Members may exceed the value of the amounts to distribute.

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[149] *Carom v. Bre-X Minerals Ltd.*, 2014 ONSC 2507 at para 124, **BA, Tab 59**;
Cassano v. Toronto Dominion Bank, 98 O.R. (3d) 543 at para 17, **BA, Tab 60**.

[150] As, for instance, was recently approved in *Micevic v. Johnson & Johnson*, 2019 ONSC 665, **BA, Tab 64**.

123. The Heart and Stroke Foundation is the proposed *cy-près* beneficiary for this action.[151] It has national reach and is dedicated to fighting heart disease in Canada. As all Class Members suffer from heart conditions necessitating the use of Defibrillators, there is no question that the Heart and Stroke Foundation is a charity that will work in the interests of the Class Members. The Heart and Stroke Foundation has confirmed that it is willing to accept any *cy-près* award provided to it.

G. HONORARIA APPROVAL

124. A representative plaintiff may receive an honorarium, on a *quantum meruit* basis, where he or she "rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class."[152] While the case law suggests that an honorarium should be infrequent,[153] the award may be made where the representative plaintiff "has made an exceptional contribution that has resulted in success for the class."[154]

125. When determining whether to award an honorarium, and the amount of such an honorarium, the court may consider, amongst other factors: (a) active involvement in the initiation of the litigation and retainer of counsel; (b) exposure to a real risk of costs; (c) significant personal

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[151] JKP Affidavit (SA) at paras 74-75, **MR, Vol 1, Tab 3 at 36.**

[152] *Hodge v. Neinstein*, 2019 ONSC 439 at para 48, **BA, Tab 3**;

Windisman v. Toronto College Park Ltd., [1996] OJ No 2897 at para 28 (Gen Div), **BA, Tab 65**.

[153] *Hodge v. Neinstein*, 2019 ONSC 439 at para 48, **BA, Tab 3**;

McCarthy v. Canadian Red Cross Society, [2007] O.J. No. 2314 (SCJ), **BA, Tab 28**.

[154] *Hodge v. Neinstein*, 2019 ONSC 439 at para 49, **BA, Tab 3**;

Markson v. MBNA Canada Bank, 2012 ONSC 5891 at paras. 55-71, **BA, Tab 55**;

Toronto Community Housing Corp. v. ThyssenKrupp Elevator (Canada) Ltd., [2012] O.J. No. 5495, **BA, Tab 66**.

hardship or inconvenience in connection with the prosecution of the litigation; (d) time spent and activities undertaken in advancing the litigation; (e) communication and interaction with other class members; and (f) participation at various stages in the litigation, including discovery, settlement negotiations and trial.[155]

126. Courts in Ontario are increasingly noting the importance of having real and engaged representative plaintiffs (rather than a "string-puppet" of class counsel[156]). While a representative plaintiff ought not to be placed in a "privileged or superior position to his or her fellow Class Members", recognizing representative plaintiffs who have gone over and above their duties to the Class through a meaningful honorarium is a justified and positive development in the class action jurisprudence. Furthermore, the potential for such honoraria facilitates access to justice by providing some incentive for representative plaintiffs to rise above ordinary expectations and take strong and proactive steps to act for the class.

127. Class Counsel endorses Shirley and Roland's request for an honorarium in this action and proposes a modest honorarium of $5,000 each.[157]

128. After receiving the Health Canada Advisory in October 2016, Shirley and Roland actively sought out counsel who could assist them in commencing a class action and were referred by other lawyers to Margaret Waddell. This action started as a direct consequence of Shirley and Roland identifying a potential mass wrong and seeking to obtain compensation, not merely for themselves,

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[155] *Hodge v. Neinstein*, 2019 ONSC 439 at para 50, **BA, Tab 3**;
Robinson v. Rochester Financial Ltd., [2012] O.J. No. 534 at paras 26-44, **BA, Tab 67**.

[156] *Sondhi v. Deloitte Management Services LP*, 2018 ONSC 271 at para 44, **BA, Tab 68**.

[157] JKP Affidavit (CFA) at para 47, **MR, Vol 2, Tab 5 at 357.**

but also for the other Class Members, despite their advanced ages and physical frailties, and despite the public notoriety it entailed.[158]

129. Immediately after this action was started, Shirley participated in a television interview with CTV news as part of an investigative report. This allowed Shirley to get the message out to affected Class Members that a proposed class action was commenced and that she would be seeking to hold St. Jude responsible for issues with the Defibrillators and to obtain compensation for the class.[159]

130. Shirley and Roland have participated in this litigation at all stages. In particular, Shirley, who is in fragile health, participated in a lengthy, and very emotional, cross-examination on her affidavit in support of the certification motion. Roland attended at this examination as well and has supported Shirley at all times in the litigation.[160]

131. Shirley and Roland met with Class Counsel on numerous occasions, both at their home in Port Hope and at Waddell Phillips' office in Toronto, to discuss the case, provide background information, assist in documentary production, swear affidavits, obtain updates on the action, and provide instructions to Class Counsel.[161]

132. Shirley and Roland were asked to review, and did review, several volumes of documentation completed for the certification motion and for this settlement approval motion in

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[158] JKP Affidavit (CFA) at para 46 (a), **MR, Vol 2, Tab 5 at 355.**

[159] JKP Affidavit (CFA) at para 46 (d), **MR, Vol 2, Tab 5 at 355.**

[160] Affidavit of Shirley and Roland Houle at para 26 (c), **MR, Vol 2, Tab 4 at 322.**

[161] Affidavit of Shirley and Roland Houle at para 26 (f), **MR, Vol 2, Tab 4 at 322.**

order to provide instructions to Class Counsel and to assist counsel in providing evidence to this Court through their affidavits.[162]

133. During settlement discussions, Shirley and Roland reviewed settlement discussion developments and communicate their thoughts and instructions to Class Counsel. They were required to understand, and gave instructions on, the subtle ways that different Class Members may be impacted by different proposed settlement distributions.[163]

134. Class Counsel is unaware of any other Class Members who were willing to act as representative plaintiffs or who expressed an interest in commencing a class proceeding against the Defendants. If not for the Houles, this action would not have been started and the Class would have received no compensation.

135. This litigation caused Shirley and Roland to open their private lives up to public scrutiny and to provide very personal information, including medical information, as evidence to the Court.[164] Without providing this personal information, the action could not have succeeded. As a result of Shirley and Roland's efforts, no other Class Members will have to open their personal lives and private health information to public scrutiny.

136. The Houles proceeded with this litigation in the absence of litigation funding after a proposed litigation funding agreement was not approved without significant changes. They relied upon the undertakings of Class Counsel to provide an indemnity for adverse costs and to cover the

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[162] Affidavit of Shirley and Roland Houle at para 26 (g), **MR, Vol 2, Tab 4 at 323.**

[163] Affidavit of Shirley and Roland Houle at para 26 (g), **MR, Vol 2, Tab 4 at 323.**

[164] Affidavit of Shirley and Roland Houle at para 26 (c), **MR, Vol 2, Tab 4 at 322.**

necessary disbursements.[165] While the Houles were not necessarily in a financial risk, they trusted in Class Counsel's undertakings and promises.

137. An honorarium of $5,000 is therefore appropriate in this case and rewards Shirley and Roland for the significant efforts that they took on behalf of almost 9,000 Class Members. Recognition of their efforts through an honorarium of $5,000 each is consistent with the approach taken and quanta awarded by this Court in recent cases such as *Romeo*[166], *Hodge*[167], and *Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund*[168].

H. COUNSEL FEE APPROVAL

138. Class Counsel moves for approval of the Retainer Agreement and approval of their legal fees in the amount of $1,147,500, HST in the amount of $149,175, and its disbursements in the amount of $75,000 (a total of $1,371,675). This is a contingency fee of 27% of the total Settlement

[165] JKP Affidavit (CFA) at para 42, **MR, Vol 2, Tab 5 at 354**.

[166] *Romeo v. Ford Motor Co.*, 2019 ONSC 1831 ("*Romeo*"), **BA, Tab 27** (an honorarium of $7,500 was awarded to the lead representative plaintiff and $5,000 to the other five representative plaintiffs).

[167] *Hodge v. Neinstein*, 2019 ONSC 439 ("*Hodge*"), **BA, Tab 3** (an honorarium of $10,000 for the representative plaintiff was approved).

[168] *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.*, 2018 ONSC 6447 ("*Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund*"), **BA, Tab 69** (an honorarium of $10,000 per representative plaintiff was approved)

Fund, representing a multiplier of less than 1.5 on docketed time.[169] Class Counsel submits that this fee request is fair and reasonable in all of the circumstances.

Counsel Fee Approval Legal Principles

139. Section 32 of the *CPA* provides that class counsel may not collect a fee in accordance with a retainer agreement unless the agreement is approved by the court. Ultimately the court has the authority to determine the amount to which class counsel is entitled for legal fees. Section 33 of the *CPA* allows class counsel to enter into a contingency fee arrangement for payment of its fees for a class proceeding.

140. On a fee approval motion, the basic test is whether class counsel's proposed fees are fair and reasonable, in all of the circumstances.[170] To determine whether a fee is fair and reasonable, the court undertakes an analysis of the risk undertaken by class counsel and the results achieved for the class.[171] Factors relevant when assessing the reasonableness of class counsel's fees include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class

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[169] JKP Affidavit (CFA) at paras 23-25, **MR, Vol 2, Tab 5 at 354.**

[170] *Lavier v MyTravel Canada Holidays Inc.*, 2011 ONSC 1222, at para 32, **BA, Tab 13**;
Charette v. Trinity Capital Corporation, 2019 ONSC 3153 at para 80, **BA, Tab 21**;
Cass v. Westernone, 2018 ONSC 4794 at para 117, **BA, Tab 4**;
Parsons v. Canadian Red Cross Society (2000), 49 OR (3d) 281 (SCJ) at paras 13-14 and 56, **BA, Tab 70**;
Hodge v. Neinstein, 2019 ONSC 439 at para 44, **BA, Tab 3**.

[171] *Lavier v MyTravel Canada Holidays Inc.*, 2011 ONSC 1222, at para 32, **BA, Tab 13**;
Hodge v. Neinstein, 2019 ONSC 439 at para 44, **BA, Tab 3**;
Parsons v. Canadian Red Cross Society, (2000), 49 OR (3d) 281 (SCJ) at para 13, **BA, Tab 70**;
Smith v. National Money Mart, 2010 ONSC 1334 at paras 19-20, varied 2011 ONCA 233, **BA, Tab 71**;
Fischer v. I.G. Investment Management Ltd., [2010] OJ No 5649 (SCJ) at para 25, **BA, Tab 72**.

counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.[172]

141. There is no one correct level for fees and, as with a settlement approval, the fees must fall within a zone of reasonableness.[173] If approving a fee pursuant to a contingency agreement, the court must consider all the relevant factors and circumstances and determine whether "the fee fixed by the agreement is reasonable and maintains the integrity of the profession."[174]

142. In *Cannon*, Belobaba J established the principle that a contingency fee of up to 33% is presumptively valid and enforceable, provided that such an arrangement is "fully understood and accepted by the representative plaintiffs."[175] As noted by Strathy J in *Abdulrahim*, "[a] contingency fee of one-third is standard and has become common place in personal injury litigation in this province for many years. It has come to be regarded by lawyers, clients and the courts as a fair

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[172] *Hodge v. Neinstein*, 2019 ONSC 439 at para 45, **BA, Tab 3**;
Cass v. Westernone, 2018 ONSC 4794 at para 118, **BA, Tab 4**;
Silver v. Imax Corp., 2016 ONSC 403 at para 41, **BA, Tab 20**;
Smith v. National Money Mart, 2010 ONSC 1334, varied 2011 ONCA 233, **BA, Tab 71**;
Fischer v. I.G. Investment Management Ltd., [2010] OJ No 5649 (SCJ) at para 28, **BA, Tab 72**.

[173] *Micevic v. Johnson & Johnson*, 2019 ONSC 665, **BA, Tab 64**;
Smith v National Money Mart, 2010 ONSC 1334 at para 19, **BA, Tab 71**.

[174] *Hodge v. Neinstein*, 2019 ONSC 439 at para 46, **BA, Tab 3**;
Commonwealth Investors Syndicate Ltd. v. Laxton, [1994] BCJ No 1690 (CA) at para 47, **BA, Tab 73**.

[175] *Cannon v. Funds for Canada Foundation*, [2013] O.J. No. 5825 at para 8, **BA, Tab 74**;
Cass v. Westernone, 2018 ONSC 4794 at para 125, **BA, Tab 4**.

arrangement… taking into account the risks and rewards of such litigation"[176] This presumption, however, does not apply to "mega-fund" cases or cases involving settlements of more than $50 million.[177] This action is not a mega-fund case.

143. The presumptive validity of the fee may be rebutted where there is evidence that: (1) there is a lack of full understanding or true acceptance on the part of the representative; (2) the agreed to contingency amount is excessive; or (3) the legal fees awarded are so large as to be unseemly or otherwise unreasonable.[178] None of these factors apply here, as addressed below.

144. The policy behind awarding a contingency fee, and part of the explanation for the presumptive validity advocated by Belobaba J in *Cannon*, is that such arrangements provide access to justice by encouraging class counsel to take on the financial and time risks associated with class action litigation. The opportunity for a meaningful fee "must not be a false hope"[179] and the *CPA* explicitly endorsed contingency fee arrangements to incentivize class counsel to take on class proceedings – particularly when there is a real risk that they may never be paid for their time or reimbursed for their disbursements.[180] Awarding a contingency fee rather than fees based upon a "multiplier" further incentivizes early settlement and rewards efficiently achieved positive results

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[176] *Abdulrahim v. Air France*, [2011] O.J. No. 326 at para 13, **BA, Tab 75**;
Cass v. Westernone, 2018 ONSC 4794 at para 124, **BA, Tab 4**.

[177] *Brown v. Canada (Attorney General)*, [2018] O.J. No. 3286 at para 56, **BA, Tab 76**.

[178] *Cannon v. Funds for Canada Foundation*, [2013] O.J. No. 5825 at para 9, **BA, Tab 74**;
Cass v. Westernone, 2018 ONSC 4794 at para 126, **BA, Tab 4**.

[179] *Gagne v. Silcorp Limited* (1998), 41 OR (3d) 417 (CA) at para 14, **BA, Tab 77**;
Cass v. Westernone, 2018 ONSC 4794 at para 120, **BA, Tab 4**.

[180] *Cass v. Westernone*, 2018 ONSC 4794 at para 121, **BA, Tab 3**;
Parsons v. Canadian Red Cross Society (2000), 49 OR (3d) 281 (SCJ) at para 56, **BA, Tab 70**.

for the class.[181] Class action fee approval hearings are therefore driven both by the particular circumstances of the case before the court and the larger access to justice policy considerations which seek to incentivize class counsel taking future cases.

Presumptive Validity of the Contingency Fee Retainer Agreement

145. Under the terms of the Retainer Agreement, Class Counsel was entitled to a 33% contingency fee, plus taxes and disbursements, in the event that the action was successful and the Class obtained recovery.[182] The Retainer Agreement is therefore presumptively valid and should be enforced by the Court unless there are circumstances which detract from the Retainer Agreement's presumptive validity.

146. The Plaintiffs fully understood the Retainer Agreement. Notably, the Plaintiffs obtained independent legal advice from Jacqueline Horvat on July 20, 2017 as to the nature and terms of the Retainer Agreement in the context of obtaining advice for a proposed funding agreement.

147. The contingency amount agreed to by the Plaintiffs in the Retainer Agreement is not excessive and is in keeping with standard contingency rates in other class actions and in individual civil litigation in Ontario.[183]

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[181] *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada* (1998), 40 OR (3d) 83 (Gen Div) at para 11, **BA, Tab 78**;

Cass v. Westernone, 2018 ONSC 4794 at para 122, **BA, Tab 4**;

Osmun v. Cadbury Adams Canada Inc., 2010 ONSC 2643 at paras 21-22, **BA, Tab 22**.

[182] JKP Affidavit (CFA) at para 21, **MR, Vol. 2, Tab 5 at 348**.

[183] JKP Affidavit (CFA) at para 21, **MR, Vol. 2, Tab 5 at 348**.

148. Nevertheless, the contingency amount requested by Class Counsel is 27% of the $4,250,000 settlement.[184] This represents a significant reduction of the fee to which Class Counsel were entitled under the, presumptively valid, Retainer Agreement amount of 33%. Costs in the amount of $750,000 will be paid by the Defendants and will reduce the total fees paid by the Class. Class Counsel is therefore asking for $621,675 from the $4,250,000 settlement to cover the balance of its costs, disbursements, and taxes – an amount less than 15% of the Settlement Fund.

149. In the circumstances of this case, the legal fees requested are not extraordinarily large or unseemly.[185] Class Counsel litigated this action to the very doorsteps of the Court for a contested certification motion and expended a significant number of hours doing so. By the time settlement was reached, some of the heaviest lifting in the action, other than a trial of the common issues, was already completed. Cross-referencing Class Counsel's contingency fee against the value of its docketed hours reveals that the 27% contingency fee represents a multiplier of less than 1.5 on its hours and demonstrates that the fees requested are reasonable.

Factors in Support of Class Counsel's Proposed Fees

(a) Legal and Factual Complexity

150. This action was legally and factually complex. In its initial (contested) certification factum, Class Counsel reviewed, at length, the emerging law under the duty to warn and the liability for medical device manufacturers, designers, and distributors. The complexities and movement in this

[184] JKP Affidavit (CFA) at para 23, **MR, Vol. 2, Tab 5 at 349**.

[185] In fact, the fees requested fall in line with the average fees identified in Professor Catherine Piché's, "Class Action Value", (2018) 19 *Theoretical Inquiries* 261, **BA, Tab 2**. At 292 Professor Piché provides a table (Table 1) outlining the average attorney fees payable to Class Counsel in cases settled for around $5,000,000. The amount requested by Class Counsel is consistent with amounts awarded, on average, in cases settling for similar amounts.

area of the law are perhaps best demonstrated by this Court's decision in the trial decision in *Andersen* and, more recently, in the certification decision in *Vester*.[186] The law of negligence for medical device manufacturers and distributors is evolving and it is not clear where Ontario's courts will come down in the future – particularly for the emerging duty to warn.

151. Medical devices, particularly defibrillators, are at the forefront of modern technology. Class Counsel needed to rely heavily upon expert witnesses to understand the basics of the lithium battery technology employed in the Defibrillators, distill and gather the necessary information, and then create an evidentiary record for the Court's use at the certification motion. It takes significant time to obtain even a basic understanding of the chemical and physical sciences that reveal the design problems with the Defibrillators' lithium batteries, and the impact that would have on Class Members.

(b) Risks and Responsibility Assumed by Class Counsel

152. Class Counsel identified that this action was risky from its inception. At the outset, Class Counsel sought litigation funding, which was conditionally approved by the Court, but the funder did not agree to the required changes. Instead, an undertaking was provided to the Plaintiffs that Class Counsel would pay any adverse costs awards made against the Plaintiffs by the Court.[187] By not proceeding with litigation funding, the Class will receive a significantly larger percentage of the overall settlement (10% of the net settlement, for instance, would have been payable if the Class Proceedings Fund were to have funded this action).

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[186] *Vester v. Boston Scientific Ltd.*, 2015 ONSC 7950 ("*Vester*"), **BA, Tab 32**.

[187] JKP Affidavit (CFA) at para 22, **MR, Vol. 2, Tab 5 at 348**.

153. By bearing the tens of thousands of dollars in disbursements themselves, and undertaking to cover any adverse costs awarded on a failed certification motion, Class Counsel obtained additional recovery for the Class, while risking their firms' resources – a consideration of particular importance for Waddell Phillips which is a newly formed small firm of only seven lawyers.[188] In October 2018, when there was every indication that a contested certification motion would proceed, the full risk of the litigation rested on Class Counsel.

154. Certification is never a sure bet and, as demonstrated in the recent *Kuiper* decision, medical device class actions may not even be certified, let alone succeed at trial.[189] Here, the Defendants delivered a huge record in response to the certification motion detailing many of their arguments not only regarding certification, but also on the merits. The Defendants raise many strong arguments about why the Class suffered no loss because the risk of premature battery depletion was an accepted risk from the outset.

(c) Importance to the Class

155. This class action was of importance to the Class as it involved medical devices, the Defibrillators, that are of central importance to the health of each Class Member. The Class Members require the Defibrillators to maintain a healthy heart rhythm and to provide a key failsafe against cardiac failure and death. Each Class Member was subject to the advisory and each Class Member likely felt some measure of anxiety and concern upon learning of a risk of failure of the Defibrillators without warning.

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[188] JKP Affidavit (CFA) at para 42, **MR, Vol. 2, Tab 5 at 354**.

[189] *Kuiper v. Cook (Canada) Inc.*, [2018] O.J. No. 5666 ("*Kuiper*"), **BA, Tab 79**;
also see *O'Brien v Bard Canada Inc.*, [2015] O.J. No. 1892, **BA, Tab 80**.

(d) Skill and Competence of Class Counsel and Results Achieved

156. For reasons described above, and particularized in greater detail in the Affidavits of John Kingman Phillips provided for this motion, this was an action in which liability and damages were uncertain. Class Counsel, nevertheless, negotiated a settlement that ensures that every Class Member obtains some level of compensation under the settlement.

157. The competency of Class Counsel is reflected in the record and written submissions prepared for the certification motion, together with the structure and terms of the Settlement Agreement. Class Counsel vigorously fought to have this action certified and kept this action on a path to a successful certification while also pursuing settlement. By pushing certification forward, Class Counsel was able to exert the pressure necessary to obtain a good settlement for the Class.

158. The $5,000,000 settlement is a very good result given that there are few, if any, reports of serious injuries in Canada as a result of the Defibrillators' lithium cluster formation issues. There are no reported deaths. The settlement provides an acceptable level of compensation for the PHIs and ensures that those few Class Members who were required to replace their Defibrillators prematurely, or who reasonably elected to do so, obtain compensation for pain and suffering commensurable with what they might have expected to obtain if successful on liability at trial. The settlement compensates the rest of the Class whose compensable claims are legally tenuous as well.

(e) Expectations of the Class for Legal Fees

159. Class Counsel's requested fee of 27%, at a multiplier of under 1.5, is in keeping with recent case law. In *Roveredo v. Bard Canada,*[190] for instance, a medical devices class action settled, on consent, prior to a certification motion, and class counsel's contingency fee was approved at 30% on a settlement of $1.375 million. Other recent non-mega-fund settlement approvals which awarded similar contingency fees or multipliers prior to a contested certification hearing include:

(a) *Sheridan Chevrolet v. Denso Corporation,*[191] a defective car parts class action in which Class Counsel fees of $3,370,881.39 were approved as part of a $13,483,524 settlement (25%);

(b) *Romeo v. Ford Motor Co.,*[192] a defective car parts class action in which counsel fees of $3,000,000 were approved at a multiplier of 1.85 on docketed hours;

(c) *Kafai v. Nature's Touch Frozen Foods Inc*.,[193] a product liability class action in which counsel fees of 25% were approved on a total settlement of $3,000,000; and

(d) *Jones v. Zimmer GMBH,*[194] referred to and considered in greater detail above, which was a faulty medical device class action which settled on a "claims-made" basis, with counsel fees approved at 33% of all class members approved claims. The court noted,

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[190] *Roveredo v. Bard Canada*, [2013] O.J. No. 5127, **BA, Tab 41**.

[191] *Sheridan Chevrolet v. Denso Corporation et al*, [2018] O.J. No. 4966, **BA, Tab 17**.

[192] *Romeo v. Ford Motor Co.*, 2019 ONSC 1831, **BA, Tab 27**.

[193] *Kafai v. Nature's Touch Frozen Foods Inc*., 2019 ONSC 167, **BA, Tab 82**.

[194] *Jones v. Zimmer GMBH*, 2016 BCSC 1847, **BA, Tab 40**.

in that case, that "[t]he contingency fee of 33.33% is within the typical range for class actions in British Columbia."[195]

(f) Opportunity Cost to Class Counsel

160. Class Counsel, to date, has expended approximately $740,000 of time in prosecuting this action for the Class and anticipates expending an additional $75,000 of time will be spent completing the settlement of this action. These are hours that Class Counsel could have devoted to other class actions or to other, non-contingency based, litigation. Class Counsel ran a serious risk that they would not be paid for the hours expended on this action.

(g) Objections

161. To date, only one objection to the legal fees has been received, simply stating that the fees are "very high."[196]

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[195] *Jones v. Zimmer GMBH*, 2016 BCSC 1847 at para 60, **BA, Tab 40** referring to *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2014 BCSC 1936, **BA, Tab 54** and *Stanway v. Wyeth Canada Inc.*, 2015 BCSC 983, **BA, Tab 83**.

[196] JKP Affidavit (CFA) at para 18, **MR, Vol 2, Tab 5 at 347-348**.

PART IV – RELIEF REQUESTED

162. For these reasons, the Plaintiffs and Class Counsel respectfully request approval of the Settlement Agreement, honourarium, and counsel fees as requested.

All of which is respectfully submitted this 25th day of July, 2019

MARGARET L. WADDELL
Waddell Phillips Professional Corporation

PAUL MILLER
Howie Sacks & Henry LLP

Lawyers for the Plaintiffs

SCHEDULE "A" – INDEX OF AUTHORITIES

1. *Perdikaris v Purdue Pharma Inc.*, 2018 SKQB 86
2. Catherine Piché, "Class Action Value", (2018) 19 *Theoretical Inquiries* 261
3. *Hodge v. Neinstein*, 2019 ONSC 439
4. *Cass v. WesternOne Inc.*, 2018 ONSC 4794
5. *Fantl v. Transamerica Life Canada*, [2009] OJ No 3366
6. *Baxter v. Canada (Attorney General)*, (2006) 83 OR (3d) 481
7. *Parsons v. Canadian Red Cross Society*, [1999] OJ No 3572
8. *Dabbs v. Sun Life Assurance*, [1998] OJ No 1598 (Gen Div)
9. *Sheridan Chevrolet Cadillac v. T. Rad Co*., 2018 ONSC 3786
10. *Seed v. Ontario*, 2017 ONSC 3534
11. *Clegg v HMQ Ontario*, 2016 ONSC 2662
12. *Dabbs v Sun Life Assurance Company of Canada*, [1998] OJ No 2811 (Gen Div)
13. *Lavier v MyTravel Canada Holidays Inc*., 2011 ONSC 1222
14. *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd*., [2005] OJ No 1118 (SCJ)
15. *Welsh v. Ontario*, 2018 ONSC 3217
16. *Ontario New Home Warranty Program v. Chevron Chemical Co.*, [1999] OJ No 2245 (SCJ)
17. *Sheridan Chevrolet v Furukawa Electric et al*, 2016 ONSC 729
18. *Bancroft-Snell v Visa Canada Corporation*, 2015 ONSC 7275
19. *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corporation*, 2014 ONSC 5812
20. *Silver v. Imax Corp*., 2016 ONSC 403

21. *Charette v. Trinity Capital Corporation*, 2019 ONSC 3153

22. *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643

23. *Nunes v. Air Transat A.T. Inc*., [2005] OJ No 2527

24. *Kafai v. Nature's Touch Frozen Foods Inc.*, 2019 ONSC 167

25. *Serhan (Trustee of) v. Johnson & Johnson*, 2011 ONSC 128

26. *Wein v Rogers Cable Communications Inc.*, 2011 ONSC 7290

27. *Romeo v. Ford Motor Co.*, 2019 ONSC 1831

28. *McCarthy v. Canadian Red Cross Society*, [2007] O.J. No. 2314 (SCJ)

29. *Fraser v. Falconbridge Ltd.*, [2002] OJ No 2383 (SCJ)

30. *Welsh v. Ontario*, 2019 ONCA 41

31. *Andersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660

32. *Vester v. Boston Scientific Ltd*., 2015 ONSC 7950

33. *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27

34. *Saadati v. Moorhead*, 2017 SCC 28

35. Mitesh S. Amin and Kenneth A. Ellenbogen, "The Effect of Device Advisories on Implantable Cardioverter-defibrillator Therapy", (2010) 12 *Curr Cardio Rep* 361

36. Douglas P. Gibson, et al., "Decision-making, emotional distress, and quality of life in patients affected by the recall of their implantable cardioverter defibrillator", (2008) 10 *Europace* 540

37. *Burnett Estate v. St. Jude Medical, Inc.*, 2009 BCSC 82

38. *Burnett Estate v. St. Jude Medical, Inc.*, 2009 BCSC 1651

39. *McSherry v Zimmer GmbH*, 2016 ONSC 4606

40. *Jones v. Zimmer GMBH*, 2016 BCSC 1847

41. *Roveredo v. Bard Canada*, [2013] O.J. No. 5127

42. *Elliot v. Joseph Brant Hospital*, 2013 ONSC 124

43. *Cardozo v. Becton, Dickinson and Company*, 2005 BCSC 1612

44. *Hunt v. Mezentco Solutions Inc.*, 2017 ONSC 2140

45. *Lambert v. Guidant Corporation*, 2009 CanLII 23379 (ON SC)

46. *Peter v. Medtronic, Inc.*, 2007 CanLII 53244 (ON SC)

47. *Fantl v. ivari*, 2018 ONSC 4443

48. *Lépine v. Société canadienne des postes*, 2009 SCC 16

49. *Mancinelli v. Royal Bank of Canada*, 2018 ONSC 4192

50. *Eidoo v. Infineon Technologies AG*, 2015 ONSC 5493

51. *Zaniewicz v. Zungui Haixi Corporation*, 2013 ONSC 5490

52. *Rosen v. BMO Nesbitt Burns Inc.*, 2016 ONSC 4752

53. *Leslie v. Agnico-Eagle Mines*, 2016 ONSC 532

54. *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2014 BCSC 1936

55. *Markson v. MBNA Canada Bank*, 2012 ONSC 5891

56. *Green v. Tecumseh Products of Canada Limited*, 2016 BCSC 217

57. *Donohue v Baja Mining*, 2016 ONSC 1569

58. *Slark v. Ontario*, 2017 ONSC 4178

59. *Carom v. Bre-X Minerals Ltd.*, 2014 ONSC 2507

60. *Cassano v. Toronto-Dominion Bank*, 98 O.R. (3d) 543

61. *Gilbert v. CIBC* (2004), 3 CPC (6^{th}) 35 (SCJ)

62. *Park v. Nongshim Co., Ltd.*, 2019 ONSC 1997

63. *Ali Holdco Inc. v. Archer Daniels Midland Company*, 2019 ONSC 131

64. *Micevic v. Johnson & Johnson*, 2019 ONSC 665.

65. *Windisman v. Toronto College Park Ltd*., [1996] OJ No 2897

66. *Toronto Community Housing Corp. v. ThyssenKrupp Elevator (Canada) Ltd.*, [2012] O.J. No. 5495

67. *Robinson v. Rochester Financial Ltd.*, [2012] O.J. No. 534

68. *Sondhi v. Deloitte Management Services LP*, 2018 ONSC 271

69. *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.*, 2018 ONSC 6447

70. *Parsons v. Canadian Red Cross Society* (2000), 49 OR (3d) 281 (SCJ)

71. *Smith v. National Money Mart*, 2010 ONSC 1334

72. *Fischer v. I.G. Investment Management Ltd.*, [2010] OJ No 5649 (SCJ)

73. *Commonwealth Investors Syndicate Ltd. v. Laxton*, [1994] BCJ No 1690 (CA)

74. *Cannon v. Funds for Canada Foundation*, [2013] O.J. No. 5825

75. *Abdulrahim v. Air France*, [2011] O.J. No. 326

76. *Brown v. Canada (Attorney General)*, [2018] O.J. No. 3286

77. *Gagne v. Silcorp Limited* (1998), 41 OR (3d) 417 (CA)

78. *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada* (1998), 40 OR (3d) 83 (Gen Div)

79. *Kuiper v. Cook (Canada) Inc.*, [2018] O.J. No. 5666

80. *O'Brien v Bard Canada Inc.*, [2015]O.J. No.: 1892

81. *Sheridan Chevrolet v. Denso Corporation*, [2018] O.J. No. 4966

82. *Kafai (Litigation guardian of) v. Nature's Touch Frozen Foods Inc*., [2019] O.J. No. 428

83. *Stanway v. Wyeth Canada Inc.*, 2015 BCSC 983

84. *Macmillan v. Merck Frosst Canada & Co*., 2016 SKQB 325

SCHEDULE "B" - LEGISLATION

Class Proceedings Act, 1992, SO 1992, c 6

Notice of certification

17 (1) Notice of certification of a class proceeding shall be given by the representative party to the class members in accordance with this section. 1992, c. 6, s. 17 (1).

Court may dispense with notice

(2) The court may dispense with notice if, having regard to the factors set out in subsection (3), the court considers it appropriate to do so. 1992, c. 6, s. 17 (2).

Order respecting notice

(3) The court shall make an order setting out when and by what means notice shall be given under this section and in so doing shall have regard to,

(a) the cost of giving notice;

(b) the nature of the relief sought;

(c) the size of the individual claims of the class members;

(d) the number of class members;

(e) the places of residence of class members; and

(f) any other relevant matter. 1992, c. 6, s. 17 (3).

Idem

(4) The court may order that notice be given,

(a) personally or by mail;

(b) by posting, advertising, publishing or leafleting;

(c) by individual notice to a sample group within the class; or

(d) by any means or combination of means that the court considers appropriate. 1992, c. 6, s. 17 (4).

Idem

(5) The court may order that notice be given to different class members by different means. 1992, c. 6, s. 17 (5).

Contents of notice

(6) Notice under this section shall, unless the court orders otherwise,

(a) describe the proceeding, including the names and addresses of the representative parties and the relief sought;

(b) state the manner by which and time within which class members may opt out of the proceeding;

(c) describe the possible financial consequences of the proceeding to class members;

(d) summarize any agreements between representative parties and their solicitors respecting fees and disbursements;

(e) describe any counterclaim being asserted by or against the class, including the relief sought in the counterclaim;

(f) state that the judgment, whether favourable or not, will bind all class members who do not opt out of the proceeding;

(g) describe the right of any class member to participate in the proceeding;

(h) give an address to which class members may direct inquiries about the proceeding; and

(i) give any other information the court considers appropriate. 1992, c. 6, s. 17 (6).

Solicitations of contributions

(7) With leave of the court, notice under this section may include a solicitation of contributions from class members to assist in paying solicitor's fees and disbursements. 1992, c. 6, s. 17 (7).

Notice to protect interests of affected persons

19 (1) At any time in a class proceeding, the court may order any party to give such notice as it considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding. 1992, c. 6, s. 19 (1).

Idem

(2) Subsections 17 (3) to (5) apply with necessary modifications to notice given under this section. 1992, c. 6, s. 19 (2).

Approval of notice by the court

20 A notice under section 17, 18 or 19 shall be approved by the court before it is given. 1992, c. 6, s. 20.

Costs of notice

22 (1) The court may make any order it considers appropriate as to the costs of any notice under section 17, 18 or 19, including an order apportioning costs among parties. 1992, c. 6, s. 22 (1).

Idem

(2) In making an order under subsection (1), the court may have regard to the different interests of a subclass. 1992, c. 6, s. 22 (2).

Judgment distribution

26 (1) The court may direct any means of distribution of amounts awarded under section 24 or 25 that it considers appropriate. 1992, c. 6, s. 26 (1).

Idem

(2) In giving directions under subsection (1), the court may order that,

(a) the defendant distribute directly to class members the amount of monetary relief to which each class member is entitled by any means authorized by the court, including abatement and credit;

(b) the defendant pay into court or some other appropriate depository the total amount of the defendant's liability to the class until further order of the court; and

(c) any person other than the defendant distribute directly to class members the amount of monetary relief to which each member is entitled by any means authorized by the court. 1992, c. 6, s. 26 (2).

Idem

(3) In deciding whether to make an order under clause (2) (a), the court shall consider whether distribution by the defendant is the most practical way of distributing the award for any reason, including the fact that the amount of monetary relief to which each class member is entitled can be determined from the records of the defendant. 1992, c. 6, s. 26 (3).

Idem

(4) The court may order that all or a part of an award under section 24 that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members, if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order. 1992, c. 6, s. 26 (4).

Idem

(5) The court may make an order under subsection (4) whether or not all class members can be identified or all of their shares can be exactly determined. 1992, c. 6, s. 26 (5).

Idem

(6) The court may make an order under subsection (4) even if the order would benefit,

(a) persons who are not class members; or

(b) persons who may otherwise receive monetary relief as a result of the class proceeding. 1992, c. 6, s. 26 (6).

Supervisory role of the court

(7) The court shall supervise the execution of judgments and the distribution of awards under section 24 or 25 and may stay the whole or any part of an execution or distribution for a reasonable period on such terms as it considers appropriate. 1992, c. 6, s. 26 (7).

Payment of awards

(8) The court may order that an award made under section 24 or 25 be paid,

(a) in a lump sum, forthwith or within a time set by the court; or

(b) in instalments, on such terms as the court considers appropriate. 1992, c. 6, s. 26 (8).

Costs of distribution

(9) The court may order that the costs of distribution of an award under section 24 or 25, including the costs of notice associated with the distribution and the fees payable to a person administering the distribution, be paid out of the proceeds of the judgment or may make such other order as it considers appropriate. 1992, c. 6, s. 26 (9).

Return of unclaimed amounts

(10) Any part of an award for division among individual class members that remains unclaimed or otherwise undistributed after a time set by the court shall be returned to the party against whom the award was made, without further order of the court. 1992, c. 6, s. 26 (10).

Discontinuance, abandonment and settlement

29 (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate. 1992, c. 6, s. 29 (1).

Settlement without court approval not binding

(2) A settlement of a class proceeding is not binding unless approved by the court. 1992, c. 6, s. 29 (2).

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court binds all class members. 1992, c. 6, s. 29 (3).

Notice: dismissal, discontinuance, abandonment or settlement

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

(a) an account of the conduct of the proceeding;

(b) a statement of the result of the proceeding; and

(c) a description of any plan for distributing settlement funds. 1992, c. 6, s. 29 (4).

SHIRLEY HOULE AND RONALD HOULE Plaintiffs	- and -	ST. JUDE MEDICAL INC. et al. Defendants	Court File No. CV-17-572508

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

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(Settlement and Fee Approval Motion)

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