

CANADA / JUDGMENT

Tietz v. BridgeMark Financial Corp.

2021 BCSC 25

COURT

Supreme Court of British Columbia

DECIDED

8 January 2021

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2021 BCSC 25 Tietz v. BridgeMark Financial Corp.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tietz v. BridgeMark Financial Corp.,

2021 BCSC 25

Date: 20210108

Docket: S197731

Registry: Vancouver

Between:

Michael Tietz and Duane Loewen

Plaintiffs

And

BridgeMark Financial Corp., Jackson & Company Professional Corp., Anthony Jackson, Lukor Capital Corp., Justin Edgar Liu, Rockshore Advisors Ltd. (formerly known as Cam Paddock Enterprises Inc.), Cameron Robert Paddock, Konstantin Lichtenwald, Simran Singh Gill, JCN Capital Corp., John Bevilacqua, Essos Corporate Services Inc., Sway Capital Corp., Von Rowell Torres, Detona Capital Corp., Danilen Villanueva, Natasha John Emami, Altitude Marketing Corp, Ryan Peter Venier, Platinum Capital Corp., 658111 B.C. Ltd., Jason Christopher Shull, Tryton Financial Corp., Abeir Haddad, Tavistock Capital Corp., Robert John Lawrence, Jarman Capital Inc., Scott Jason Jarman, Northwest Marketing and Management Inc., Rufiza Esmail, Denise Trainor, Aly Babu Mawji, Escher Invest SA, Hunton Advisory Ltd., Randy White, Kendl Capital Limited, 1153307 B.C. Ltd., Russell Grant Van Skiver, Bertho Holdings Ltd., Robert William Boswell, Haight-Ashbury Media Consultants Ltd., Ashkan Shahrokhi, Saiya Capital Corporation, Tara Haddad, Keir Paul MacPherson, Tollstam & Company Chartered Accountants, Albert

Kenneth Tollstam, 727 Capital, David Raymond Duggan, Viral Stocks Inc., 10X Capital, Cryptobloc Technologies Corp., Neil William Stevenson-Moore, Kenneth Clifford Phillippe, Brian Biles, Kootenay Zinc Corp., Robert Tindall, Affinor Growers Inc., Nicholas Brusatore, Sam Chaudhry, Green 2 Blue Energy Corp., Slawomir Smulewicz, Michael Young, Glenn Little, Beleave Inc., Andrew Wnek, Bojan Krasic, Citation Growth Corp (formerly known as LIHT Cannabis Corp. and Marapharm Ventures Inc.), Linda Sampson, David Alexander, Yari Alexander Nieken, Hanspaul Pannu, BLOK Technologies Inc., Robert Dawson, James Hyland, PreveCeutical Medical Inc., Stephen Van Deventer, Shabira Rajan, Abattis Bioceuticals Corp., Robert Abenante, Kent McParland, Speakeasy Cannabis Club Ltd., Marc Geen, Mervyn Geen, Jeremy Ross, Alexander Kaulins, Kopr Point Ventures Inc., (formerly known as New Point Exploration Corp.), and Bryn Gardener-Evans

Defendants

Before: The Honourable Madam Justice Wilkinson

Reasons for Judgment

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Counsel for the Defendant, Sam Chaudhry:

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D.W. Gibbons

Counsel for the Defendant, Nicholas Brusatore:

A.S. Dosanjh

N.E. John

Appearing in person on behalf of the Defendant, Citation Growth Corp.

Erik Anderson, CEO

No on appearing on behalf of the remaining Defendants

Place and Date of Hearing:

Vancouver, B.C.

December 14, 2020

Place and Date of Ruling given to Parties with Reasons to Follow:

Vancouver, B.C.

December 14, 2020

Place and Date of Judgment:

Vancouver, B.C.

January 8, 2021

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- [1] On December 14, 2020, I granted an application pursuant to the Class Proceedings Act, R.S.B.C. c. 50 [Act], for certification of this action as a class proceeding against certain settling defendants, and for approval of the settlement of this action against the settling defendants in accordance with the terms of a settlement agreement, with reasons to follow. These are those reasons.

Background

- [2] This action concerns the acquisition of shares in 2018 by certain defendants, referred to in the notice of civil claim as the "purported consultants", under private placements carried out by certain other corporate issuer defendants, including one of the settling defendants, Beleave Inc. The other settling defendants, Andrew Wnek and Bojan Krasic, were both officers and directors of Beleave Inc. during the relevant time period. I will refer to Beleave Inc., Andrew Wnek, and Bojan Krasic collectively as the "Settling Defendants".
- [3] This action arose out of an investigation by the British Columbia Securities Commission (the "Securities Commission") into the private placements that are the subject of this action.
- [4] The plaintiffs allege that the defendants, including the Settling Defendants, participated in an investment scheme carried out in 2018. It is alleged the defendant purported consultants acquired shares in the defendant corporate issuers (including Beleave Inc.) through false pretenses and deception on the public market. This, they claim, resulted in loss and damage to the plaintiffs and other proposed class members who acquired shares in the defendant corporate issuers (including Beleave Inc.) after the deception.
- [5] The plaintiffs and the Settling Defendants entered into a settlement agreement dated July 31, 2020 (the "Settlement Agreement"). This is the first proposed settlement in this action which continues against the other defendants.

Issues

- [6] On December 14, 2020, the issues before me for determination were:
- a) Should the action be certified as a class proceeding for the purpose of and in accordance with the Settlement Agreement? If so, should Michael Tietz and Duane Loewen be appointed as representative plaintiffs?
 - b) Should the Settlement Agreement be approved?

History of the Litigation

- [7] On November 26, 2018, the Executive Director of the Securities Commission issued a notice of hearing and temporary orders against many of the defendants in this action, including Beleave Inc. The orders included that these defendants cease trading in and were prohibited from purchasing securities of the defendant corporate issuers.
- [8] On January 15, 2019, the Securities Commission conducted a hearing with regard to extending the temporary orders until the investigation could be completed. The Securities Commission declined to extend the temporary orders against Beleave Inc. and some others.
- [9] On June 5, 2019, Beleave Inc. entered into a settlement agreement with the Securities Commission. In that settlement it agreed it had participated in conduct abusive to the capital markets and, but for mitigating circumstances, that conduct would otherwise warrant public interest orders against it.
- [10] This action was filed on July 11, 2019, and service of all defendants was completed in late December 2019.
- [11] Settlement discussions with plaintiffs' counsel were initiated by counsel for Beleave Inc. These discussions were premised on the precarious financial condition of Beleave Inc., and the fact that the insurance proceeds, potentially available in respect of the claims, were being diminished by ongoing defence costs relating to the claims.
- [12] On February 21, 2020, the plaintiffs filed a petition seeking leave pursuant to s. 140.8 of the Securities Act, R.S.B.C. 1996, c. 418, to bring claims for secondary market liability under s. 140.3 of the Securities Act.
- [13] On June 5, 2020, Beleave Inc. filed for protection under the Companies' Creditors Arrangement Act, R.S.C.1985, c. 36, in the Ontario Superior Court of Justice (the "CCAA Proceedings"). At that time the Court granted a stay of proceedings against Beleave Inc. and its officers and directors.
- [14] Counsel for the plaintiffs, counsel for the Settling Defendants, and counsel for Beleave Inc.'s insurer reached agreement on full terms of the Settlement Agreement in October 2020.

- [15] Due to the existing CCAA Proceedings and the related stay order, the Settlement Agreement contemplates that Beleave Inc. would first apply to the Ontario Court for an order authorizing it to enter into and execute the Settlement Agreement, an order lifting the stay order for the purposes of seeking approval of the Settlement Agreement, and an order granting certain declaratory to the insurer.
- [16] On November 16, 2020, the Ontario Court granted the orders sought. On November 30, 2020, the Ontario Court made an order terminating the CCAA Proceedings upon the filing of the monitor's certificate, an order authorizing Beleave Inc. to file assignments into bankruptcy, and an order for the monitor to act as trustee in bankruptcy. A notice of termination of proceedings was issued by the monitor on December 3, 2020, giving notice that the monitor's certificate terminating the CCAA Proceedings would be filed on December 15, 2020.

The Settlement Agreement

- [17] Under the terms of the Settlement Agreement the Settling Defendants agree to pay \$2,400,000 for the benefit of class members. Upon court approval of the Settlement Agreement, the funds will be placed in a settlement fund held by counsel for the class members.
- [18] The Settling Defendants also agree to use reasonable efforts to cooperate with the plaintiffs in the continued prosecution of the action. These efforts include:
- a) The production of non-privileged documents relevant to the action.
 - b) Mr. Wnek and Mr. Krasic will each:
 - i. make themselves available for interviews with class counsel which will take place on a single day, will take no more than six hours, and may be transcribed by a court reporter; and
 - ii. make themselves reasonably available to provide evidence at the trial of this action, or provide an affidavit or declaration and attend at a cross-examination in support of the certification of this action or in the event of a summary judgment application brought against the plaintiffs.
- [19] The Settlement Agreement provides that the plaintiffs will apply to the court after the settlement approval hearing for approval of a settlement administration plan. The Settling Defendants will not have standing to make submissions regarding the settlement administration plan.

Should the Action be Certified for the Purposes of Settlement?

- [20] The plaintiffs and Settling Defendants seek to have the action certified as a class proceeding solely for the purpose of and in accordance with the Settlement Agreement. Counsel referred me to a number of cases that confirm that the court has the authority to certify a claim for the purposes of settlement: *Haney Iron Works Ltd. v. Manufacturers Life Insurance Co.*, [1998] B.C.J. No. 2936 (S.C.); *Bodnar v. The Cash Store Inc.*, 2010 BCSC 145 at paras. 15, 32; *Wilson v. Depuy International Ltd.*, 2018 BCSC 1192 at paras. 49-51.
- [21] The court also has the power to approve a partial settlement of multi-defendant proceedings and has exercised that power to certify a class proceeding against only some defendants for the purpose of approving a partial settlement of the proceeding with those defendants: *Main v. Cadbury Schweppes plc*, 2010 BCSC 816 at para. 15; *Green v. Tecumseh Products of Canada Limited*, 2016 BCSC 217 at paras. 1, 6-15; *Cantlie v. Canadian Heating Products Inc.*, 2015 BCSC 1225 at paras. 1, 4-6. The court encourages such partial settlements: *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2010 BCSC 472 at para. 20.
- [22] Despite the fact that the Settling Defendants consent to certification for settlement purposes the court must still be satisfied that the claim meets the statutory requirements for certification as set out in s. 4(1) of the Act.
- [23] In the settlement context the requirements for class certification may be relaxed or need not be as rigorously applied: *Wilson*, at para. 50.
- [24] Where an action is being certified as a class proceeding only for the purpose of settlement against some defendants a determination that the criteria for certification has been satisfied should be without prejudice to whether those criteria are satisfied for the remaining defendants: *Green*, at para. 11. That is the case in the application before me.
- [25] The Settling Defendants consent to the class certification for the purposes of settlement.
- [26] Taking into consideration the requirements of s. 4(1) of the Act, I am satisfied that this action should be certified as a class action for the purposes of the Settlement Agreement for the following reasons:
- a) The notice of civil claim discloses causes of action for unlawful conspiracy and fraudulent or negligent misrepresentation. In addition, the plaintiffs propose to bring claims in statutory secondary market liability in respect of the private placements with Beleave Inc. Assuming all the facts pleaded in this action are true, it is not plain and obvious that the plaintiffs' claim cannot succeed.
 - b) There is an identifiable class of two or more persons (being all persons other than the defendants and any other defined excluded persons) who acquired securities in the defendant corporate issuers at the relevant time periods set out in the notice of civil claim. The defined class is rationally connected to the proposed common issues and provides objective criteria by which individuals can determine if they are members of the class.

- c) The claims of the class members raises a common issue which, for the purposes of the settlement, is: whether misrepresentations were made in the public disclosure made by Beleave Inc. concerning the private placements as described in the notice of civil claim which closed on April 27, 2018 and June 12, 2018.
 - d) A class proceeding is the preferable procedure for the fair and efficient resolution of the common issues since the common issues predominate over any individual issues to the extent that no other means of resolving the claim would be more practical or efficient.
 - e) The evidence supports my finding that Michael Tietz and Duane Loewen are suitable representative plaintiffs and would fairly and adequately represent the interests of the class, they have proposed a settlement agreement in a workable form for resolving the proceeding, and do not have an interest in the common issues which conflicts with the interests of the other class members.
- [27] Accordingly, for the purposes of this application, I order that the action be certified as a class action and that Michael Tietz and Duane Loewen are appointed as the representative plaintiffs.

Should the Settlement Agreement be Approved?

- [28] The applicable principles for the approval of a settlement under ss. 35(1) and (3) of the Act are summarized in Bodnar, at paras. 16-21:
- a) The standard for approval of a settlement is whether the settlement is fair, reasonable, and in the best interests of the class as a whole.
 - b) The court is not required to dissect the proposed settlement with an eye to perfection. Instead, the question is whether the settlement falls within a zone or range of reasonableness.
 - c) The court is not entitled to modify the terms of a negotiated settlement.
 - d) In considering whether to approve a settlement, the court must consider the litigation risks and benefits in proceeding with the action. The court's function is to determine whether there are any disadvantages to the settlement that are sufficient to justify its rejection.
 - e) Counsel's recommendation that a settlement be approved should be given significance by the court. When the proposed class settlement has been negotiated at arm's length by class counsel there is a presumption of fairness.
 - f) In evaluating the reasonableness of a settlement the court may consider evidence concerning the expected participation in the settlement by class members as a factor in assessing the sufficiency of the funds available to compensate class members under the terms of the settlement.

- [29] The advantages of the Settlement Agreement are:

- a) The financial benefit to the class of \$2,400,000 is significant, particularly given the risks of the action not being successful at the statutory leave stage, certification stage, and at trial and due to the financial circumstances of Beleave Inc. The Settling Defendants are unlikely to have the means to satisfy a judgment for the damages sought by the plaintiffs and continuing with the litigation means the insurance funds will be diminished until little or nothing is left.
 - b) The agreement obliges the Settling Defendants to cooperate in the continued prosecution of the litigation. This is a significant non-monetary benefit to the putative class members.
 - c) Claims of the class members in respect of their purchases of shares in Beleave Inc. will continue against the remaining defendants. This includes those who were involved in the acquisition of shares in Beleave Inc. under the two private placements at issue, those involved in the subsequent sale of the shares, and the other defendants who entered into or arranged the consulting agreements with Beleave Inc. as part of the private placement transactions.
 - d) The Settlement Agreement provides that the plaintiffs will not claim from the remaining defendants any portion of loss that the court may ultimately attribute to the fault of the Settling Defendants, and in those circumstances fairly and properly bars the remaining defendants from making any claims of contribution or indemnity against the Settling Defendants.
- [30] There do not appear to be any disadvantages to the Settlement Agreement in the circumstances.
- [31] Plaintiffs' counsel are experienced class action counsel who pursued the action diligently. All aspects of the Settlement Agreement have been approved by the representative plaintiffs, the Settlement Defendants, and the insurer.
- [32] Taking the above factors into account and the fact the agreement has been consented to, I am satisfied that the Settlement Agreement is fair and reasonable and in the best interests of those affected by it.

Conclusion

- [33] The plaintiffs' application for approval of the Settlement Agreement is granted.
- [34] The plaintiffs may take their order as sought with the two changes discussed by counsel on December 14, 2020: the changes to paragraph seven as put forth by the defendant PreveCeutical Medical Inc. and the additional order that nothing in the Settlement Agreement derogates from or otherwise limits the plaintiffs' document production obligations in this action, as consented to by the plaintiffs and the Settling Defendants.

"Wilkinson J."

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Prepared on 29 October 2026 · Esheria