CITATION: Park v. Nongshim Co., Ltd., 2019 ONSC 1997
COURT FILE NO.: CV-17-577418-00CP
DATE: 20190327

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: JOOLI PARK, Plaintiff

AND:

NONGSHIM CO., LTD., NONGSHIM AMERICA, INC., OTTOGI CORPORATION, OTTOGI AMERICA, INC., SAMYANG FOODS CO., LTD., KOREA YAKULT CO., LTD., and PALDO CO., LTD., Defendants

BEFORE: Justice Glustein

COUNSEL: *Douglas Lennox*, for the Plaintiff

David T. Neave, for the Defendants Nongshim Co., Ltd. and Nongshim America, Inc.

David W. Kent, for the Defendants Ottogi Corporation and Ottogi America, Inc.

Adam Bazak, for the Defendant Samyang Foods Co., Ltd.

Gillian Kerr and Eric S. Block, for the Defendants Korea Yakult Co., Ltd. and Paldo Co., Ltd.

HEARD: March 26, 2019

REASONS FOR DECISION

Nature of motion and overview

[1] The plaintiff Jooli Park ("Park") brings this motion pursuant to the *Class Proceedings Act 1992*, S.O. 1992, c. 6 (the "*CPA*") for an order to:

(i) on consent, certify the action against the defendant Samyang Foods Co. ("Samyang") for the purposes of settlement,

(ii) on consent, approve the settlement of this action with Samyang in accordance with the terms of the settlement agreement signed on November 25, 2017 (the "Settlement Agreement"),

(iii) on consent, approve the dismissal of this action as against the defendants Nongshim Co., Ltd. ("Nongshim Korea"), Nongshim America, Inc., Ottogi

Corporation ("Ottogi Korea"), Ottogi America, Inc., Korea Yakult Co., Ltd. ("Yakult"), and Paldo Co., Ltd. (collectively, the "Non-Settling Defendants"),

(iv) on consent, approve the payment of Class Counsel fees and disbursements,

(v) on consent, approve the payment of a $500 honorarium to Park, and

(vi) on consent, approve the proposed *cy-près* distribution of the remainder of the settlement funds in equal shares to the Law Foundations of Ontario and British Columbia.

[2] There is a companion case in British Columbia, *Kozma et al. v. Nong Shim Co., Ltd.*, Court File No. VLC-S-S-157170 ("*Kozma*") which is being case managed by Justice Funt.

[3] Similar relief was granted by Justice Funt in *Kozma* on March 15, 2019[1] but it is contingent on the Ontario court also granting matching orders.

[4] At the hearing, I granted the relief sought, except for the payment of the honorarium to Park.

[5] Park provided three draft orders to the court at the hearing. I signed the first order dismissing the action against the Non-Settling Defendants. I signed the second order certifying the action as against Samyang and approving the Settlement Agreement.

[6] I requested that counsel provide a revised version of the third draft order setting out the quantum of the proposed distribution of funds as well as removing the term ordering payment of an honorarium.

[7] I granted the above relief by endorsement dated March 26, 2019 with reasons to follow. I now set out my reasons below.

Facts

[8] This class action concerns allegations that the defendants engaged in a conspiracy to fix the price of instant ramen noodles manufactured by the defendants or their subsidiaries or affiliates ("Korean Noodles") sold in Canada.

(a) Related Korean and US proceedings

[1] Justice Funt ordered $500 honorariums for each of the four plaintiffs in the *Kozma* action and did not set out the specific amounts of the distribution for fees and disbursements (inclusive of taxes) and for the *cy-près* distribution. As I set out below, I did not order a $500 honorarium for Park and I required that the amounts of the distribution be specified in the order.

[9] The class action was brought in the light of certain Korean and US proceedings which I review below.

1. Korean proceedings

[10] On or about July 12, 2012, the Korean Fair Trade Commission ("KFTC") issued an order (the "2012 KFTC Order") holding that Nongshim Korea, Samyang, Ottogi Korea, and Yakult (collectively the "Korean Defendants") had each conspired to fix, maintain, raise and/or stabilize the price for Korean Noodles sold in South Korea.

[11] The KFTC found that (i) the Korean Defendants had increased the price for their respective Korean Noodles at the same time and to similar levels at least six times between May 2001 and February 2010; (ii) there was never any obvious disruption or interruption in the Korean Defendants' conspiracy to increase the price of Korean Noodles; and (iii) the Korean Defendants' conspiracy was continuous and repetitive.

[12] The 2012 KFTC Order enjoined the Korean Defendants in South Korea from (i) committing anti-competitive acts by collaboratively deciding the price for Korean Noodles, and (ii) exchanging pricing information regarding Korean Noodles.

[13] The 2012 KFTC Order required the Korean Defendants to pay penalties totaling approximately ₩136.3 billion (approximately US$120 million) as follows:

(i) Nongshim Korea was ordered to pay approximately ₩108.1 billion in penalties;

(ii) Samyang was ordered to pay approximately ₩12.1 billion in penalties;

(iii) Ottogi Korea was ordered to pay approximately ₩9.8 billion in penalties; and

(iv) Yakult was ordered to pay approximately ₩6.3 billion in penalties.

[14] Samyang announced, on July 17, 2012, that it was excused by the KFTC from paying the penalty because it had voluntarily reported the price fixing conspiracy to the KFTC to avail itself of the KFTC's Leniency Program.

[15] Nongshim Korea, Ottogi Korea, and Yakult appealed to the Seoul High Court seeking to vacate the penalties imposed by the KFTC. On November 8, 2013, the court upheld the KFTC's ruling as against Nongshim Korea and Ottogi Korea. On December 4, 2013, the court upheld the KFTC's ruling as against Yakult.

[16] On December 24, 2015, the Supreme Court of Korea overturned the High Court's decision upholding the KFTC corrective actions and penalties. After the Supreme Court's ruling, the KFTC published a decision on January 28, 2016, revoking all corrective actions and penalties related to the 2012 KFTC Order against the Korean Defendants.

2. US proceedings

[17] On July 22, 2013, a class action was filed in the United States District Court, Central Division of California Western Division: *The Plaza Company v. Nong Shim Company Ltd., Nong Shim America, Inc. et al.,* Case No. 2:2013cv05274.

[18] The action was brought on behalf of all persons who directly purchased Korean Noodles in the United States from May 2001 to present ("US Plaintiffs"). The claim refers to the 2012 KFTC Order.

[19] Various other actions were also brought for both direct and indirect purchasers of Korean Noodles. Both the direct and indirect purchaser actions were consolidated as *In re Korean Ramen Antitrust Litigation*, Case No. 3:13-CV-4115-WHO-DMR (N.D. Cal.) and to be case managed by Judge William Orrick of the United States Federal District Court in the Northern District of California.

[20] On August 22, 2016, national settlements in the United States were reached with Samyang in both the direct and indirect purchaser actions. These settlements provide for substantial cooperation from Samyang as well as a cash payment.

[21] The settlements mirror the proposed settlement with Samyang in Canada.

[22] With respect to other claims in the United States, by reasons dated January 19, 2017, Justice Orrick granted certification in a contested motion against Nongshim Korea, Nongshim America, Inc. (collectively, the "Nongshim Defendants"), Ottogi Korea, Ottogi America, Inc. (collectively, the "Ottogi Defendants") and Yakult (the "US Non-Settling Defendants").

[23] On December 28, 2017, Justice Orrick dismissed motions for summary judgment brought by the Nongshim Defendants and the Ottogi Defendants. Yakult was no longer a party to the action at that time.

[24] A class action jury trial against the Nongshim Defendants and the Ottogi Defendants commenced on November 13, 2018. The jury reached a verdict on December 17, 2018 and the decision of the court was released on January 11, 2019. The Nongshim Defendants and the Ottogi Defendants were successful, as the jury found that the US Plaintiffs failed to establish a price fixing conspiracy.

[25] An application for a new trial was made by the US Plaintiffs and was set to be heard on April 10, 2019. However, the US Plaintiffs agreed to abandon their appeal in exchange for the defendants waiving their costs.

(b) History of the current action

[26] The *Kozma* action was filed on behalf of a proposed class of British Columbia residents in August 2015. The Ontario proceeding was filed on June 20, 2017. Klein Lawyers is Class Counsel on both actions.

[27] The action in British Columbia was filed before the 2012 KCTF Order was overturned in South Korea, and was also filed prior to the settlements reached in the US with Samyang.

[28] In 2016, after the settlement with the Samyang was approved in the US, the plaintiffs and Samyang sought negotiation of a similar deal in Canada. As British Columbia was not an "opt-out" jurisdiction, Class Counsel brought the present class action in Ontario to assist for settlement purposes.

[29] After months of arm's length negotiation, a settlement agreement was signed on November 25, 2017 which included both the British Columbia and Ontario actions. In the recitals of the Settlement Agreement, Samyang states that it has agreed to enter into the settlement in order to avoid the expenses, risk, and burden of further litigation; to obtain the releases, orders, and judgment contemplated by this Settlement Agreement; and to put to rest with finality all claims that have been or could have been asserted against it in the British Columbia and Ontario actions.

[30] A hearing before this court was held on November 15, 2018 for approval of the form of notice to the class, providing information related to the proposed hearing for certification and settlement approval. Class Counsel provided the court with a proposed notice program prepared by Crawford Class Action services. The notice program was approved. It was also approved by the court in British Columbia and parallel orders were granted.

[31] On November 14, 2018, the Nongshim Defendants served Park with a motion for summary judgment seeking to dismiss the claims against them based on the statute of limitations. The motion was not set down as later events led to the proposed dismissal of the action without costs against the Non-Settling Defendants.

[32] The class action jury trial in the US started after the hearings in British Columbia and Ontario approving notice of the consent certification and proposed settlement. Class Counsel followed the case closely. The verdict was released on January 11, 2019 and the US Plaintiffs were unsuccessful. Upon weighing the risk of pursuing this action in British Columbia and in Ontario, the plaintiffs and Class Counsel have determined that it is not in the best interests of the plaintiffs to continue this action against the Non-Settling Defendants.

(c) The Settlement Agreement

[33] As noted above, the Settlement Agreement was signed before the verdict in the US proceedings dismissing the action against the US Non-Settling Defendants. The key terms of the agreement are:

(i) **Settlement Fund:** Samyang has agreed to pay $288,586.98 as the Settlement Amount to be held by Class Counsel in an interest bearing trust account until a distribution of such funds is approved by the Court (the "Settlement Fund");

(ii) **Co-operation discovery, information, and documents:** Samyang has agreed to co-operate with the plaintiffs in pursuing the claims against the Non-Settling

Defendants by assisting the plaintiffs to obtain documents, discovery, and information from Samyang that were part of the actions in Korea as well as the United States. Additionally, the Settlement Agreement includes access to information stored on a hard drive held by Samyang pursuant to an agreement in the US proceedings;

(iii) **Access to witnesses such as current or former employees of Samyang**: The plaintiffs will be able to obtain information from a witness regarding Samyang's submission to the KFTC in connection with the KFTC's investigation of the Korean Noodles industry. Samyang will provide witnesses, such as current or former employees, to attest to the authenticity of documents as well as the veracity of the content of US deposition transcripts for use in the Canadian Actions;

(iv) **Releases and Dismissals and Effect of the Settlement**: Upon the Settlement Agreement becoming effective, the British Columbia and Ontario actions will be dismissed as against Samyang with prejudice and without costs. Samyang will receive full and final releases from the Settlement Class upon the date the Agreement becomes effective;

(v) **Bar Order:** Bar orders shall be sought from both the British Columbia and Ontario courts, preventing the claims for contribution and indemnity by the Non-Settling Defendants against Samyang;

(vi) **Certification for Settlement Purposes Only:** The actions shall be certified as class proceedings as against Samyang solely for purposes of settlement of the actions and the approval of this Settlement Agreement by the courts. For the Ontario Action, the proposed Settlement Class is defined as:

> All persons in Canada, excluding British Columbia, who purchased, either directly or indirectly Korean Noodles during the Class Period, except for any Excluded Person. The Class period means May 1, 2001 to December 31, 2010.

And the proposed common issue is:

> Did the Settling Defendant [Samyang] conspire to fix, raise, maintain or stabilize the price of Korean Noodles in Canada during the Class Period?

(vii) **Notice to Settlement Class**: The Settlement Agreement provides for two notices to the proposed Settlement Classes. The first notice is for the proposed certification for settlement purposes as well as the application for settlement approval. The second type of notice is either notice of approval of the Settlement Agreement or, in the alternative, if the Settlement Agreement is not approved,

terminated or fails to take effect the proposed Settlement Classes will be given notice. Costs of the notices shall be paid from the Settlement Fund;

(viii) **Opting Out:** If a potential settlement class member does not wish to participate in the settlement, such person must opt-out of the actions in accordance with the Settlement Agreement. Samyang reserves all of its legal rights and defences as against the person who opted out;

(ix) **Class Counsel's Fees and Disbursements:** The Agreement states that Class Counsel Disbursements and Class Counsel Fees shall be reimbursed and paid solely out of the Settlement Fund and that Class Counsel may seek approval contemporaneous with seeking approval of the Settlement Agreement;

(x) **Administrative Expenses:** All administrative expenses are to be paid out of the Settlement Fund. This includes costs of notice to the class; and

(xi) **Funds remaining in the Trust Account:** If there are any funds remaining in the Trust Account after the payment of Class Counsel disbursements, Class Counsel fees, and administrative expenses, Class Counsel shall seek direction from the courts on the distribution of the remaining funds.

(d) The Notice Program

1. Notice of the Hearing/Objections

[34] Under the first phase of the notice program, notice of this proposed certification and settlement, as approved by this Court, has been published. The notice program was implemented by Class Counsel with the assistance of Crawford Class Services. Class Counsel retained Crawford Class Action Services who arranged the "Digital Banner Notice", "Print Publications", and the "Press Release" portions of the publication.

[35] The Digital Banner Notice effort began on January 7, 2019 and was completed on February 3, 2019. The advertisements appeared on Google (DoubleClick), Sizmek and Yahoo! Audience Network in English, French, and Korean as well as social media advertising on Facebook and Instagram in English for a total of approximately 35 million impressions.

[36] Combined, the ad networks cover nearly 90% of Canadian population. According to Crawford Class Action Services, the ads ran on thousands of websites including: yahoo.com, huffingtonpost.ca, foodnetwork.ca, koreatimes.net, accuweather.com, canada.com, tsn.ca, torontosun.com, lapresse.ca, and many more. Ads ran in English, French, and Korean.

[37] Newsfeed notices ran across Facebook and Instagram, top social networking sites in Canada. Combined, they include over 20 million active users in Canada. Ads ran in English on Facebook and Instagram.

[38] Print publications were effected by publishing a short-form notice which appeared in a ¼ page advertisement in Korean in the vanChosun – Vancouver on January 7, 2019, and the Korea Times Daily – Toronto on January 14, 2019.

[39] The Press Release was disseminated on January 7, 2019 over PR Newswire's National Canadian bilingual newsline in French and English. The release was issued broadly to a network of over 2,400 major media, industry, trade, regional, and sector websites. In addition, all news releases and multimedia are posted to the newswire.ca website, which receives the highest number of Canadian monthly unique visitors and referred search traffic in the industry. The notice was published by several media outlets including Canadian Business Journal, Globe Advisor, Automobile Association of Canada, and AutoOpinion.ca, among others.

[40] The approved court notice was posted on Class Counsel's website on December 10, 2018 and remains posted on the website. To date, Class Counsel has not received any objections.

2. Notice of settlement approval and right to opt-out

[41] The settlement agreement provides that a second notice program will be implemented, should be case be certified and the settlement approved. Crawford Class Action Services has agreed to do Phase II of the notice program. This program provides the same level of notice that was issued in Phase I. Crawford has provided a proposal and cost estimate at $41,277.16.

3. Notice of distribution of the settlement

[42] In addition to the approval of the Settlement Agreement, certification against Samyang for settlement purposes, and dismissal of the action against the Non-Settling Defendants, Class Counsel also seeks approval of its fees and disbursements, payment of an honorarium of $500 to Park, and a distribution of the remaining funds in equal shares to the Law Foundation of British Columbia and the Law Foundation of Ontario.

[43] While details of this proposed distribution were not included in the published notice about this hearing, an application for fees was expressly contemplated in section 13 of the Settlement Agreement. Class Counsel proposes that the details of this distribution be included in the second notice.

Analysis

[44] I address below each of the issues set out at paragraph 1.

[45] In my prior decisions in *Cass v. Westernone*, 2018 ONSC 4794 ("*Cass*") and in *Ali Holdco Inc. v. Archer Daniels Midland Company*, 2019 ONSC 131 ("*Ali Holdco*"), I addressed the law relevant to many of the issues raised in this matter. I rely on those reasons where applicable below.

Issue 1: Certification of the action against Samyang for settlement purposes

[46] In *Cass*, I reviewed the applicable law and held (at paras. 44-46):

> Under s. 5(1)(a), the court applies the same standard of proof as on a motion to strike a cause of action. The facts as pleaded are assumed to be true and the requirement is satisfied unless it is plain and obvious that the plaintiff's claim cannot succeed (*Hollick*, at paras. 16, 25).
>
> For the remaining certification requirements, the plaintiff must establish "a minimum evidential basis for a certification order" by "show[ing] some basis in fact for each of the certification requirements" (*Hollick*, at paras. 24-25).
>
> The court must be satisfied that all of the requirements for certification are met, even when certification is sought for the purposes of settlement. However, the requirements "need not be as rigorously applied in a settlement context" (*Osmun v. Cadbury Adams Canada Inc.*, [2009] O.J. No. 5566 (S.C.J.) ("*Osmun*"), at para. 21) given the different circumstances associated with actions which have reached settlement (*Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.J.), at para. 30), and because the manageability of the proceeding is not at issue (*Speevak v. Canadian Imperial Bank of Commerce*, 2010 ONSC 1128, at para. 14).

[47] Under s. 5(1)(a), the pleadings disclose a cause of action against Samyang. The alleged conspiracy is set out with the required particularity, identifying (i) the impugned acts to allegedly suppress and eliminate competition in the Korean Noodles industry and to increase or maintain the prices of Korean Noodles, (ii) the alleged conspirators, (iii) the nature of the Korean Noodle market, (iv) the dates of the alleged conspiracy, and (v) the damages suffered.

[48] Under s. 5(1)(b), there is an objective class definition proposed which identifies all those who may have a claim, who will be bound by the result of the litigation, and who are entitled to notice. The class is defined by objective criteria without reference to the merits of the action (*Cass*, at para. 58, citing *Hollick v. Toronto (City)*, 2001 SCC 68, [2013] 3 S.C.R. 477, at para. 17 ("*Hollick*"); *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.), at para. 10).

[49] The proposed class of "[a]ll persons in Canada, excluding British Columbia, who purchased, either directly or indirectly Korean Noodles during the Class Period, except for any Excluded Person" for the proposed class period between May 1, 2001 to December 31, 2010" meets the above test.

[50] In *Cass*, I summarized the applicable law for the requirement under s. 5(1)(c) of a proposed common issue, at para. 65:

> The proposed common issue is "necessary to the resolution of each class member's claim" and a "substantial ingredient" of those claims (*Hollick*, at para.

> 18). Allowing the suit to proceed as a representative one will avoid duplication of fact-finding and legal analysis, meeting the "low bar" required for this aspect of s. 5 (*Cloud* [*v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.)], at paras. 51-52).

[51] The proposed common issue of whether Samyang conspired to fix, raise, maintain, or stabilize the price of Korean Noodles in Canada during the Class Period is necessary to the resolution of each member's claim and is a "substantial ingredient" of those claims. The determination of the issue would avoid duplication of fact-finding and legal analysis.

[52] In *Cass*, I summarized the applicable law for the requirement under s. 5(1)(d) of a preferable procedure on a settlement approval motion, at para. 67-69:

> A class proceeding is the preferable procedure for the resolution of the common issues in an action when it is a fair, efficient and manageable method for advancing the class members' claims, and is preferable to other means of resolving the class members' claims (*Hollick*, at paras. 27-31).
>
> In considering preferability, a court "is to adopt a practical cost-benefit approach … to consider the impact of a class proceeding on class members, the defendants, and the court" (*AIC Limited v. Fischer*, 2013 SCC 69, at para. 21).
>
> Further, "where there is a cause of action, an identifiable class, common issues, and a settlement, there is a strong basis for concluding that a class proceeding is the preferable procedure because certification would serve the primary purposes of the *Class Proceedings Act, 1992*; namely, access to justice, behavioural modification, and judicial economy" (*Krajewski v. TNOW Entertainment Group, Inc.*, 2012 ONSC 3908, at para. 32).

[53] The proposed class action against Samyang is the preferable procedure as it serves the goal of access to justice. It would not be preferable for each proposed class member to bring an individual action for the limited amount of damages incurred by each class member. The costs of such litigation would be prohibitive. A class action would provide a fair, efficient, and manageable method to advance the class members' claims.

[54] Under s. 5(1)(e), I find that Park is an appropriate representative, as she has a common interest with other class members and has no conflict of interest. She has vigorously prosecuted the claim to date (*Cass*, at para. 76, citing *Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343 (C.A.), at paras. 75-76).

[55] Certification in price-fixing cases has been ordered by the courts both on a contested basis (see *Godfrey v. Sony Corp.*, 2017 BCCA 302, 1 B.C.L.R. (6th) 319; and *Crosslink Technology Inc. v. BASF Canada*, 2014 ONSC 1682) and on a consent basis for settlement purposes (*Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2010 BCSC 472; and *Shah v. LG Chem, Ltd.*, 2019 ONSC 554).

[56] For the above reasons, I certify the action as a class proceeding as against Samyang for settlement purposes as per the Endorsement.

Issue 2: Approval of the Settlement Agreement

(a) The applicable law

[57] In *Cass*, I set out the applicable law on the test for approval of a settlement agreement in a class action, at paras. 85-90:

> In *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) ("*Parsons 1*"), Winkler J. (as he then was) set out the applicable legal principles relevant to the court's assessment of the reasonableness of a settlement agreement (at paras. 69-80):
>
> (i) The test for approving a settlement is whether, in all of the circumstances, the settlement is fair, reasonable and in the best interests of the class as a whole, not whether the settlement meets the demands of a particular class member;
>
> (ii) The court should not engage in a "dissection of the settlement with an eye to perfection in every aspect". The settlement need only fall "within a zone or range of reasonableness", which is an "objective standard which allows for variation depending on the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation";
>
> (iii) In determining whether to approve a settlement, the court may take into account the following factors:
>
> (a) the likelihood of recovery or success,
> (b) the proposed settlement terms and conditions,
> (c) the amount and nature of discovery, evidence or investigation,
> (d) the future expense and likely duration of litigation,
> (e) the recommendation of neutral parties, if any,
> (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 degree and nature of communications by counsel and the representative plaintiff with class members during the litigation and information conveying to the court the dynamics of, and the position taken by the parties during, their negotiation, and
> (i) the recommendation and experience of counsel;

(iv) These factors "are, and should be, a guide in the process and no more. Indeed, in a particular case, it is likely that one or more of the factors will have greater significance than others and should accordingly be attributed greater weight in the overall approval process"; and

(v) Class action settlements must be "seriously scrutinized by judges".

The function of the court in reviewing a settlement is not to reopen and enter into negotiations with litigants in the hope of improving the terms of the settlement. It is within the power of the court to indicate areas of concern and afford the parties an opportunity to answer those concerns with changes to the settlement. However, the court's power to approve or reject settlements does not permit it to modify the terms of a negotiated settlement (*Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (S.C.J.) ("*Dabbs*"), at para. 10).

"Evidence sufficient to decide the merits of the issue is not required because compromise is necessary to achieve any settlement. However, the court must possess adequate information to elevate its decision above mere conjecture" (*Ontario New Home Warranty Program v. Chevron Chemical Co.*, [1999] O.J. No. 2245 (S.C.J.), at para. 92). The parties proposing the settlement have an obligation to 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 (*Dabbs*, at para. 15).

It is not necessary that examination for discovery have occurred at the time of settlement. Settlements reached at an early stage of proceedings are appropriate (*Dabbs*, at para. 24).

There is a "strong initial presumption of fairness" when the settlement is negotiated at arm's length and recommended by class counsel (*Serhan (Trustee of) v. Johnson & Johnson*, 2011 ONSC 128 ("*Serhan*"), at paras. 55-56).

Similarly, Sharpe J. (as he then was) held in *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 2811 (S.C.J.), at para. 32:

> The fact that this settlement is strongly recommended by experienced class counsel is certainly a factor in its favour. The recommendation of class counsel is clearly not dispositive as it is obvious that class counsel have a significant financial interest in having the settlement approved. Still, the recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputation for integrity and diligent effort on behalf of their clients is also on the line. […] [Footnotes omitted.]

[58] I now review the above factors based on the evidence on this motion.

(b) Application of the law to the evidence

1. The likelihood of recovery, or the likelihood of success

[59] In the present case, the Settlement Agreement was reached before the recent US trial decision dismissing the claim against the US Non-Settling Defendants.

[60] On the evidence before the court, the Settlement Agreement, when reached, enhanced the class' chances of success. It remains beneficial for the class after the US proceedings.

[61] The settlement was reached before documentary discovery of any of the defendants. The settlement provides funds and substantial co-operation from Samyang in the continuing litigation as against the Non-Settling Defendants. This assistance reduces time, costs, and provides access to information, facilitates evidence from witnesses, and provides documents for use in the common issues trial regarding the conspiracy that might not otherwise be available to the class.

[62] I agree with Park's submission that actions involving price fixing are complex and the allegations of conspiracy in this case against the defendants span many years. Most of the events regarding the alleged conspiracy occurred in Korea. Having to deal with evidence in Korean in an action proceeding in a Canadian court adds even more complexity to an already difficult case.

[63] Settlements with one or more defendants, exchanged for co-operation are not uncommon in price fixing cases. It provides a tactical advantage to the class as it can simplify the litigation by reducing the number of defendants and also providing invaluable information.

[64] In *Osmun v. Cadbury Adams Canada Inc*., 2010 ONSC 2643, at para. 36, Strathy J. (as he then was) approved a similar settlement between the plaintiff and two of the alleged conspirators in a chocolate price-fixing scheme. Strathy J. noted the "important and immeasurable non-pecuniary benefit" and the "inestimable value" of a settlement with one defendant "in a conspiracy action, where the allegation is that the defendants share a dark secret, obtaining the cooperation of two of the alleged conspirators to assist the plaintiff in pursuing the alleged co-conspirators" (at para. 36).

[65] Another benefit of the settlement at the time it was reached is that it could have increased the prospect of success of reaching a settlement with the Non-Settling Defendants. The Settlement Agreement could have served as a catalyst for other Non-Settling Defendants, encouraging them to settle with the plaintiff rather than being drawn into lengthy litigation.

[66] The litigation in the United States provides a clear example of drawn out court proceedings with mixed results for the parties. The US Plaintiffs were successful on certification and on the motion by the Nongshim Defendants and Ottogi Defendants for

summary judgment. However, Yakult was successful in being removed as a defendant. Further, the US Plaintiffs lost a jury trial and agreed not to pursue an appeal in exchange for an agreement by the Nongshim and Ottogi Defendant not to pursue costs.

[67] After the unsuccessful US trial jury verdict, the risks associated with continuing litigation against Samyang have increased. If a trial based on conspiracy amongst the US Non-Settling Defendants could not succeed, there would be little if no basis to support a conspiracy claim against Samyang. It is unlikely that Samyang would approach the plaintiffs with any form of settlement at this point in time.

2. Other relevant factors

[68] I summarize the other relevant factors supporting approval of the Settlement Agreement:

(i) The settlement provides financial compensation in circumstances where the US Plaintiffs' action was dismissed against the US Non-Settling Defendants and resulted in significant costs (which were only not pursued in exchange for the agreement by the US plaintiffs to abandon their appeal);

(ii) Class Counsel is experienced in class action litigation and recommends the settlement;

(iii) At the time that this partial settlement was negotiated, it was difficult to estimate how long this litigation could last. The assistance provided by Samyang, particularly with document discovery and access to witnesses, would have substantially expedited the plaintiff's preparation for trial;

(iv) On August 22, 2016, settlements were reached between the direct and indirect purchasers and Samyang in the United States. These settlements mirror the one proposed in this action. The settlements were approved by Judge Orrick as they were found to be "fair, reasonable and adequate" based on the complexity, expense and likely duration of the litigation, the settlement class' reaction to the settlement, and the results achieved;

(v) To date, there have been no objections and there has been an extensive notice program;

(vi) The negotiations with Samyang were in good faith. They spanned many months and required significant advocacy on the part of plaintiffs' counsel. While Samyang reached an earlier agreement with the US Plaintiffs which provided a model for the Canadian Agreement, there were significant parts to the agreement which required adapting and expansion to suit the needs of Canadian litigation; and

(vii) The representative plaintiff was involved in this case and communicated with counsel throughout. As set out in her affidavit, Park met with her lawyers at various times, spoke with them on the phone and corresponded with them by email. She was kept informed of the progress of the case in British Columbia and the United States.

[69] Based on the above evidence, I approve the Settlement Agreement.

Issue 3: Approval of the dismissal of this action as against the Non-Settling Defendants

[70] In *Ali Holdco*, I summarized the applicable law on a motion for approval of a discontinuance of an action under s. 29 of the *CPA* as follows (at para. 58):

> Section 29(1) of the *CPA* requires court approval to discontinue a class action proceeding, even if the class action has not yet been certified. I summarize the relevant principles below:
>
> (i) In order to grant the discontinuance, the court must be satisfied that the interests of the proposed classes will not be prejudiced (*Parker v. Pfizer Canada Inc.*, 2017 ONSC 2418 ("*Parker*"), at para. 17; *Durling v. Sunrise Propane Energy Group Inc.*, 2009 CarswellOnt 9181 (S.C.J.) ("*Durling"),* at paras 14, 16);
>
> (ii) Consequently, the court can consider whether the chances of success in the litigation are "risky" or "remote" (*Parker*, at para. 20);
>
> (iii) Court approval prevents the use of a discontinuance for an improper purpose. The court reviews a proposed discontinuance to ensure that it does not result in collusive or inadequate settlements, including the risk that (a) a representative plaintiff can enhance his or her individual bargaining position or (b) counsel can use a discontinuance to sacrifice class members' interests for legal fees (*Durling*, at para. 14, *Parker*, at para. 17);
>
> (iv) Court approval for the discontinuance of a proposed class action (a) deters plaintiffs and class counsel from abusing the class action procedure by bringing a meritless class proceeding to extract a payment as the price of discontinuing the class proceeding and (b) provides the court with an opportunity to ameliorate any adverse effect of the discontinuance on class members who might be prejudiced by the distribution (*Parker*, at para. 19);
>
> (v) A motion for discontinuance should be carefully scrutinized, and the court should consider, among other things, whether the

proceeding was commenced for an improper purpose, whether there is a viable replacement party so that putative class members are not prejudiced or whether the defendant will be prejudiced (*Parker*, at para. 18); and

(vi) The court can consider whether intervening events in the course of a class proceeding have caused the chances of success to become remote (*Parker*, at paras. 8, 9, and 12).

[71] I find no concerns as to improper use of the class action procedure in this case, nor any concerns of additional terms required to protect the interests of class members.

[72] Based on regulatory action in South Korea and related litigation in the United States, this litigation appeared potentially promising for Park until the trial verdict in December 2018. In light of that new information, it is now reasonable for Park to end her lawsuit. No payment has been sought from the Non-Settling Defendants in exchange for this voluntary dismissal.

[73] In the present case, the settlement with Samyang was reached prior to the jury verdict in the United States. While a loss in the US class action jury trial is not determinative of a Canadian outcome, the risks associated with this claim have increased.

[74] Even with the co-operation of Samyang, the US Plaintiffs were unable to prove that a price fixing conspiracy existed. Consequently, it is unlikely that the Non-Settling Defendants would have any incentive to consider a settlement with the class at this time.

[75] The plaintiffs in the British Columbia and Ontario actions faced significant litigation risks at all stages of the proceeding. There would have been the potential for a contested certification hearing in more than one jurisdiction, which may have resulted in multiple appeals and inconsistent outcomes. There is a motion for summary judgment on limitation periods filed in the Ontario proceeding by the Nongshim Defendants with the potential to spur on other similar applications filed by the other Non-Settling Defendants. If certified, there would likely be an extensive discovery phase leading to a lengthy common issues trial also with potential for appeals. And in the end, the result could be that the price fixing conspiracy cannot be established based on the evidence.

[76] Park's dismissal with respect to her individual claim does not prejudice anyone else who might still want to pursue a claim.

[77] In addition, there is no evidence of any abuse by Park or by counsel. To the contrary, I find that they are acting in good faith and in the best interests of class members, by choosing not to pursue the action against the Non-Settling Defendants.

[78] Consequently, I approve the dismissal without costs of the action against the Non-Settling Defendants.

Issue 4: Approval of class counsel fees and disbursements

[79] I reviewed the applicable law for approval of class counsel fees and disbursements in *Cass*, at paras. 117-26:

> Class counsel fees are to be approved on the basis of whether they are "fair and reasonable" in all of the circumstances (*Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.) ("*Parsons 2*"), at para. 13-14 and 56; *Lefrancois v. v. Guidant*, 2014 ONSC 1956 ("*Lefrancois*"), at para. 52).
>
> The courts in *Lefrancois* (at para. 52) and in *Silver* (at para. 41) set out the following factors which may be considered by the court when determining whether class counsel's fees are fair and reasonable:
>
> (i) the factual and legal complexities of the matters,
>
> (ii) the risks assumed in pursuing the litigation, including the risk that the matter might not be certified, and the risk of loss at trial,
>
> (iii) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement,
>
> (iv) the amount in issue,
>
> (v) the result achieved,
>
> (vi) the importance of the matter to the class members and to the public,
>
> (vii) the degree of responsibility assumed and the skill and competence demonstrated by class counsel,
>
> (viii) the ability of the class to pay, and
>
> (ix) the expectations of the representative plaintiffs, the class and class counsel as to the basis for calculating fees and the amount of fees.
>
> An agreement to make a contingent payment, on the basis of a percentage of a settlement or recovery, is contemplated by the word "otherwise" in s. 32(1)(c) of the *CPA*, and has often been awarded (*Nantais v. Telectronics Proprietary (Canada) Ltd.* (1996), 28 O.R. (3d) 523 (Gen. Div.) at pp. 528-29; *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada* (1998), 40 O.R. (3d) 83 (Gen. Div.) ("*Crown Bay*"), at 86).
>
> Contingency fee arrangements are an "important means" to provide "enhanced access to justice to those with claims that would not otherwise be brought because

to do so as individual proceedings would be prohibitively uneconomic or inefficient". Similar to a multiplier, a contingency fee retainer "gives the lawyer the necessary economic incentive to take the case in the first place and to do it well" and, as such, "that opportunity must not be a false hope" (*Gagne v. Silcorp Limited* (1998), 41 O.R. (3rd) 417 (C.A.), at 422-23).

The policy of the *CPA* is to provide an incentive to class counsel to pursue class actions in order to increase access to justice. Class counsel fees have been awarded and are intended to compensate law firms for the risk that they may never be paid for their time or reimbursed for their disbursements. In *Parsons 2*, Justice Winkler (as he was then) stated (at para. 56; see also para. 14):

> […] The legislature has not seen fit to limit the amount of fees awarded in a class proceeding by incorporating a restrictive provision in the *CPA*. On the contrary, the policy of the *CPA*, as stated in *Gagne*, is to provide an incentive to counsel to pursue class proceedings where absent such incentive the rights of victims would not be pursued. It has long been recognized that substantial counsel fees may accompany a class proceeding. […]

In *Crown Bay*, Winkler J. commented on the benefits of a contingency fee in class actions to encourage settlement (at 88):

> […] On the other hand, where a percentage fee, or some other arrangement such as that in *Nantais*, is in place, such a fee arrangement encourages rather than discourages settlement […] Fee arrangements which reward efficiency and results should not be discouraged.

Similarly, in *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752, Strathy J. (as he then was) endorsed contingency fee arrangements in class actions. He held (at paras. 21 and 22):

> There is much to be said in favour of contingent fee arrangements. Litigants like them. They provide access to justice by permitting the lawyer, not the client, to finance the litigation. They encourage efficiency. They reward success. They fairly reflect the considerable risks and costs undertaken by class counsel, including the risk that they will never be paid for their work, the risk that their compensation may come only after years of unpaid work and expense, and the risk that they will be exposed to substantial cost awards if the action fails. Effective class actions simply would not be possible without contingent fees. Contingent fee awards serve as an incentive to counsel to take on difficult but important class action litigation.

> […] in my respectful view, courts should not be too quick to disallow a fee based on a percentage simply because it is a multiple – sometimes even a large multiple – of the mathematical calculation of hours docketed times the hourly rate.

In *Abdulrahim v. Air France*, 2011 ONSC 512, Strathy J. (as he then was) approved a "one-third" contingency fee, referring to it as "standard in class action litigation". He held (at para. 13):

> A contingency fee of one-third is standard in class action litigation and has been 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 arrangement between lawyers and their clients, taking into account the risks and rewards of such litigation. Fees have been awarded based on such a percentage in a number of class action cases.

In *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686 ("*Cannon*"), Justice Belobaba also approved a one-third contingency fee and held that there was a presumption that such arrangements are valid and enforceable provided that they are "fully understood and accepted by the representative plaintiffs". He held (*Cannon*, at para. 8):

> What I suggest is this: contingency fee arrangements that are fully understood and accepted by the representative plaintiffs should be presumptively valid and enforceable, whatever the amounts involved. Judicial approval will, of course, be required but the presumption of validity should only be rebutted in clear cases based on principled reasons.

In *Cannon*, Justice Belobaba provided "examples of clear cases where the presumption of validity could be rebutted" which included (*Cannon*, at para. 9):

(i) "Where there is a lack of full understanding or true acceptance on the part of the representative",

(ii) "Where the agreed-to contingency amount is excessive", and

(iii) "Where the application of the presumptively valid one-third contingency fee results in a legal fees award that is so large as to be unseemly or otherwise unreasonable".

[80] I apply the above principles to the present case.

[81] I find that there is no basis to rebut the "strong presumption of validity" of the contingency fee arrangement (*Cannon*, at para. 9).

[82] I rely on the following factors:

(i) When the action started, there was considerable legal uncertainty as to whether this claim would be successful. Consequently, Class Counsel undertook risks to pursue the action;

(ii) A conspiracy claim based on alleged conduct in Korea is factually and legally complex. Even if the Korean and US proceedings had been successful, significant work would have been required by Class Counsel to pursue the claims in the British Columbia and Ontario actions;

(iii) Class Counsel obtained significant benefits for the class through the Settlement Agreement;

(iv) The agreed-to contingency amount is not excessive; and

(v) The application of the contingency fee does not results in a legal fees award that is so large as to be unseemly or otherwise unreasonable.

[83] For the above reasons, I approve the Fee Agreement and the fees, disbursements, and taxes sought by Class Counsel. I fix legal fees at a total of $107,739.14, being $96,195.66 for fees plus applicable taxes of $11,543.48 and disbursements at $128,047.16 (inclusive of taxes).[2] Consequently, the total of legal fees and disbursements (including the $2,000 for honorariums ordered by Justice Funt for the four British Columbia plaintiffs) is $237,786.30.

Issue 5: Approval of honorarium for Park

(a) The applicable law

[84] The payment of honorarium to representative plaintiffs in Ontario for class actions is "exceptional and rarely done". In *Baker Estate v, Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105, Strathy J. (as he then was) conducted a thorough review of the case law and held, at paras. 93-95:

> The payment of compensation to a representative plaintiff is exceptional and rarely done: *McCarthy v. Canadian Red Cross Society* [2007] O.J. No. 2314 (S.C.J.) at para. 20; *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen. Div.); *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.); *Bellaire v. Daya* [2007] O.J. No. 4819 (S.C.J.) at para. 71. It should not

[2] (comprised of $84,770 in disbursements incurred to March 4, 2019, $41,277.16 for the costs of the second notice program, and $2,000 for all other disbursements to be incurred from March 4, 2019 onwards (excluding the second notice program))

> be done as a matter of course. Any proposed payment should be closely examined because it will result in the representative plaintiff receiving an amount that is in excess of what will be received by any other member of the class he or she has been appointed to represent: *McCutcheon v. Cash Store Inc.* [2008] O.J. No. 5241 (S.C.J.) at para. 12. That said, where a representative plaintiff can show that 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, it may be appropriate to award some compensation: *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen. Div.) at para. 28.
>
> The Court of Appeal has recently indicated in *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233, 106 O.R. (3d) 37 at paras. 134-135 that any compensation paid to the representative plaintiff should normally be paid out of the settlement fund and not out of Class Counsel's fee, to avoid concerns with respect to fee-splitting.
>
> It is interesting to note that on certification motions, the Court is often concerned to ensure that the representative plaintiff is truly engaged in the litigation and is not a mere "bench-warmer" or a "straw man" recruited by Class Counsel. Courts have frequently commented on the need to have an active and involved plaintiff who will be familiar with the proceedings, instruct counsel, monitor settlement discussions and generally act as any private client would in supervising his or her own litigation. A private client will normally receive indirect compensation for such efforts out of the proceeds of settlement or judgment. A representative plaintiff normally will not. That being said, these are contributions the Court expects a representative plaintiff to make and I respectfully agree with the observation of Hoy J. in *Bellaire v. Daya*, above, at para. 71 that compensation should not be awarded simply because the representative plaintiff has done what is expected of him or her. It should be reserved for cases, like *Garland v. Enbridge Gas Distribution Inc.*, [2006] O.J. No. 4907 (S.C.J.) where the contribution of the representative plaintiff has gone well above and beyond the call of duty.

[85] In *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911, Strathy J. again refused to order an honorarium. He summarized the factors for the court to consider, at para. 43:

> In this particular case, while I acknowledge the contribution made by Kathryn Robinson and by Rick Robinson, and commend them on the work they have done to bring this matter to a successful conclusion on behalf of their fellow class members, I am not prepared to award such compensation. In my respectful view, requests for compensation for the representative plaintiff are becoming routine, as Sharpe J. anticipated in *Windisman*, above. I agree with those who have expressed the opinion that compensation should be reserved to those cases where, considering all the circumstances, the contribution of the plaintiff has been exceptional. The factors that might be appropriate for consideration could include:

(a) active involvement in the initiation of the litigation and retainer of counsel;

(b) exposure to a real risk of costs;

(c) significant personal 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.

[86] The exceptional nature of an honorarium is even more circumscribed in a *cy-près* settlement where there is no monetary success for the class. Winkler J. (as he then was) held in *Sutherland v. Boots Pharmaceutical PLC*, [2002] O.J. No. 1361, at para. 22:

> While the work of the Representative Plaintiffs is commendable, to compensate them for their work when the settlement funds for the entire class are being donated to research without a single penny finding its way into the hands of a class member would be contrary to the precept of a Cy-pres distribution in particular and to a class proceeding generally. Compensation for representative plaintiffs must be awarded sparingly. The operative word is that the functions undertaken by the Representative Plaintiffs must be "necessary", such assistance must result in monetary success for the class and in any event, if granted, should not be in excess of an amount that would be purely compensatory on a *quantum meruit* basis. Otherwise, where a representative plaintiff benefits from the class proceeding to a greater extent than the class members, and such benefit is as a result of the extraneous compensation paid to the representative plaintiff rather than the damages suffered by him or her, there is an appearance of a conflict of interest between the representative plaintiff and the class members. A class proceeding cannot be seen to be a method by which persons can seek to receive personal gain over and above any damages or other remedy to which they would otherwise be entitled on the merits of their claims. This request is denied.

(b) Application of the law to the evidence

[87] There is no evidence to support the payment of an honorarium.

[88] In *Robinson*, the representative plaintiffs filed evidence that they each spent more than 300 hours to assist class counsel (at para. 28). Such work did not meet the "exceptional" requirement set out by Justice Strathy, as the factors he set out did not apply.

[89] In *Sutherland*, each of the four representative plaintiffs spent on average 100 hours of time for which they kept detailed records. Those plaintiffs were not awarded an honorarium as Winkler J. held that apart from research that they conducted, the other tasks of "meeting with counsel, reviewing options, providing instructions to counsel with respect to proposals and counter proposals and meeting amongst themselves to evaluate their position and develop strategy… are those expected to be undertaken by almost all representative plaintiffs" (at para. 19).

[90] In *Baker*, no honorarium was ordered despite the evidence of the representative plaintiffs (at para. 92):

> Their affidavits indicate that they were extensively involved in settlement discussions, correspondence, telephone conversations and meetings, and review of settlement documentation. Mrs. Baker, who lives in England, was required to travel from her home in Cornwall to London for cross-examination on her affidavits.

[91] In light of the above case law, Park's filed no evidence as to any exceptional circumstances justifying an honorarium. Her evidence is only that:

> I provided information for the Statement of Claim and reviewed it. I have met with my lawyers various times, spoken with them by phone, and corresponded with them by email, and they have kept me informed as to the progress of this case, and related cases in British Columbia and in the United States. I discussed the details of the Samyang settlement with my lawyers and consent to the settlement.

[92] The above evidence is not sufficient to award an honorarium based on the case law reviewed above, and I dismiss the request for this relief.

Issue 6: Approval of a *cy-près* distribution of the remaining settlement funds equally to the Law Foundation of Ontario and the Law Foundation of British Columbia

(a) The applicable law

[93] In *Cass*, I set out the following principles relevant to court approval of *cy-près* settlements, at para. 91:

> *Cy-près* settlements have been ordered by the court where (*Serhan*, at paras. 58-59):
>
> (i) "it is not practical to distribute the benefits in any other manner";
>
> (ii) "A direct distribution to the Settlement Class would be uneconomic considering the modest damages and the fact that there is no cost effective

way of locating the Settlement Class Members, determining if they suffered damage and, if so, establishing their loss"; and

(iii) "[T]he *cy près* distribution is directly related to the issues in the lawsuit" and will "directly benefit" people in similar circumstances to the class members.

[94] In *Ali Holdco*, I added, at para. 47:

I also rely on the following principles relevant to *cy-près* distribution, as set out by Perell J. in *Slark v. Ontario*, 2017 ONSC 4178 ("*Slark*"):

(i) A *cy-près* distribution must be fair, reasonable and in the best interests of the class (*Slark*, at para. 36);

(ii) A reasonable number of class members who would not otherwise receive monetary relief must benefit from the order (*Slark*, para. 36);

(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 (*Slark*, at para. 38);

(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 (*Slark*, at para. 39); 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 (*Slark*, at para. 40).

(b) Application of the law to the facts of the present case

[95] In the present case, Park proposes that a *cy-près* distribution of the balance of the funds be made equally to the Law Foundation of Ontario and the Law Foundation of British Columbia.

[96] I find that it is appropriate to order the *cy-près* payment to the Law Foundations, given their role in promoting consumer rights and access to justice.

[97] After deduction of $237,786.30 for the legal fees, disbursements, and British Columbia honorariums set out at paragraph 83 above, there will be $50,800.68 remaining in the fund.

[98] As in *Serhan*, it is not practical to distribute the balance of the funds to every shareholder since "it would be uneconomic considering the modest damages" (which are even less than in *Serhan*), and there is "no cost effective way of locating the Settlement Class members, determining if they suffered damage and, if so, establishing their loss" (*Serhan*, at para. 58).

[99] Further, allocating the net settlement funds to the Law Foundations is "directly related to the issues in this litigation" (*Serhan*, at para. 59), since future consumers will benefit from education as to their legal rights and potential legislative reform based on the work of the Law Foundations.

[100] Consequently, I find that the *cy-près* payment is appropriate.

Order and costs

[101] For the above reasons, I grant the relief sought except for the request for an honorarium. Counsel may send me a revised third order which incorporates the specific distribution ordered and the dismissal of the honorarium request.

GLUSTEIN J.

Date: 20190327