CITATION: Dine v. Biomet Inc., 2024 ONSC 5949
COURT FILE NO.: CV-13-490112-00CP
DATE: 20241028

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: STEVEN DALTON DINE, Plaintiff

AND:

BIOMET INC., BIOMET ORTHOPEDICS LLC, BIOMET MANUFACTURING CORP., BIOMET U.S. RECONSTRUCTION, LLC and BIOMET CANADA INC., Defendants

BEFORE: Glustein J.

COUNSEL: *Jonathan Ptak, Jamie Shilton, Daniel McConville, Brent Ryan, Sophie Estienne, and Kayrouz Abou Malhab* for the plaintiff

Derek Ricci, Chantelle Cseh, and Henry Machum, for the defendants

HEARD: October 25, 2024

REASONS FOR DECISION

NATURE OF MOTION AND OVERVIEW

[1] The plaintiff, Steve Dalton Dine ("Dine") brings four motions to the court:

(i) **A motion for approval of the settlement agreement executed on July 18, 2024 (the "Settlement Agreement")**, seeking, on consent, orders (a) for a declaration that the Settlement Agreement is fair, reasonable, and in the best interests of the class, (b) approving the Settlement Agreement pursuant to s. 29 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*CPA*"), (c) approving the form, content, and manner of distribution of the proposed notice of settlement approval, and (d) approving Verita Global LLC ("Verita") as the administrator of the claims process pursuant to the Settlement Agreement.

(ii) **A motion for approval of the $750,000 Discretionary Fund (the "Discretionary Fund") established under the Settlement Agreement (the "Special Claims Protocol"**), seeking orders (a) for a declaration that the Special Claims Protocol is fair, reasonable, and in the best interests of the class, (b) approving the Special Claims Protocol pursuant to s. 29 of the *CPA*, and (c) appointing Verita as the administrator of the Special Claims Protocol.

(iii) **A motion for approval of fees, disbursements, honorarium, and payments to public litigation funders**, seeking orders (a) approving the retainer agreement between Class Counsel[1] and the plaintiff, (b) approving the defendants' contribution of $1,250,000 to Class Counsel fees and disbursements pursuant to section 9.1 of the Settlement Agreement, (c) approving Class Counsel fees on awards made under the Settlement Agreement and in respect of the Discretionary Fund, (d) approving a $7500 honorarium to Dine, to be paid by the defendants, (e) providing that the Class Proceedings Fund ("CPF") is entitled to: (1) the amount of any direct financial support paid under section 59.3 of the *Law Society Act*, R.S.O. 1990, c. 43, excluding any amount repaid by the plaintiff, and (2) 10% of the amount of the award or settlement funds, if any, to which each class member is entitled, excluding awards made to class members resident in Quebec, and (f) providing that the Fonds d'aide aux actions collectives (the "Fonds") is entitled to a levy on the award or settlement funds, if any, to which each class member resident in Quebec is entitled pursuant to the Settlement Agreement.

(iv) **A motion for orders relating to notice to be provided by 78 hospitals listed in Schedule "A" to the notice of motion (the "Hospitals")**, seeking orders: (a) validating service of the plaintiff's motion record on the Hospitals by regular mail or courier and deeming service effective five days after the date the motion record was mailed or couriered, (b) that the Hospitals shall, within 90 days of receipt of the order, for each individual implanted at a Hospital with any of the M2a 38, the M2a Magnum or the ReCap Femoral Resurfacing System (collectively the "Biomet Devices") (1) check their records and databases to identify each person implanted at the Hospital with a Biomet Device to confirm each person's identified address and health insurance number, if it is reasonably possible to do so, and mail a copy of the Notice of Settlement and Explanatory Letter attached as Schedule "B" to the notice of motion to the identified address, and (2) compile a list of the individuals set out in subpara. (1) above including contact information for those individuals, and deliver that list to Verita, and (c) that the Hospitals be reimbursed by Verita for the Hospitals' reasonable costs to carry out the terms of this in accordance with the Settlement Agreement.

[2] The defendants (collectively, "Biomet") consent to the first motion. The other motions are unopposed.

[3] For the reasons that follow, I grant the relief sought, except for the honorarium claimed by Dine.

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[1] Class Counsel is a consortium comprised of Koskie Minsky LLP, Whelton Hiutin LLP, Klein Lawyers, and Sylvestre Painchaud et Associés.

FACTS

[4] There are no contested facts before the court on this motion. Consequently, I adopt the facts either taken *verbatim* or paraphrased from the plaintiff's factum or affidavit evidence.

Background to the action

[5] A hip implant consists of a set of artificial components that are used to replace part or all of the natural hip joint. The initial procedure to replace a natural hip joint is called the "index" surgery. Any further operation that involves a removal from, exchange with, or addition to an existing device is called a "revision" surgery.

[6] Between 2003 and 2014, Biomet marketed a range of hip implant systems which used metal-on-metal ("MoM") articulating components, three of which are at issue in this proceeding: the M2a 38, M2a Magnum and ReCap Femoral Resurfacing System (each a "Biomet Device").

[7] Over time, some patients who were implanted with a Biomet Device suffered from pain, discomfort, and metal-related pathologies, and some had to undergo extremely invasive "revision" surgeries, wherein part or all of their implants were removed and replaced.

The Biomet Devices

[8] The three Biomet Devices were each approved for sale by Health Canada by the issuance of medical device licences between 2003-2006. Over 4000 implant systems were sold across Canada. About half of these sales occurred in 2009-2011, with sales tapering off to just a handful in 2014 when sales ended.

[9] In February 2015, two of the Biomet Devices were issued a "hazard alert" in Australia. However, in Canada, the Biomet Devices remained under approval by Health Canada until sales ended in 2014. Health Canada confirmed that the Biomet Devices met the "safety and effectiveness" requirements of the Medical Device Regulations as late as in November 2013, which is after this case was commenced.

[10] Other MoM hip implant cases (discussed in more detail below) involved devices which had been recalled in Canada.

The Plaintiff

[11] In 2006, Dine was implanted with a Biomet Device. Subsequently, he suffered continuous, intense, and increasing pain. In 2008, Dine underwent surgery to replace his implant with a different Biomet Device. However, he continued to experience excruciating hip pain. On March 15, 2013, Dine underwent another revision surgery to replace his Biomet Device with a non-MoM implant.

History of the Proceeding

Commencement and certification

[12] On October 4, 2013, Dine commenced this class action, which alleged that the Biomet Devices were negligently designed. The defendants deny the allegations against them.

[13] The certification proceedings were vigorously contested by both sides. The plaintiff served a voluminous certification record which included an affidavit from Dine, an expert report from Dr. Stephen Graves (the "Graves Report"), and further evidence including informational materials for the Biomet Devices.

[14] The defendants filed voluminous materials in response, including:

(i) a record for a motion seeking production of the plaintiff's medical records,

(ii) a statement of defence, and

(iii) a notice of motion for summary judgment, seeking dismissal of the plaintiff's claims on the basis that the Biomet Devices were not negligently designed.

[15] Following a scheduling motion brought by the plaintiff, Justice Belobaba directed that the summary judgment motion could proceed after the certification motion.

[16] The parties filed extensive further evidence on the certification motion:

(i) The plaintiff filed additional class member affidavits.

(ii) The defendants served an extensive responding motion record, including an affidavit from David Schroeder, a Vice-President with Biomet, as well as two expert reports. The defendants filed a third expert report, as well as an affidavit from another Biomet Vice-President concerning the regulatory history of the Biomet Devices.

[17] Cross-examinations were held in August 2015. The plaintiff cross-examined the three defence experts and two Biomet Vice-Presidents, while the defendants cross-examined Dine and Dr. Graves. As discussed below, Dine found his cross-examination “difficult”, since it involved highly invasive questions (though not improper) about personal health issues.

[18] In September 2015, the defendants brought a motion to strike the Graves Report, to be heard concurrently with the certification motion. Soon after, the plaintiff delivered his reply certification record, enclosing a reply expert report prepared by Dr. Graves.

[19] Following a three-day hearing, on December 18, 2015, Belobaba J. certified this action as a class proceeding. The following class was certified:

(i) All persons who were implanted in Canada with metal-on-metal hip implant systems known as the M2a 38, the M2a Magnum and the ReCap Femoral Resurfacing System; and

(ii) All other persons who by reason of a personal relationship to an implant patient have standing pursuant to section 61(1) of the *Family Law Act* or equivalent legislation in other provinces and territories.

[20] Despite granting certification, Justice Belobaba acknowledged the defendants' evidence on the purported safety of the Biomet Devices, and wrote that "the defendants may well prevail when the merits are fully adjudicated": *Dine v. Biomet*, 2015 ONSC 7050, at para. 18.

[21] Justice Belobaba declined to decide the motion to strike the Graves Report, holding that there was sufficient evidence to satisfy the "some basis in fact" standard in the report's absence: *Dine*, at paras. 62-64.

[22] On June 17, 2016, the defendants' motion for leave to appeal was dismissed by the Divisional Court: *Dine v. Biomet*, 2017 ONSC 4039 (Div. Ct.).

The Quebec Proceeding

[23] On June 19, 2015, the Conseil pour la Protection des Malades ("CPM") commenced a class action in the Quebec Superior Court through its counsel, Sylvestre Painchaud et Associés, on behalf of persons implanted in Quebec with a Biomet Device (the "Quebec Action").

[24] On September 23, 2016, the Quebec Court stayed the Quebec Action.

[25] Dine, CPM, and their counsel subsequently agreed to form a consortium to prosecute the within proceeding.

[26] Because the class is national in scope, there is no separate Quebec settlement. Upon approval of the Settlement Agreement, CPM will move for (i) homologation of this court's order under the Quebec *Code of Civil Procedure*, and (ii) discontinuance of the Quebec Action.

Notice of certification

[27] Disseminating notice of certification to the class was a complex undertaking that required numerous motions across Ontario, Quebec, and Alberta.

[28] The plaintiff implemented a national direct notice plan, which required all of the hospitals that had implanted Biomet Devices to send certification notices directly to the class members. This plan required the plaintiff to bring multiple motions in Ontario, Quebec and Alberta in 2016-2019.

[29] In addition, the plaintiff brought a further motion (i) requiring hospitals to preserve class members' medical records, (ii) requiring hospitals to send a letter from Class Counsel to class

members advising, *inter alia*, of the need to preserve their own records, and (iii) ordering Quebec's provincial health insurer to disclose class member contact information to Quebec Class Counsel.

[30] The process through which notice was provided to the class was complex and protracted. However, it enabled Class Counsel to build up extensive and detailed lists of class members who contacted them in response to notices sent to them by their hospitals. In total, as of July 2024, Class Counsel's combined contact lists included about 2100 individuals, with whom Class Counsel has maintained communication by providing regular updates.

[31] In addition, the Class Counsel firms all adopted a practice of requesting that revised class members who contacted them provide authorizations enabling Class Counsel to obtain their medical records for the purposes of the proceeding. Class Counsel's review of these records provided insight into the ranges of health impacts experienced by revised class members.

The discovery process

[32] Negotiations between the plaintiff and the defendants concerning the discovery plan were protracted and complex, given the massive volume of potentially relevant documents.

[33] In the discovery plan, the defendants agreed to disclose all documents produced in the numerous U.S. proceedings that had been consolidated through the federal multi-district litigation procedure ("MDL") and in a Florida proceeding, as well as a range of other documents specific to Canada. Between fall 2017 and fall 2018, the defendants produced the documents that had been disclosed in the U.S. proceedings. Approximately 1.5 million such documents were disclosed. The additional documents specific to Canada numbered approximately 153,000.

[34] In an effort to reduce the costs of hosting such an immense database, the plaintiff sought to obtain access to the production database maintained by plaintiffs' counsel in the U.S. In collaboration with the plaintiff in this proceeding, in February 2019, U.S. plaintiffs' counsel brought a motion before the Florida state court in Sarasota County to enable Class Counsel to access their production database. Class Counsel attended the hearing of that motion, and on May 10, 2019, the Florida Court granted the order, subject to a number of conditions precedent.

[35] Ultimately, in light of the steps necessary to fulfil the conditions set by the Florida Court, as well as disagreements between U.S. counsel for Biomet and U.S. plaintiffs' counsel regarding the mechanics by which the U.S. productions would be shared, in May 2020, Class Counsel determined that it was not feasible to rely on the production database maintained by U.S. counsel.

[36] Through 2020, the plaintiff continued efforts to make the document review process more manageable in collaboration with a Canadian document management company, Heuristica Discovery Counsel LLP ("Heuristica"). In late 2020 and early 2021, the plaintiff obtained and reviewed the transcripts and exhibits from two trials that had been conducted in the U.S. Later in 2021, these exhibits were provided to Heuristica, which used algorithmic software to identify a subset of conceptually similar documents across the 1.5 million productions from the U.S.

proceedings. Throughout this process, Class Counsel reviewed a massive volume of documents in order to prepare for discoveries, and ultimately for trial.

[37] In September 2022, the parties scheduled dates for oral examinations for discovery. Then, in October 2022, the parties agreed to engage in mediation.

Settlement discussions and mediation

[38] The parties agreed to a mediation before Linda R. Rothstein, a leading member of the Ontario bar. Ms. Rothstein has successfully mediated a number of class actions, resulting in court-approved settlements.

[39] In advance of the mediation, the plaintiff disclosed medical records for 35 revised class members to the defendants. The parties exchanged mediation briefs in April, 2023.

[40] The first mediation session took place between May 1-3, 2023. While some progress was made, an agreement could not be reached. The plaintiff agreed to provide further information concerning known class members who had undergone revision surgeries, and concerning any information maintained by the provincial health insurers.

[41] Further mediation dates with Ms. Rothstein were held on October 11-12, 2023. Again, despite further progress, an agreement was not reached.

[42] At a further mediation session with Ms. Rothstein on November 29, 2023, the parties reached an agreement-in-principle ("AIP").

[43] While the AIP was a major milestone, significant work toward the completion of a full settlement agreement remained to be done. From December 2023 through to July 2024, the parties exchanged numerous offers and counter-offers to resolve challenging issues such as the causation criteria applicable to class members whose revision surgeries occurred more than 10 years following the index surgery, which required review of scientific publications and class member medical records. The final version of the Settlement Agreement was concluded on July 18, 2024.

Biomet Device Litigation in Foreign Jurisdictions

[44] Over the course of the litigation in this proceeding, the plaintiff closely monitored developments in litigation over the same devices in foreign jurisdictions.

[45] In 2014, Biomet agreed to settle the suits that had been consolidated through the MDL (the "U.S. MDL Settlement").

[46] In 2020, federal jury trials were held in Missouri (*Bayes et al. v. Biomet, Inc. et al.*, or "*Bayes*") and Iowa (*Nicholson et al. v. Biomet, Inc. et al.*, or "*Nicholson*"). In both cases, the juries issued plaintiff verdicts, finding in *Bayes* that the M2a Magnum was negligently designed,

and finding in *Nicholson* that the same implant was defectively designed: *Bayes v. Biomet, Inc.*, 2021 WL 3330911 (E.D. Missouri); *Nicholson v. Biomet, Inc.*, 537 F.Supp.3d 990 (N.D. Iowa).

[47] Biomet challenged these verdicts before the trial judges and on appeal. Both verdicts were upheld: *Nicholson v. Biomet, Inc.*, 46 F.4th 757 (8th Cir. 2022); *Bayes v. Biomet, Inc.*, 55 F.4th 643 (8th Cir. 2022).

[48] However, on June 28, 2023, a court in the Netherlands reached the opposite conclusion in a case brought by fifteen plaintiffs against Biomet for injuries alleged to have been caused by the Biomet Devices. In *Stevens et al. v. Biomet et al.*, Rotterdam Court, 12 June 2023, C/10/461497 HA ZA 14-1051 (et al.) ("*Stevens*") the Rotterdam court dismissed all fifteen claims, finding at paras. 5.16, 5,20, 5.22-5.23, and 5.23-5.27 that during the relevant period (2004-2009), *inter alia*:

(i) Revision rates for the devices were comparable to the rates for non-MoM alternatives.

(ii) Long-term effects of chromium/cobalt particles from MoM hip implants were unknown.

(iii) The precise cause of inflamed tissue masses proximate to an implant ("pseudotumors") was unknown, and such issues were often attributed to patient-specific factors including the correct placement of the device by the operating surgeon.

(iv) While there was a general acceptance of some of the disadvantages of using MoM for hip implants, there was an overall favourable risk-to-benefit ratio when considering the advantages of the materials as well as issues with the non-MoM alternatives.

[49] The source of scientific evidence for the court's conclusions in *Stevens* was a panel of three neutral, court-appointed experts, rather than litigation experts proffered by the parties: at para. 4.10. Based on the experts' joint report, the court concluded, at para. 5.34:

> [I]t follows from the expert report that Biomet's MoM hip prostheses were "state of the art" in the relevant period, and that any known disadvantages of their use were taken for granted. That the distinct products making up the prosthesis were defective at the time… has not been established by the expert report.

[50] In reaching this conclusion, the court in *Stevens* applied the "strict liability" standard. As the court explained, under this standard, a producer is strictly liable "as soon as a product put into circulation by him shows a defect and thereby causes damage", unless "the state of scientific and technical knowledge at the time he put the product into circulation made it impossible to detect the existence of the defect": at paras. 3.1-3.4.

Scientific Views of the Comparative Performance of the Biomet Devices

[51] The Biomet Devices belong to the broader class of MoM hip implants. Since the mid-2010s, MoM has largely been phased out in favour of other materials. More than a decade of scientific research has demonstrated that failure rates vary between MoM devices, and that certain devices are considerably more likely to fail than are the Biomet Devices.

[52] The Australian Orthopaedic Association and the federal government of Australia operate a registry of joint replacement devices (the "Australian Registry") which, *inter alia*, tracks the performance of specific devices over time. In his certification decision, Belobaba J. relied significantly on the Australian data, as presented in the Graves Report: *Dines*, at paras. 24-29.

[53] In its 2023 report, the Australian Registry reported on two of the Biomet Devices, as well as on the DePuy ASR and Zimmer Durom, which, as set out below, were also the subjects of class action settlements. Per the Australian Registry, at 10 and 15 years, the Biomet Devices performed materially better than these comparators and the MoM category as a whole:

Manufacturer	**Femoral Head Component**	**Acetabular Cup Component**	**5-Year Cumulative Revision Rate**	**10-Year Cumulative Revision Rate**	**15-Year Cumulative Revision Rate**
DePuy	ASR	ASR	24.9%	45.3%	51.7%
All MoM Devices			11.6%	22.5%	28.6%
Zimmer	Metasul	Durom	5.6%	13.3%	18.3%
Biomet	M2a	M2a	6.5%	11.4%	15.9%
Biomet	M2a Magnum	ReCap	4.3%	8.5%	12.1%

[54] In 2019, Finnish researchers published results from a long-term study of thousands of patients who had received MoM hip implants (the "Finnish Study"). The revision rates for the Biomet, Zimmer, DePuy, and all MoM devices described in the Finnish Study were similar to those published by the Australian Registry.

[55] Revision rates for the Stryker Rejuvenate device, which was also the subject of a settled Canadian class action, as set out below, were not tracked in the Australian Registry or in the Finnish Study. However, available evidence indicates that those rates were very high. Dr. Graves, the plaintiff's expert for the certification motion herein, also provided a report concerning the Stryker Rejuvenate and another Stryker device for the Ritlop and Lackner class action. Dr. Graves noted that the two devices "had very similar technologies" and were "very similar in design". According to the Australian Registry, the other Stryker device – the ABG II – had a revision rate of 10.4% at just 3 years, and a revision rate of 14.5% at 5 years. These rates massively exceeded the revision rates for the Biomet Devices over the same time period.

[56] Canadian authorities do not prescribe standards for failure rates of hip implants.

[57] A U.K. authority, the National Institute for Clinical Excellence ("NICE"), has published such standards. From 2000-2014, when the Biomet Devices were available in Canada, NICE's position was that "the best prostheses… demonstrate a revision rate… of 10% or less at 10 years".

[58] The data from the Australian Registry and Finnish Study suggest that the revision rates for the Biomet Devices range from about 8.5% to 14% at ten years, rates which are within or close to the NICE benchmark, and which are considerably lower than the 22.5% to 35% revision rates for MoM devices generally as well as the 45% to 60% revision rates for the DePuy ASR.

[59] In 2014, NICE published updated guidance which recommended that a hip implant should only be used if it has a revision rate of 5% or less at 10 years.

MoM Hip Implant Class Actions: The Canadian Context

[60] The Settlement Agreement in this case follows several other settlements in other MoM hip implants class actions.

[61] These settlements were reached (and approved) in the following cases:

(i) *Jones v. Zimmer*, which concerned the Zimmer Durom device (the "Zimmer Durom Settlement"): Class counsel was Klein Lawyers LLP, part of the Class Counsel consortium in this case. Like the devices at issue in the other cases (but unlike the Biomet Devices), the Zimmer Durom was recalled by Health Canada following reports of increased rates of revision surgeries. In 2016, the Zimmer Durom Settlement was approved by the courts of B.C., Ontario, and Quebec: *Jones v. Zimmer GMBH*, 2016 BCSC 1847; *McSherry v. Zimmer GmbH*, 2016 ONSC 4606; *Major c. Zimmer inc.*, 2016 QCCS 3093.

(ii) *Wilson v. Depuy International Ltd.*, which concerned the DePuy ASR MoM hip implant (the "BC DePuy Settlement"): Klein Lawyers LLP was also class counsel in this case. The DePuy ASR had been subject to a worldwide recall following reports of extremely high revision rates. The BC DePuy Settlement was approved by the BC Supreme Court on July 16, 2018: *Wilson v. Depuy International Ltd.*, 2018 BCSC 1192.

(iii) *Ritlop and Lackner v. Stryker Canada*, which involved the Stryker Rejuvenate device (the "Stryker Rejuvenate Settlement"): Class counsel in this case were Koskie Minsky LLP, Klein Lawyers LLP, and Whelton Hiutin LLP, all members of the Class Counsel consortium in this case. Like the Zimmer Durom and DePuy ASR devices, the Stryker Rejuvenate had been recalled in Canada. Justice Belobaba approved the Stryker Rejuvenate Settlement on January 6, 2020.

(iv) *Crisante v. DePuy Orthopaedics* (the "Ontario DePuy Settlement"), an Ontario case which also involved the DePuy ASR: Class counsel in this case was Whelton

Hiutin LLP. Justice Belobaba approved the Ontario DePuy Settlement on May 21, 2021: *Crisante v. DePuy Orthopaedics*, 2021 ONSC 3703.

[62] Certain basic concepts appear in some or all of the precedent settlements, and also appear in (or are relevant to the comparison with) the Settlement Agreement. These include:

(i) base compensation to each class member who received a MoM device in one hip and then underwent a revision surgery ("single revision"),

(ii) higher base compensation to each class member who received MoM devices in both hips and then underwent revision surgeries in both hips ("bilateral revision"),

(iii) compensation for post-revision complications such as further revisions, heart attacks/strokes, lost wages, and infections,

(iv) time-based reductions in compensation corresponding with the number of years between the index surgery and revision surgery,

(v) age-based reductions in compensation corresponding with the claimant's age when the index surgery occurred,

(vi) eligibility cutoffs for claimants whose revision surgeries occurred after a certain number of years following their index surgeries,

(vii) compensation for unrevised class members, including class members who were indicated for revision but whose health status precluded the revision surgery ("medically precluded"),

(viii) compensation for family members of revised class members, and

(ix) compensation for out-of-pocket expenses.

[63] The precedent settlements and the Settlement Agreement share many of these basic concepts.

The Settlement Agreement

[64] The Settlement Agreement provides the following benefits to class members, *inter alia*:

(i) a claims-made settlement structure with no aggregate cap on compensation,

(ii) up to $75,000 in compensation for single revision class members (or up to $90,000 for bilateral revisions), subject to time-based reductions,

(iii) up to an additional $40,000 for complications following a revision surgery (up to $50,000 for bilateral revision claimants),

(iv) compensation for class members whose revision surgeries occurred up to 12 years after their MoM devices were originally implanted,

(v) a simplified claims process with no requirement to prove causation of revision surgeries which occurred during the first ten years of implantation, and low-barrier causation criteria for revision surgeries which occurred between 10-12 years of implantation,

(vi) compensation for principal caregivers and minor children of class members,

(vii) compensation for class members who are medically precluded from undergoing a revision surgery, and for other class members who have not had revision surgeries,

(viii) compensation for out-of-pocket expenses associated with a revision surgery,

(ix) compensation for certain other class members available through a separate and discrete $750,000 fund, the Special Claims Protocol which covers (a) class members whose revision surgeries occurred up to 16 years after their MoM devices were originally implanted, and (b) class members who have not had revision surgeries, but who are experiencing high levels of metal ions in their blood, and

(x) compensation for the Ontario Health Insurance Plan and all other Provincial Health Insurers of $15,000 for each revision surgery which occurred within 12 years of the index surgery.

Dissemination of Notice of the approval hearing

[65] Pursuant to a court order dated July 31, 2024, broad notice of the proposed settlement and approval hearing was disseminated through a variety of means, including direct notice to the thousands of class members from Class Counsel, electronic notice through over 6 million impressions on social media websites, a press release, and other means.

Objections

[66] Four objections were received by Class Counsel out of a potential class of over 4000 individuals. The objections raised concerns about:

(i) the payment by class members (rather than by the defendants) of 25% of the final settlement for legal fees,

(ii) the quantum of the settlement in comparison to the U.S. settlement,

(iii) deductions for *in vivo* time between the initial and revision surgeries because some class members may not have known that they should consult with a doctor until later on in the life of their implant,

(iv) a request to “ban” Biomet due to the effects on class members and Biomet’s alleged misrepresentations,

(v) insufficient compensation for an unrevised class member whose doctor has recommended revision surgery, and

(vi) entitlement to compensation for revision surgery limited to those surgeries which took place more than 180 days following the index surgery.

Evidence relevant to fee approval

[67] Upon approval of the Settlement Agreement, the defendants will contribute $1.25 million toward Class Counsel's fees and disbursements.

[68] The retainer agreement (the "Retainer") provides as follows with respect to counsel fees:

> In the event of Success in the Action, the Lawyers shall be paid from the Recovery an amount for fees which is the greater of:
>
> (a) a percentage of the total value of any Recovery, plus applicable taxes and a proportionate share of any interest accruing on the Recovery. The above percentage will be calculated based on a 35% fee of the first $25,000,000.00 or any part thereof, 25% of the second $25,000,000.00 or any part thereof, and 10% of any additional amounts, and
>
> (b) four times the Base Fee.

[69] $752.569.86 of the $1.25 million amount will be used to repay the CPF for the funding advanced. A further $22,245.03 will be applied to the disbursements incurred by Class Counsel which were not covered by the CPF. Thus, Class Counsel will share in $475,185.11 as the fee portion of the defendants' contribution.

[70] The amount remaining following repayment of disbursements will be applied to reduce fees payable by claimants. The administrator will hold back a portion of fees payable to Class Counsel until the amount held back equals the sum of (i) the residue of the defendants' contribution to Class Counsel fees and disbursements and (ii) the total of the fee portions of the costs awards made earlier in the proceeding. Disbursements incurred in connection with the implementation of the settlement will be reviewed by the court following the distribution process and the approved amount will be deducted from the withheld amount, with the balance of all held back funds then divided *pro rata* among approved claimants.

[71] The defendants' contribution to Class Counsels' fees and disbursements was substantially larger than was obtained in any of the precedent settlements:

(i) Zimmer Durom Settlement: $500,000 (costs) + $500,000 (disbursements): *McSherry v. Zimmer GmbH*, 2016 ONSC 4606, at para. 39,

(ii) BC DePuy Settlement: $275,000 (fees) + $50,000 (disbursements): *Wilson v. Depuy International Ltd.*, 2018 BCSC 1192 at para. 43, and

(iii) Stryker Rejuvenate Settlement: $550,000 (fees and disbursements): Stryker Rejuvenate Settlement Agreement at p. 27, s. 9.1.1.

[72] This larger contribution to costs and disbursements results in a larger offset against fees payable by class members, resulting in a benefit to the class.

[73] As was the case in connection with the Stryker Rejuvenate Settlement, and in line with the total fee approved in connection with the Zimmer Durom Settlement, Class Counsel in this case have undertaken not to charge more than an additional 8.3% to class members who retain Class Counsel to make a claim under the Settlement Agreement or the Special Claims Protocol.

Evidence relevant to the request for honorarium

[74] In the statement of claim and his certification affidavit, Dine was required to disclose personal health information regarding the revision surgeries he underwent, including disclosure of his use of pain medication and sleeping pills, impacts on relationships with family and friends, and his long-term disability and early retirement.

[75] Dine was the only class member who was cross-examined. During the cross-examination on his certification affidavit, counsel for the defendants referred to Dine's body mass index, suggesting to him that he would be characterized as someone who is "extremely obese". Counsel repeatedly asked Dine to confirm the time periods when he was, in counsel's terms, "extremely obese", and questioned Dine on his diabetes and asthma, as well as on his use of medications, including Ventolin (a steroid), Dilaudid (an opioid pain medication), and sleeping pills.

[76] In their factum for the certification motion, the defendants argued that what they described as Dine's "extreme obesity, diabetes, asthma and hypertension" may have contributed to the revision surgeries and other health consequences he had suffered.

[77] Honoraria were awarded in the other MoM cases:

(i) In approving the Ontario DePuy Settlement, Belobaba J. awarded $10,000 each to two representative plaintiffs, noting that each had "agreed to provide and be cross-examined on highly personal medical and employment records: *Crisante v. DePuy Orthopaedics*, 2021 ONSC 3703 at para. 40.

(ii) Justice Belobaba also approved $10,000 honoraria to the two representative plaintiffs in connection with his approval of the Stryker Rejuvenate Settlement: Stryker Fee Approval Order.

(iii) In connection with the approval of the Zimmer Durom Settlement, an honorarium of $10,000 was awarded to a representative plaintiff by the BC court, and additional honoraria of $5000 were awarded by the Ontario court to the representative plaintiff and a heavily involved class member in the Ontario action: *Jones v. Zimmer GMBH*, 2016 BCSC 1847 at para. 62; *McSherry v. Zimmer GmbH*, 2016 ONSC 4606 at para. 54; Ontario McSherry Approval Order.

Evidence relevant to appointment of Verita as the Administrator of the claims process

[78] On June 12, 2024, Verita was introduced as the unified operating brand for RicePoint Administration Inc., Kurtzman Carson Consultants LLC, and Gilardi & Co.

[79] By order of the court dated July 31, 2024, Verita was appointed notice administrator for the dissemination of the notice for the hearing of the motion for approval of the Settlement Agreement.

[80] Including the time during which it operated under the RicePoint brand, Verita has been appointed administrator on more than 160 class action settlements.

[81] In particular, while operating under the RicePoint brand, Verita was appointed administrator of the settlement in *Crisante v. DePuy* (the "Ontario DePuy Settlement"). The *Crisante v. DePuy* case also involved MoM hip implants. As the administrator, Verita received and reviewed thousands of pages of medical records submitted for class members' claims, confirmed whether the correct device had been implanted and whether revision surgeries had taken place, and assessed claims for complications and income loss.

Evidence relevant to the order sought against the Hospitals

[82] This action was certified as a class action by order of Justice Belobaba on December 18, 2015 (the "Certification Order").

[83] On November 10, 2016, Justice Belobaba made a further order (the “Hospital Notice Order”) that Hospitals deliver notice of certification and other information to individuals in the same manner as sought in the present motion before the court.

[84] The Hospitals delivered notice of certification, and an explanatory letter in the same manner set out in the Hospital Notice Order.

[85] Class Counsel received communications from a number of class members or potential class members as a result of that hospital notice program from 2016 onward, and Quebec counsel received contact information from Quebec's provincial health insurer, the Regie de l'assurance maladie du Quebec ("RAMQ"), of potential class members.

[86] Class Counsel have compiled significant lists of email and mailing addresses for class members or potential class members.[2]

ANALYSIS

Issue 1: Settlement Agreement Approval (including the Special Claims Protocol)

[87] I first review the applicable law and the apply the law to the present case.

The applicable law

[88] The law governing settlement approval in class actions is not contested. I summarize the relevant principles as follows:

(i) A settlement of a class action is not binding unless approved by the court: s. 29(2) of the *CPA*.[3]

(ii) To approve a settlement, the court must find that, in all of the circumstances, the settlement is fair, reasonable, and in the best interests of the class as a whole: *Mancinelli v. Royal Bank of Canada*, 2017 ONSC 2324 at para. 36.

(iii) The overarching question is whether the settlement falls within a zone of reasonableness; this allows for a range of acceptable outcomes depending upon the subject matter of the litigation and the nature of damages: *Sheridan Chevrolet v. Valeo S.A.*, 2021 ONSC 3555 at para. 4; *McKillop and Bechard v. HMQ*, 2014 ONSC 1282 at para. 23.

(iv) To determine whether the settlement is reasonable, "[t]he supervising court must compare the settlement with what would probably be achieved at trial, discounting for any defences, legal or evidentiary hurdles or other risks that would have to be confronted and overcome if the matter were to proceed to trial": *Brown v. Canada (Attorney General)*, 2018 ONSC 3429 at para. 12.

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[2] At the hearing, Class Counsel advised that (i) they have more than 2000 class members on their contact list and (ii) more than 160 class members have specifically contacted Class Counsel expressing interest in making a claim under the Settlement Agreement. Class Counsel further advised at the hearing that they anticipate approximately 4000 total class members.

[3] As it appeared on March 15, 2013. Amendments to the *CPA* took effect in October 2020. However, pursuant to the transitional provisions of the amended *CPA* (see s. 39(1)), the previous version of the *CPA* continues to apply to actions which were commenced before the amendments took effect, such as the present action.

(v) The court must also examine the fairness and reasonableness of the scheme of distribution under the settlement: *McKay v. Rowe et al*., 2024 ONSC 137 at para. 31.

[89] In *Parsons v. Canadian Red Cross* Society, [1999] O.J. No. 3572 (S.C.J.) at paras. 71, 72 and 92, Winkler J. (as he then was) identified a number of factors which courts may consider in this analysis:

(i) the likelihood of recovery or success,

(ii) the amount and nature of discovery evidence,

(iii) settlement terms and conditions,

(iv) the recommendation and experience of counsel involved,

(v) future expense and likely duration of litigation,

(vi) recommendation of neutral parties, if any,

(vii) the number and nature of objections,

(viii) presence of good faith and the absence of collusion,

(ix) degree and nature of communications by counsel and plaintiff with class members,

(x) the dynamics of, and positions taken during, the negotiations, and

(xi) the risks of not unconditionally approving the settlement.

[90] As Winkler J. noted in *Parsons*, “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": at para. 73.

Application of the law to the present case

[91] In the present case, I agree with the plaintiff’s submission that the most important factors to consider are the likelihood of success, terms of settlement and future delays if the litigation is required to continue. I address each of these factors below, as well as ancillary factors which also support approval of the Settlement Agreement.

(i) Likelihood of success

[92] There was considerable litigation risk if the action proceeded to trial. The litigation was highly contested and the particular risks related to the Biomet Devices were unique since those devices performed better than the other MoM devices at issue in the other MoM class actions.

[93] I rely on the following factors:

(i) In *Stevens*, the claims of 15 plaintiffs were dismissed, and that decision was based on a lower strict liability standard. As I discuss above, the Rotterdam court reviewed and considered expert evidence from a panel of three neutral, court-appointed experts, rather than litigation experts proferred by the parties. Consequently, its decision could have been highly persuasive at a common issues trial in the present case, particularly when the present class action would have also required a higher threshold to establish negligence.

(ii) A common issues court in the present case may have given little or no weight to the US litigation in *Bayes* and *Nicholson* as they were jury decisions without reasons. The appellate decisions were based only on the very high threshold for interfering with a jury verdict.

(iii) The risk profile of the Biomet Devices is significantly different than the other MoM devices. Scientific evidence on the Biomet Devices suggests that (a) the Biomet Devices have tended to have lower revision rates than other MoM hip devices and (b) the revision rates for the various Biomet Devices range from slightly below to somewhat above the most prominent regulatory standard applicable at the time that the Biomet Devices were being sold in Canada, being the 2000 NICE standards. Consequently, a common issues court could have (as in *Stevens*) relied on this revision data.

(iv) In negligent design cases, the conduct of a manufacturer is typically assessed according to the standard that existed at the time of distribution of the product and without the benefit of hindsight, and by comparing the foreseeable risk at that time as against the foreseeable utility. Thus, even if the plaintiffs could establish that the NICE standards applied to devices sold in Canada, it is likely that the more forgiving 2000 standard would apply. The fact that the revision rates for the Biomet Devices range from slightly below to somewhat above the applicable NICE benchmark weighed significantly on the plaintiff's risk analysis, and made the case much more challenging.

(v) The Biomet Devices were never subject to a recall or regulatory action in Canada (unlike the precedent cases in which there was some form of recall or regulatory action in Canada). To the contrary, Health Canada confirmed that the Biomet Devices met the "safety and effectiveness" requirements of the *Medical Device Regulations* as late as in November 2013. While the position of a regulator is not dispositive of liability, "[c]ompliance with regulatory and industry standards can be useful evidence of reasonable conduct": *Andersen v. St. Jude Medical, Inc*., 2012 ONSC 3660, at para. 101.

While the plaintiff could have relied on health alerts issued in Australia for the Biomet Devices, the lack of such an alert by Health Canada raised significant litigation risk.

(vi) Aggregate damages were not certified as a common issue. Consequently, there was a risk that the class could succeed on the common issues but lose at individual trials since every class member would have to prove that their damages were caused by the implant of the Biomet Device (let alone the cost and time such individual trials would require).

[94] Based on the above factors, I find that there was significant litigation risk if the matter had proceeded to a common issues trial.

(ii) Terms of settlement

[95] I find that the Settlement Agreement is within the zone of reasonableness. Despite the increased risk, the parties reached a settlement largely consistent with the other MoM settlements and significantly improved in many areas. I rely on the factors discussed below.

(a) The benefits of a claim-based settlement

[96] As a claims-made settlement structure, there is no aggregate cap on compensation. There are at least three advantages to this model as compared to the aggregate fund model:

(i) Aggregate fund settlements create a risk that class member compensation may be proportionately reduced if more class members come forward that are expected, or if the seriousness of class member injuries as a group are different than expected. Here, it is unknown exactly how many class members have had revision surgeries due to, *inter alia*, the absence of a national registry in Canada which would track revisions in the manner of the Australian Registry. Avoiding the risk of oversubscription is therefore a significant benefit to the class.

(ii) Because there is no risk of proportionate reductions in compensation, a claims-made settlement can specify exactly how much compensation will be payable to approved claimants. This makes it easier for class members to understand the value of their claims and provides them with significant and valuable certainty.

(iii) Under a claims-made settlement, compensation can be paid out as claims are determined. By contrast, in an aggregate fund settlement, compensation can only be paid out after the end of the claims period, when all claims have been received and determined. Under the Settlement Agreement, each claim is required to be decided within 60 days of receipt, and (subject to any request for reconsideration) will be paid out according to a monthly payment schedule.

(b) The base compensation for revised class members is within the zone of reasonableness.

[97] The base compensation under the Settlement Agreement, $75,000 for a single revision, is comparable to the amount available under the Zimmer Durom Settlement ($70,000), notwithstanding that the revision rates for the Zimmer Durom were higher than those for the Biomet Devices, and that the Zimmer Durom had been recalled, while the Biomet Devices were not.

[98] While the base compensation in the Settlement Agreement is lower than it was in the Stryker Rejuvenate Settlement and the two Depuy settlements, this reflects the fact that the devices at issue in those cases had much higher revision rates and were recalled in Canada.

[99] Further, as set out above, the plaintiff faced tremendous risk at a common issues trial owing to, *inter alia*, the low revision rates observed in the Biomet Devices and Health Canada's favourable assessment. Against the risks and in this context, the base compensation under the Settlement Agreement is an excellent result.

[100] Finally, the Settlement Agreement has features which are superior to the precedents: it extends the eligibility window beyond the precedents; it reduces and eliminates, respectively, the time and age-based reductions in compensation in the precedents; and it provides compensation to unrevised class members.

(c) Compensation reductions for years of performance have been improved.

[101] With the exception of the Ontario DePuy Settlement, which involved the most failure-prone device, all of the precedent settlements have included terms which reduced compensation based on the number of years between the index surgery and the revision surgery. While the Settlement Agreement shares this structure, its time-based reductions have been improved in terms of:

(i) Magnitude: Under the Settlement Agreement, compensation payable to a claimant whose Biomet Device was revised between its ninth and tenth year will be reduced by 20%. By contrast, under the Stryker Rejuvenate Settlement and BC DePuy Settlement, compensation for a claimant whose device survived for the same duration was reduced by 30% and 32%, respectively.

(ii) Interval before Reductions: In the Settlement Agreement, time-based reductions begin at year 7. By contrast, time-based reductions in the Zimmer Durom Settlement and the BC DePuy Settlement began at years 4 and 6, respectively.

[102] Further, unlike the Stryker Rejuvenate Settlement and the BC DePuy Settlement, the Settlement Agreement does not include terms which reduce compensation on the basis of age. For class members who received their implant at age 80, those settlements reduced compensation by 15% and 12%, respectively. The Settlement Agreement avoids such reductions entirely.

(d) Eligibility cutoff dates are more extended under the Settlement Agreement than in prior MoM settlements

[103] The precedent settlements, including the Ontario DePuy Settlement, all included terms which restricted class member eligibility based on the number of years between the index and revision surgeries. These eligibility cutoffs reflect the fact that, for all hip implants, the probability that a revision will be required increases over time; accordingly, with the passage of time, it becomes less likely that a revision is attributable to device-specific issues, rather than to the general experience with artificial hip implants. In his decision to approve the Zimmer Durom Settlement, Perell J. noted (*McSherry v. Zimmer GmbH*, 2016 ONSC 4606, at para. 47):

> Medical devices are not perfect and may fail for reasons other than negligent manufacture. Setting a deadline by reference to whether or not the patient had or scheduled revision surgery is reasonable and reflects the increased difficulty a Class Member would have in proving causation with the passage of time after the medical device has been implanted.

[104] Consistent with this, the UK authority, NICE, has only prescribed performance standards up to the 10-year mark, both in the 2000 and 2014 versions of its guidelines. There are no standards against which to measure the performance of devices past the 10-year mark. Accordingly, after that point, it is more challenging to conclude that device failures are occurring at abnormal rates.

[105] A defendant is only liable for injuries caused by its negligence. In this case as well as the precedents, the eligibility cut-off functions as a proxy for proof of causation. Up to a certain point (here, 10 years), causation is deemed, and the claimant need not show any specific proof of causation. After 10 years, the claimant needs to satisfy some causation criteria, reflecting the increased difficulty of proving causation after that point.

[106] The ultimate eligibility cut-offs in the precedent settlements function as the points at which the likelihood that a revision was caused by a defect was overwhelmed by the likelihood that the revision was caused by other factors; here however, the plaintiff was successful in negotiating an expanded window of eligibility through the Discretionary Fund and Special Claims Protocol, which will provide compensation to claimants whose devices lasted up to 16 years.

[107] In the Stryker Rejuvenate Settlement and BC DePuy Settlement, no class member whose implant lasted ten or more years was eligible for compensation. In the Ontario DePuy Settlement, the cut-off was eleven years. The eligibility cut-off for the Zimmer Durom Settlement operated somewhat differently, but it effectively restricted eligibility to class members whose devices lasted between 5-11 years, depending on the date of the index surgery.

[108] The 12-year eligibility cut-off in the Settlement Agreement improves on all of the precedents – including the settlements involving devices which had significantly higher revision rates than the Biomet Devices.

(e) Benefits for class members whose Biomet Devices have not been revised (and who are not medically precluded)

[109] This term is absent from the Stryker Rejuvenate Settlement and the BC DePuy Settlement, under which unrevised class members received no compensation, and is consistent with the Zimmer Durom Settlement.

[110] Under the Ontario DePuy Settlement, an unrevised class member could only obtain compensation by submitting evidence which demonstrated that they had suffered "serious and prolonged" psychological distress relating to fear of metallosis or other related health risks: *Crisante v. DePuy Orthopaedics*, 2021 ONSC 3703 at para. 28.

[111] Since the approval of the settlements in the precedent cases, jurisprudential developments have substantially impacted the viability of claims on behalf of individuals whose implants have not been revised.

[112] In *Palmer v. Teva Canada Limited*, 2024 ONCA 220, the Court of Appeal reaffirmed that being subjected to conduct that contributes to an increased risk of damage is not, in itself, compensable under the law of negligence: at para. 47. The court also struck out claims for psychological injury resulting from the fear of having ingested a toxic chemical, concluding that pleadings of "prolonged basis shock, worry, great mental distress and anxiety since learning of the [product recall]" did not exceed the "ordinary fortitude" standard: at para. 66.

[113] Given the law reaffirmed in *Palmer*, the plaintiff would have faced significant challenges in establishing that unrevised class members are entitled to compensation due to the mere fact of having been implanted with a Biomet Device.

(f) Comparison to the US MDL Settlement

[114] While there was higher compensation under the US MDL Settlement, the latter reflected Biomet's overall litigation exposure in the US both for litigation risk (which was not materially different) and potential monetary liability (which was materially different due to the risk of massive jury awards).

[115] Further, there are several respects in which the Settlement Agreement distributes compensation on broader and fairer terms than did the U.S. MDL Settlement. For example:

(i) Compensation for claimants whose Biomet Devices lasted between 10 and 12 years was reduced by 90% under the U.S. MDL Settlement, whereas the same claimants' compensation would only be reduced by 30% and 40%, respectively, under the Settlement Agreement;

(ii) The U.S. MDL Settlement provided no compensation to unrevised claimants; and

(iii) Estate claimants were only entitled to 10% of the base amount payable to revision claimants (US$20,000), whereas estate claimants under the Settlement Agreement have access to the same process and same compensation as living claimants.

(g) The Special Claims Protocol provides important compensation

[116] In addition to the claims-made settlement structure described above, the Settlement Agreement provides that the defendants will pay $750,000 toward the establishment of the Discretionary Fund, the distribution of which will be determined by Class Counsel. To this end, Class Counsel have designed the Special Claims Protocol which provides compensation to the following groups, who were excluded from the precedent settlements:

(i) Unrevised class members with high blood levels of cobalt or chromium;

(ii) Class members, if any, whose index surgery occurred in late 2013 or 2014 and whose revision surgery occurred within 12 years, but after the claims deadline in the Settlement Agreement; and

(iii) Class members whose revision surgeries occurred 12-16 years after their index surgery.

[117] None of the precedent settlements provided compensation for high metal levels, despite concerns raised by some objectors to those settlements. The Special Claims Protocol will ensure that concerned class members will be able to recover for this issue (in addition to recovery as unrevised class members under the terms of the Settlement Agreement).

[118] The second category in the Special Claims Protocol protects against the possibility that a revised class member, due to the timing of their index and revision surgeries, may slip through the cracks of the eligibility criteria in the Settlement Agreement. While it is unclear whether any such individuals exist, these terms ensure that no class member is unfairly excluded on this basis.

[119] The third category provides a further extension of the eligibility window to those class members whose revision surgeries occurred up to 16 years after their index surgeries. This extends eligibility far beyond the precedent settlements.

[120] Further, after all individual claims are assessed, if there are any remaining funds a secondary distribution of $100,000 is available to other class members, with any outstanding balance (if it arises) to be paid to the Fonds and then (if any funds remain available) to provincial health insurers.

[121] The Special Claims Protocol will compensate claimants who were excluded under the other settlements and is a fair scheme for distributing the Discretionary Fund.

[122] All of the above benefits provide additional compensation to class members who would not otherwise have received benefits under the Settlement Agreement. For the above reasons, the Special Claims Protocol is fair and reasonable.

(iii) Avoidance of lengthy delays

[123] The Settlement Agreement avoids the lengthy delays that would have been incurred if the matter had proceeded to a common issues trial.

[124] Had the plaintiff pursued litigation and succeeded at a common issues trial, compensation for class members would still be many years away. Class Counsel estimates that oral discoveries, preparation of expert reports, trial proceedings and appeals, a s. 25 motion to determine the process for individual issues, and appeals of those decisions, and then claims by individual class members, would take at least 5-6 years.

[125] Based on the timelines in the Settlement Agreement, if approval is granted compensation can begin flowing in spring 2025. Given the age of the class members, this is another factor that supports approval.

(iv) Additional factors supporting approval of the Settlement Agreement

[126] I rely on the following additional factors which support approval of the Settlement Agreement:

(i) Settlement was reached after extensive documentary discovery. Approximately 1.5 million documents were disclosed from the US proceedings. The additional documents specific to Canada numbered approximately 153,000. Detailed records for many class members were obtained from the RAMQ to provide information as to those class members who required revision surgeries.

(ii) Settlement is recommended by experienced Class Counsel, many of whom were counsel in the comparable MoM litigation.

(iii) Settlement was reached after hard-fought, fully briefed, arm's length negotiations over six days between counsel with the assistance of a senior, experienced mediator. A further 8 months of hard-fought negotiations were required to arrive at an executed Settlement Agreement after the AIP was reached.

(iv) Settlement was reached in good faith.

(v) Consideration of objections

[127] Only four objections were received after a thorough notice program. With respect to the concerns summarized at para. 66 above, I find:

(i) The defendants are not required to pay legal fees on a settlement of a class action. The Retainer Agreement provides for payment by class members.

(ii) While settlements are often higher in the United States because of its different legal system, the Settlement Agreement must be considered on the basis of the

applicable Canadian legal principles and comparable MoM settlements, which demonstrate that it falls well within the zone of reasonableness with considerable additional benefits to class members.

(iii) Deductions for *in vivo* time between the initial and revision surgeries are based on scientific principles as it is more difficult to establish causation when there is a longer *in vivo* time, and such deductions have been a component of all MoM settlements (and were improved under the present Settlement Agreement).

(iv) While many class members will be frustrated as a result of their personal experience, a request to "ban" Biomet due to the effects on class members and Biomet's alleged misrepresentations is not available as a court remedy and cannot be considered as no liability is admitted under the Settlement Agreement.

(v) Unrevised class members have a more difficult claim because revision takes place based on medical recommendations which have determined that the first MoM failed. Nevertheless, the Settlement Agreement compensates unrevised class members.

(vi) Revisions prior to six months are excluded since they would not arise from prolonged friction over time which is the basis for the causation claim of the class members.

(vi) Conclusion

[128] There has been significant variation in the MoM settlements in terms of the base compensation available, time and age-based compensation reductions, and entitlement to compensation for family members and unrevised claimants. These variations reflect not just differing levels of litigation risk, but also the principle that there may be multiple ways in which a fair and reasonable settlement can be fashioned, and that all of the components of a settlement are to be considered holistically, to determine whether the settlement falls within the "zone of reasonableness".

[129] For the above reasons, the Settlement Agreement (including the Special Claims Protocol) is fair, reasonable, and in the best interests of the class. It provides substantial compensation to a broader section of the class than any of the past precedents, despite significant litigation risks. Consequently, I approve the Settlement Agreement and the Special Claims Protocol under s. 29 of the *CPA*.

Issue 2: Fee approval

[130] I first review the applicable law and then apply the law to the facts of the present case.

The applicable law

[131] In determining whether to approve Class Counsel's request for legal fees and the retainer agreement, the court must determine whether those fees are fair and reasonable in all of the circumstances. The factors to be considered are well established and include the following (as set out in *Smith Estate v. National Money Mart Company*, 2013 ONCA 233 at para. 80):

(i) the legal and factual complexities of the action,

(ii) the risks undertaken, on both the merits and prospects of certification,

(iii) the degree of responsibility assumed by class counsel,

(iv) the monetary value of the matters at issue,

(v) the importance of the issues to the class members,

(vi) the skill and competence demonstrated by class counsel throughout the action,

(vii) the results achieved,

(viii) the ability of the class to pay and the class's expectation of legal fees, and

(ix) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation.

[132] In assessing the reasonableness of legal fees, courts must consider risk to class counsel together with the access to justice principles underlying the *CPA*: *Gagne v. Silcorp Ltd.*, [1998] O.J. No. 4182 (C.A.) at pp. 9-10.

[133] Legal fees do not only reward counsel for successful results, but "also encourage counsel to take on difficult and risky class action litigation": *Abdulrahim v. Air France*, 2017 ONSC 512 at para. 9.

[134] The retainer agreement ought to be the start of the court’s analysis: *Commonwealth Investors Syndicate v. Laxton*, [1994] B.C.J. No. 1690 9cA) at para. 47.

[135] Fee awards in the order of 33.3% of the settlement amount have been deemed to be "presumptively valid" on their face, subject to the terms of a retainer agreement: *Cannon v. Funds for Canada Foundation*, 213 ONSC 7684 at paras. 3, 10.

Application of the law to the present case

[136] Class Counsel seek a fee of 25% which is consistent with the Retainer Agreement, the authorities, the class counsel fees awarded in the precedent cases, and the risk undertaken and results achieved. In particular, Class Counsel seeks approval of:

(i) the defendants' contribution of $1.25 million for Class Counsel fees and disbursements,

(ii) contingency fee payments of 25% on all amounts awarded to approved claimants under the Settlement Agreement (less the holdback as set out at paras. 69-70 above, and

(iii) a contingency fee of 25% on the Discretionary Fund.

[137] I address each of these issues below.

(i) Approval of the Defendants' Contribution to Fees and Disbursements

[138] Under the Settlement Agreement, the defendants will contribute $1.25 million toward Class Counsel's fees and disbursements. The allocation of those funds is set out at para. 69 above. The holdback and distribution process is set out at para. 70 above.

[139] Class counsel obtained a larger contribution from the defendants than in any of the precedent settlements. This larger contribution to costs and disbursements results in a larger offset against fees payable by class members, resulting in a benefit to the class.

[140] For the above reasons, I approve the payment of $1.25 million by the defendants as their contribution to fees and disbursements.

(ii) Class counsel fees and individual legal fees

(a) Approval of the fees model

[141] The proposed legal fee model separates the payment of a fee to Class Counsel for work done during the common issues stage and with respect to settlement implementation from the payment of any further fees pursuant to a retainer between a class member and their lawyer (including, if the class member chooses, Class Counsel).

[142] As was the case with the Stryker Rejuvenate Settlement, and in line with the total fee approved in connection with the Zimmer Durom Settlement, Class Counsel in this case have undertaken not to charge more than an additional 8.3% to class members who retain Class Counsel to make a claim under the Settlement Agreement or the Special Claims Protocol.

[143] The proposed model has a number of benefits for claimants:

(i) It preserves litigation autonomy for claimants who wish to retain a different lawyer.

(ii) Claimants who choose to self-represent in the claims process do not pay fees in connection with the preparation and submission of their individual claims.

(iii) Claimants who choose to retain Class Counsel will not pay fees greater than 33.3% as a result of the undertaking given by Class Counsel.

[144] For the above reasons, I approve the same model in the present case.

(b) Approval of class counsel fees on awards under the Settlement Agreement[4]

[145] Class Counsel seeks approval of a 25% contingency fee on all awards issued under the Settlement Agreement. The principles of fee approval strongly support approval of this request.

(1) The contingency fee sought is reasonable

[146] Class Counsel's request is consistent with precedent. This is the same fee percentage and model of class counsel and individual fees which was approved in connection with the Stryker Rejuvenate Settlement: *Wilson v. Depuy International Ltd.*, 2018 BCSC 1192; Stryker Fee Approval Order.

[147] On the Zimmer Durom Settlement, the BC court approved in bulk individual retainers which provided for payment of 33.3% fees: *Jones v. Zimmer GmbH*, 2016 BCSC 1847 at paras, 29, 60.

[148] Those awards, and Class Counsel's request here, are consistent with the well-accepted view that one-third contingency fees are "standard" in the class action settlement context: *Cannon*, at para. 11, *Oberski v. General Motors LLC*, 2024 ONSC 4281, at para. 53.

(2) The litigation raised significant risk

[149] The Settlement Agreement was achieved despite high litigation risk. When this action commenced, there had been no settlements of MoM hip cases in Canada. As evidenced by the heavily contested certification motion in this case, the defendants were prepared to vigorously defend the safety and efficacy of their products.

[150] The present case developed more risks on the merits than the MoM precedents, given, *inter alia*, the lack of recall action in Canada and the comparatively lower revision rates observed in the Biomet Devices. This case was highly risky when it was commenced, and, as the *Stevens* litigation in the Netherlands demonstrated, remained highly risky on the merits.

[151] This has also been a complex case. From the initial research into hip implants at case commencement, to the preparation of expert reports at the certification stage, to the notice stage and motions brought in three provinces, to engagement with U.S. counsel for documentary

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[4] In this subsection, I address fees for awards under the Settlement Agreement but excluding the Discretionary Fund (which I address in the subsection below).

discoveries, through to ongoing review of scientific publications to inform settlement negotiations, Class Counsel has managed complicated procedures and difficult substantive issues.

(3) Actual costs incurred by Class Counsel

[152] In addition, Class Counsel has expended extensive time and resources to vigorously advance the action through many complex stages. The four Class Counsel firms have incurred thousands of hours, valued at a total of $4,369,108.50. The 25% fee is reasonable given the hours expended to date, as well as the ongoing work that will be required following settlement approval which relate to the implementation of the settlement for the class as a whole.

(4) Fees sought are lower than the Retainer Agreement

[153] Further, the 25% Class Counsel fee sought on this motion will, based on Class Counsel's estimates, result in a lower fee than the amount for which Class Counsel would be entitled to seek approval under the Retainer Agreement (given the provision for 35% fees on the first $25 million recovered).

[154] The fees sought by Class Counsel are consistent with the expectations of the class, and are supported by Dine. The notice of settlement approval hearing described Class Counsel's fee request. The total fee (being 25% in class counsel fees plus 8.3% for those who retain the Class Counsel firms to act on their individual claim) is consistent with the ordinary practice in personal injury litigation, which is generally undertaken on a contingency basis and in which 33% fees are presumptively valid.

[155] Notwithstanding the risks and complexities of this case, Class Counsel negotiated a resolution which will provide substantial compensation more broadly and fairly than in any of the precedents.

[156] Consequently, I approve Class Counsel fees on awards under the Settlement Agreement.

(c) Approval of fees on the Discretionary Fund

[157] Class Counsel seek approval of a 25% fee on the Discretionary Fund established under the Settlement Agreement. The Discretionary Fund is a non-reversionary fund, and will allow class members whose claims fall within the criteria of the Settlement Agreement – including those whose implants which lasted up to 16 years, and those with high metal levels in their blood – to obtain compensation. No similar fund was obtained in connection with the previous settlements, and it offers significant benefits to the class.

[158] This fee model is used for the Discretionary Fund because it is an "all-in", non-reversionary fund which covers compensation, administrative expenses, and legal fees, as compared to the claims-made structure of the Settlement Agreement.

[159] Awarding class counsel fees as a straight percentage of the total fund available to the class is common and judicially well-accepted, having become the usual manner for the payment of class counsel fees: *Endean v. The Canadian Red Cross Society; Mitchell v. CRCS*, 2000 BCSC 971 at para. 38.

[160] By way of further example, Belobaba J. approved a fee of 30% on the global fund established by the Ontario DePuy Settlement: *Crisante v. DePuy Orthopaedics*, 2021 ONSC 3703, at paras. 33-36.

[161] Similar to fees for claims under the Settlement Agreement, Class Counsel have undertaken not to charge more than an additional 8.3% to class members who retain Class Counsel to make a claim under the Special Claims Protocol.

[162] For the same reasons set out above with respect to the 25% fee on awards under the Settlement Agreement, I approve Class Counsel's request for a 25% fee on the Discretionary Fund.

Issue 3: The honorarium

[163] I first review the applicable law and then apply the law to the present case.

[164] For the reasons that follow, I do not grant the honorarium sought on behalf of Dine.

The applicable law

[165] The availability of honoraria was recently addressed by the Court of Appeal in *Fresco v. Canadian Imperial Bank of Commerce*, 2024 ONCA 628, which affirmed the Divisional Court's decision in *Doucet v. Royal Winnipeg Ballet*, 2023 ONSC 2323.

[166] In *Fresco*, the court held that "honoraria should be reserved for exceptional cases where such an award will serve access to justice": at para. 106.

[167] In *Fresco*, the court at para. 108 adopted the comments of Strathy J. (as he then was) in *Baker Estate v. Sony BMG Music (Canada Inc*.) 2011 ONSC 7105, that this type of payment "is exceptional and rarely done… It should not be done as a matter of course" and "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…where the contribution of the representative plaintiff has gone well above and beyond the call of duty."

[168] Similarly, at para. 109, the court in *Fresco* adopted the comments of Winkler J. (as he then was) in *Sutherland v. Boots Pharmaceutical Plc.*, (2002), 21 C.P.C. (5th) 196 (Ont. S.C.), where he stated:

> [W]here 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 member.

[169] Finally, the court in *Fresco* noted, at para. 111, that "[f]actors that might qualify as exceptional circumstances could include exposure to a real risk of costs or significant personal hardship in connection with the prosecution of the action." The court set out, at para. 111, the example (cited in *Doucet*, at para. 58) of a representative plaintiff in an abuse case who "put their personal experience forward, reliving their trauma, while relieving other class members from having to do so."

Application of the law to the present case

[170] Dine seeks an honorarium of $7500 to be paid by the defendants. I do not find that the evidence before the court meets the strict standard required under *Fresco* and *Doucet*.

[171] The plaintiff led evidence that he was required to disclose personal medical information because of his role as a representative plaintiff. However, in any class action involving medical devices, or (on an even broader scale) any case raising health issues, a representative plaintiff would expect to be examined as to any pre-existing conditions that may be relevant to causation, since a defendant may rely on individual issues of causation to submit that the proposed class action is not suitable for certification.

[172] Consequently, as the representative plaintiff, Dine was required to answer questions about his obesity, diabetes and asthma, as well as on his use of medications, including Ventolin (a steroid), Dilaudid (an opioid pain medication), and sleeping pills. The defendants were entitled to rely on that evidence in their certification factum to submit that such individual factors may have contributed to the revision surgeries and other health consequences he has suffered.

[173] However, I do not accept the plaintiff's submission that answering health questions is a "personal hardship" justifying the exceptional nature of an honorarium. In the example of "personal hardship" set out in *Doucet* at para. 58, a representative plaintiff in an abuse case must "put their personal experience forward, reliving their trauma, while relieving other class members from having to do so." That person suffers personal hardship by taking on the role of a representative plaintiff.

[174] However, if the plaintiff's position in the present case is accepted, any person who acts as a representative plaintiff in a case involving any health issue, whether for defective medical devices, hazardous pharmaceutical products, or large-scale medical negligence cases, could all claim honoraria since they would be required (as would any other plaintiff in any similar civil action) to disclose medical information. Such a result is not consistent with the "personal hardship" standard set by the court in *Fresco*, which requires evidence of individual suffering or privation.

[175] The plaintiff submits that the quantum of an honorarium may reflect the amount of personal hardship, such that the $7500 requested in the present case would be a lower amount given that Dine was cross-examined on medical issues. I do not agree.

[176] In *Fresco*, the court held that the exceptional threshold of personal "hardship" had to be established before a court could order any honorarium, based on *Doucet* and the conclusions of Justices Strathy and Winkler in the relevant case law. Consequently, unless such hardship can be established, no honorarium, no matter how nominal, ought to be awarded.

[177] The plaintiff relies on the awards of honoraria to representative plaintiffs in other MoM settlements (summarized at para. 77 above). However, those honoraria were all ordered prior to the decision in *Fresco*, which set out the "exceptional circumstances" test applicable to the award of an honorarium to a representative plaintiff.

[178] For the above reasons, I reject the request for an honorarium to Dine. As Winkler J. held in *Sutherland*, at para. 22, I find that "the work of" Dine in the present case was "commendable." He participated in all steps of the litigation and was an excellent representative for the interests of the class members. However, commendable work as a representative plaintiff is not sufficient to obtain an honorarium. There are no exceptional circumstances of personal hardship supporting the rare circumstance where an honorarium can be ordered.

Issue 4: Order against the Hospitals

[179] Class Counsel has significant lists of email and mailing addresses for class members or potential class members, and has already delivered notice to those lists in accordance with the July 31, 2024 order. As discussed above, the information to compile those lists was based on (i) the information Class Counsel have compiled from the RAMQ and (ii) communications from a number of class members or potential class members as a result of that hospital notice program from 2016 onward.

[180] However, only the Hospitals at which the Biomet Devices were implanted hold the complete lists of class members. Consequently, in order to distribute notice of the Settlement Agreement as widely as possible to ensure that class members receive notice of the settlement, a further hospital notice program is appropriate.

[181] A solicitor-client relationship exists between Class Counsel and the class members. As such, the provision of class member contact information to Class Counsel does not attract confidentiality concerns in this context.

[182] The specific device name, size, lot number, serial number, and bar code implanted into each class member is available to the Hospitals, and may be readily located in their records. The Hospitals have also previously created the list set out above following the Hospital Notice Order.

[183] The Hospitals do not oppose the order and will be reimbursed for reasonable costs of the proposed hospital notice program.

[184] For the above reasons, I grant the relief sought against the Hospitals with respect to the proposed notice program.

Issue 5: *Ancillary relief*

[185] I also grant the ancillary relief of appointing Verita as administrator of the claims process under the Settlement Agreement and the Special Claims Protocol.

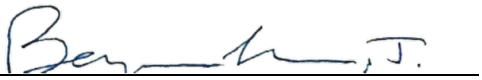
[186] Verita is a highly-experienced class action administrator and has particular experience with MoM settlements. They capably managed the notice process related to the settlement of the action.

[187] The task of administering the Settlement Agreement and Special Claims Protocol will involve similar steps to those taken by Verita in its prior administration of the Ontario DePuy Settlement. Verita can successfully administer the Settlement Agreement in this class action, as well as the Special Claims Protocol.

[188] The proposed form, content and manner of distribution of the notice of settlement approval are consistent with the process already approved by this court. Consequently, I approve the notice of settlement approval and the plan for dissemination of class notices.

ORDER AND COSTS

[189] For the above reasons, I grant the relief sought by the plaintiff, except for the honorarium sought on behalf of Dine. The plaintiff shall provide the court with clean copies of draft orders (in Word format and without Case Center page references) for my review and signature.



GLUSTEIN J.

Date: 20241028

CITATION: Dine v. Biomet Inc., 2024 ONSC 5949
COURT FILE NO.: CV-13-490112-00CP
DATE: 20241028

ONTARIO

SUPERIOR COURT OF JUSTICE

STEVEN DALTON DINE

Plaintiff

AND:

BIOMET INC., BIOMET ORTHOPEDICS LLC, BIOMET MANUFACTURING CORP., BIOMET U.S. RECONSTRUCTION, LLC and BIOMET CANADA INC.

Defendants

REASONS FOR DECISION

Glustein J.

Released: October 28, 2024