

CITATION: Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP, 2020
ONSC 2793
COURT FILE NO.: CV-12-466694CP
DATE: 2020/05/04

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)
)
EXCALIBUR SPECIAL)
OPPORTUNITIES LP) *Jeffrey Larry and Paul J. Davis for the*
Plaintiff) Plaintiff
)
- and -)
)
SCHWARTZ LEVITSKY FELDMAN)
LLP) *Emily Stock for the Defendant*
Defendant)
)
Proceeding under the *Class proceedings*) **HEARD:** May 4, 2020
Act, 1992.)

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] In this certified class action under the *Class Proceeding Act, 1992*, the Representative Plaintiff Excalibur Special Opportunities LP, and a class of 56 investors sued Schwartz Levitsky Feldman LLP, for auditor’s negligence. After eight years of litigation, the parties have signed a Settlement Agreement. Excalibur moves for settlement approval. Class Counsel, Paliare Roland Rosenberg Rothstein LLP, moves for approval of its counsel fee.

B. Facts

[2] In 2010, the Class Members had purchased units of Southern China Livestock Inc. in a series of private placements. The auditors had given a clean audit opinion, but in short order, Southern China Livestock went out of business and the investors lost their US\$7,594,965 investment.

[3] In October 2012, Excalibur commenced a proposed class action alleging negligence and negligent misrepresentation against the defendant in connection with the audit report contained in the private placement memorandum.

[4] In June 2013, the auditors brought a motion challenging Excalibur's standing to bring the action on the basis that it had not registered a change of name under Ontario's *Limited Partnerships Act*.¹ Excalibur responded with a cross-motion seeking leave to continue the action *nunc pro tunc*.

[5] In June 2013, I granted Excalibur's motion,² and July 2013, the Divisional Court refused leave to appeal.³

[6] In October 2013, the auditors delivered their Statement of Defence along with a Third Party Claim naming as party defendants: Southern China Livestock; its executives; lawyers who acted for Southern China Livestock; and the placement agents for the private placements.

[7] Excalibur moved for certification and in July 2014, I dismissed the certification motion.⁴

[8] Excalibur obtained leave to appeal, and on June 15, 2015, a majority of the Divisional Court dismissed Excalibur's appeal.⁵

[9] In November 2016, Excalibur sought and obtained leave to appeal to the Court of Appeal.

[10] On December 6, 2016, a majority of the Court of Appeal allowed Excalibur's appeal and certified the action.⁶ The Court certified the following Class Definition:

All persons or entities who purchased investment units ("Units") of Expedite 4, Inc. between March 29, 2010 and December 23, 2010, and who continued to hold any of the shares or warrants comprising the Units as of December 23, 2010, other than Excluded Parties, where the Excluded Parties are: the Defendant, including its partners, employees, successors and assigns; the officers, directors, employees, agents, legal representatives, subsidiaries, affiliates, predecessors, successors and assigns of Expedite 4, Inc. (the "Company"), Southern China Livestock International Inc., or Southern China Livestock Inc., and any entity in which any of the foregoing have or had any legal or *de facto* controlling interest; and Rodman & Renshaw LLC and Newbridge Securities Corporation, including their officers, directors, senior management employees, predecessors, successors and assigns.

[11] The auditors sought leave to appeal the Court of Appeal's decision to the Supreme Court of Canada. On June 8, 2017, the Supreme Court denied leave with Justice Côté dissenting on the leave application.⁷

[12] After obtaining documentary production, Class Counsel and counsel for the auditors agreed to mediation.

[13] Class Counsel retained an accounting expert, Andrew Mintzer of Hemming, Morse LLP in Los Angeles, California to review the audit files and to provide an opinion for the mediation. The auditors retained Alan Mak, an accountant at BDO Canada LLP, to provide an opinion for the mediation.

[14] On February 21, 2018, the parties attended a full day mediation with Ronald Slaght. The mediation was not successful.

[15] On May 29 and 30, 2018, Class Counsel examined the auditor's representative, Gerry

¹ R.S.O. 1990, c. L.16.

² *Excalibur Special Opportunities LP. V. Schwartz Levitsky Feldman LLP*, 2013 ONSC 3271.

³ *Excalibur Special Opportunities LP. V. Schwartz Levitsky Feldman LLP*, 2013 ONSC 4901 (Div. Ct.).

⁴ *Excalibur Special Opportunities LP. V. Schwartz Levitsky Feldman LLP*, 2014 ONSC 4118.

⁵ *Excalibur Special Opportunities LP. V. Schwartz Levitsky Feldman LLP*, 2015 ONSC 1634 (Div. Ct.).

⁶ *Excalibur Special Opportunities LP. V. Schwartz Levitsky Feldman LLP*, 2016 ONCA 916.

⁷ *Excalibur Special Opportunities LP. V. Schwartz Levitsky Feldman LLP*, [2017] S.C.C.A. No. 54.

Goldberg, for discovery.

[16] On August 28 and December 11, 2018, Excalibur's representative, Suresh Madan, its Vice President and Portfolio Manager, was examined for discovery.

[17] In November 2018, the action was set down for trial.

[18] In July 2019, the parties attended a second full day of mediation. The mediator was Stephen Morrison. The action did not settle; however, the parties agreed to continue discussions through Mr. Morrison as the action progressed toward trial.

[19] On November 27, 2019, the parties attended a case conference. Counsel for the third parties appeared and advised that they intended to bring motions challenging the Court's jurisdiction as well as the *ex parte* orders that had extended the time to serve the thirdparty claims. I scheduled the third parties' motions and a motion by the auditors for security for costs to be heard on April 9, 2020.

[20] Meanwhile the settlement negotiations being facilitated by Mediator Morrison were continuing. In late-March 2020, the parties agreed to a settlement of \$4.2 million plus payment of up to \$60,000 towards administering the settlement.

[21] The following payments would be made from the Settlement Fund: (a) payment of fees and disbursements, and taxes to Class Counsel; (b) an honorarium to Excalibur of \$35,000; and (c) any administration and notice costs in excess of \$60,000. The balance, the "Claimants' Fund" will be distributed to Class Members through a simplified claims process.

[22] The following formula will be used to calculate each claimant's payment: (a) the claims administrator will calculate the aggregate investment amounts of all of the claimants (the "Subscribed Total"); (b) the claims administrator will calculate each claimant's investment amount (the "Principal Amount"); (c) the claims administrator will divide each claimant's Principal Amount by the Subscribed Total (the "Percentage of Total"); and (d) the claims administrator will multiply each claimant's Percentage of Total by the Claimants' Fund to obtain the "Payment to Claimant".

[23] On April 1, 2020, the parties executed the formal Settlement Agreement.

[24] Class Counsel and Excalibur concluded that the settlement was fair and reasonable and recommend its approval.

[25] Class Counsel incurred time with a value in excess of \$1.28 million to prosecute the action. The lawyers who had primary responsibility for carriage of the matter spent over 1,700 hours working on the case from the initial investigation until the Settlement Agreement was finalized.

[26] Class Counsel paid disbursements of \$341,146.12 to prosecute the action. Of those disbursements, \$158,169.34 remain outstanding, with the rest paid through amounts received in costs awards by the defendant. The disbursements were primarily for payment of experts at certification and an accounting expert for mediation and trial.

[27] Class Counsel is seeking approval for the amounts provided in the retainer agreement to be paid out of the Settlement Fund: namely: (a) \$158,169.34 in outstanding disbursements, and (b) after deduction of disbursements, fees of 25% of the amount remaining in the Settlement Fund plus HST, which is \$1,141,817.17. These fees would represent a multiplier of less than 0.89 times the total time Class Counsel incurred to prosecute the action.

[28] On April 2, 2020, the Court issued an order approving notice of this hearing provided in the Settlement Agreement. In accordance with the order, notice was provided by email or mail to all 57 Class Members on April 8, 2020. There were no objections to the Settlement Agreement, Class Counsel's fees and disbursements, or the honorarium.

[29] Thus, after eight years of litigation, Excalibur brings this motion for settlement approval, and Class Counsel seeks court approval for its contingency fee retainer agreement, which provides for fees of 25% of any recovery obtained for the Class. Excalibur, which did not have an indemnity from counsel for an adverse costs award, seeks an honorarium of \$35,000.

C. Settlement Approval

[30] Section 29 of the *Class Proceedings Act, 1992* requires court approval for the discontinuance, abandonment, or settlement of a class action. Section 29 states:

Discontinuance, abandonment and settlement

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

Settlement without court approval not binding

(2) A settlement of a class proceeding is not binding unless approved by the court.

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court binds all class members.

Notice: dismissal, discontinuance, abandonment or settlement

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

- (a) an account of the conduct of the proceeding;
- (b) a statement of the result of the proceeding; and
- (c) a description of any plan for distributing settlement funds.

[31] Section 29(2) of the *Class Proceedings Act, 1992*, provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class.⁸

[32] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely

⁸ *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 43 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 57 (S.C.J.).

duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with Class Members during the litigation.⁹

[33] In determining whether to approve a settlement, the court, without making findings of fact on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement.¹⁰ An objective and rational assessment of the pros and cons of the settlement is required.¹¹

[34] The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation.¹² A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally.¹³

[35] Generally speaking, the exercise of determining the fairness and reasonableness of a proposed settlement involves two analytical exercises. The first exercise is to use the factors and compare and contrast the settlement with what would likely be achieved at trial. The court obviously cannot make findings about the actual merits of the Class Members' claims. Rather, the court makes an analysis of the desirability of the certainty and immediate availability of a settlement over the probabilities of failure or of a whole or partial success later at a trial. The court undertakes a risk analysis of the advantages and disadvantages of the settlement over a determination of the merits. The second exercise, which depends on the structure of the settlement, is to use the various factors to examine the fairness and reasonableness of the terms and the scheme of distribution under the proposed settlement.¹⁴

[36] In the immediate case, in determining whether a settlement is reasonable and in the best interests of the class, all the factors favour approving the settlement.

[37] In the immediate case, perfection would be a judgment of approximately \$10-11 million. The proposed settlement is \$4.2 million, which in my opinion is a very good recovery having regard to the litigation risk and the further delay of an already very protracted and intensely fought litigation.

[38] The matter of an auditor's duty of care and the scope of that duty of care to investors as distinct from the auditor's duty of care to the audit client is a contentious legal issue that depends upon whether a proximate relationship has been established in the circumstances of the particular

⁹ *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 45 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 59 (S.C.J.); *Corless v. KPMG LLP*, [2008] O.J. No. 3092 at para. 38 (S.C.J.); *Jeffery v. Nortel Networks Corp.*, 2007 BCSC 69; *Fakhri v. Alfalfa's Canada, Inc.*, 2005 BCSC 1123.

¹⁰ *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 at para. 10 (S.C.J.).

¹¹ *Al-Harazi v. Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191 at para. 23 (Ont. S.C.J.).

¹² *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 70 (S.C.J.); *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.).

¹³ *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 at para. 17 (Ont. S.C.J.); *Fraser v. Falconbridge Ltd.*, [2002] O.J. No. 2383 at para. 13 (S.C.J.).

¹⁴ *Welsh v. Ontario*, 2018 ONSC 3217.

case.¹⁵ In the immediate case, although Class Counsel's view is that the Class would have the stronger position on the duty of care issue, there is a real risk that the common issues trial judge would find that the auditors did not owe the investors a duty of care.

[39] Assuming a duty of care, there is the highly contentious issue of whether the auditor's work fell below the standard of care. In the immediate case, although Class Counsel's view is that the Class would have the stronger position on the standard of care issue, there is a real risk that the common issues trial judge would find that the defendant met the standard of care.

[40] In my opinion, the settlement in the immediate case is good, fair, reasonable, and in the best interests of the Class Members. I approve the Settlement Agreement.

D. Counsel Fee

[41] The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved.¹⁶

[42] Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.¹⁷

[43] The court must consider all the factors and then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession.¹⁸

[44] This was a complex, hard fought case in which Class Counsel took on significant risk and obtained a good result in a case that was important to the Class Members who had lost their whole investment. Of the 57 investors, the smallest investment was US\$10,000, while the largest was US\$1 million. More than half of the Class Members had investments exceeding US\$50,000.

[45] In my opinion, having regard to the various factors used to determine whether to approve Class Counsel's fee request, Class Counsel's fee request in the immediate case should be approved.

E. Honorarium

[46] 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

¹⁵ *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63; *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165; *Whitehouse v. BDO Canada LLP*, 2020 ONSC 144; *Lavender v. Miller Bernstein*, 2018 ONCA 729.

¹⁶ *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 25 (S.C.J.); *Smith v. National Money Mart*, 2010 ONSC 1334 at paras. 19-20, varied 2011 ONCA 233; *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 at para. 13 (S.C.J.).

¹⁷ *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 28 (S.C.J.); *Smith v. National Money Mart*, 2010 ONSC 1334, varied 2011 ONCA 233.

¹⁸ *Commonwealth Investors Syndicate Ltd. v. Laxton*, [1994] B.C.J. No. 1690 at para. 47 (B.C.C.A.).

monetary success for the class, the representative plaintiff may be compensated by an honorarium.¹⁹

[47] However, the court should only rarely approve this award of compensation to the representative plaintiff.²⁰ Compensation for a representative plaintiff may only be awarded if he or she has made an exceptional contribution that has resulted in success for the class.²¹ Compensation to the representative plaintiff should not be routine, and an honorarium should be awarded only in exceptional cases.

[48] In determining whether the circumstances are exceptional, the court may consider among other things: (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.²²

[49] In my opinion, the honorarium request in the immediate case should be granted. But for Excalibur's willingness to come forward and accept the risk of an adverse costs award, the Class would not have had an access route to justice.²³

F. Conclusion

[50] For the above reasons, I approve the settlement, Class Counsel's fee, and the honorarium to Excalibur.

[51] I approve the Orders attached as Schedule A and B to these Reasons for Decision.

[52] In the circumstances of the Covid-19 emergency, these Reasons for Decision are deemed to be an Order of the court that is operative and enforceable without any need for a signed or entered, formal, typed order.

[53] The parties may submit formal orders for signing and entry once the court re-opens; however, these Reasons for Decision are an effective and binding Order from the time of release.



Perell, J.

Released: May 4, 2020

¹⁹ *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 at para. 28 (Gen. Div.).

²⁰ *Sutherland v. Boots Pharmaceutical plc*, *supra*; *Bellaire v. Daya*, [2007] O.J. No. 4819 at para. 71. (S.C.J.); *McCarthy v. Canadian Red Cross Society*, [2007] O.J. No. 2314 (S.C.J.).

²¹ *Toronto Community Housing Corp. v. ThyssenKrupp Elevator (Canada) Ltd.*, 2012 ONSC 6626; *Markson v. MBNA Canada Bank*, 2012 ONSC 5891 at paras. 55-71.

²² *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911 at paras. 26-44.

²³ *Charette v. Trinity Capital Corp.*, 2019 ONSC 3153 (\$50,000); *Toth v. Canada*, 2019 FC 125 (\$50,000); *Brown v. Canada (Attorney General)*, 2018 ONSC 3429 (\$20,000); *Cannon v. Funds for Canada Foundation*, 2017 ONSC 2670 (\$50,000).

SCHEDULE “A”

Court File No. CV-12-466694-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

JUSTICE PAUL M. PERELL) , THE TH
) DAY OF , 2020

BETWEEN:

EXCALIBUR SPECIAL OPPORTUNITIES LP

Plaintiff

- and -

SCHWARTZ LEVITSKY FELDMAN LLP

Defendants

Proceedings under the *Class Proceedings Act*, 1992

ORDER

THIS MOTION made by the Plaintiff for an order approving a settlement reached between the parties was heard this day electronically due to the COVID-19 emergency;

ON READING the motion record, factum, and authorities of class counsel, and on hearing the submissions of counsel for the parties, and on being advised that the parties consent to this order and that Epiq Class Action Services Canada Inc. consents to being appointed as Claims Administrator,

1. **THIS COURT ORDERS** that the settlement set out in the Settlement Agreement dated March 31, 2020 (the “Settlement Agreement,” a copy of which is attached as Schedule 1) is approved, and is fair, reasonable and in the best interests of the Class.

2. **THIS COURT DECLARES** that the Settlement Agreement forms part of this Order and is binding upon the Representative Plaintiff, all Class Members, and the Defendant.

3. **THIS COURT ORDERS** that Epiq Class Action Services Canada Inc. is hereby appointed Claims Administrator for this proceeding and to fulfill the duties and responsibilities of the Claims Administrator as set out in the Settlement Agreement and that the Claims Administrator will be compensated as provided in the Settlement Agreement.
4. **THIS COURT ORDERS** that, pursuant to the *Class Proceedings Act, 1992* (the “CPA”), the Court shall supervise the implementation and administration of the Settlement Agreement.
5. **THIS COURT ORDERS** that the notice to Class Members of settlement approval set out in the Settlement Agreement is approved.
6. **THIS COURT ORDERS** that the Class Members shall be notified of this order and the approved Settlement Agreement by:
 - a. posting notice on the website of Class Counsel.
 - b. posting notice on a dedicated website for the settlement created by the Claims Administrator; and
 - c. sending notice by email or mail to the last known contact information of the Class Members as set out in the class list, as updated by information provided to Class Counsel and the reasonable and proportionate investigation of the Claims Administrator.
7. **THIS COURT DECLARES** that the publication of the notice in the manner described in this order and in the Settlement Agreement satisfies the requirements of section 19 of the CPA.
8. **THIS COURT ORDERS** that the Claim Deadline will be as stipulated in the Settlement Agreement.
9. **THIS COURT ORDERS** that a the claims process will be administered by the Claims Administrator as set out in the Settlement Agreement and that those Class Members who submit claims in accordance with the terms of the Settlement Agreement will be entitled to compensation as provided in the Settlement Agreement.
10. **THIS COURT ORDERS** that each Releasor has, by virtue of this order and the Settlement Agreement, individually, completely, and unconditionally released and forever discharged the Releasees from any and all of the Released Claims, save and except for the Releasees’ obligations pursuant to the Settlement Agreement.
11. **THIS COURT ORDERS** that the Releasors and anyone claiming through or on behalf of any of them are barred from commencing, instituting, or prosecuting the Released Claims

against the Releasees in any action, litigation, or other proceeding in any court of law or equity, arbitration, tribunal, proceeding, or any forum in respect of the Released Claims.

12. **THIS COURT ORDERS** that it shall retain exclusive and continuing jurisdiction over this Proceeding, the parties, and all Class members to interpret and enforce the terms, conditions, and obligations under the Settlement Agreement and this order.

13. **THIS COURT ORDERS** that this Proceeding is hereby dismissed, without costs, and with prejudice.

14. **THIS COURT ORDERS** that this Order is effective on this day without having been entered because of the COVID-19 emergency.

Schedule "1"
Settlement Agreement
SETTLEMENT AGREEMENT
Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP
Court File No. CV-12-466694-00CP

This Agreement is made and entered into this 31st day of March, 2020, between the Defendant and the Representative Plaintiff on behalf of the Class.

Recitals

WHEREAS the Proceeding was commenced in the Ontario Superior Court of Justice, under file number CV-12-466694-00CP, in which the Plaintiff alleged, among other things, negligence and negligent misrepresentation against the Defendant in respect of an audit opinion the Defendant authored regarding certain financial statements of SCL;

AND WHEREAS the Proceeding has been certified as a class action under the *CPA*;

AND WHEREAS notice of certification of this action under the *CPA* was provided on August 16, 2017, and the deadline to opt out of the Proceeding expired on November 14, 2017;

AND WHEREAS the Parties have been litigating this proceeding for more than seven years, including a motion concerning the status of the Representative Plaintiff to litigate this proceeding, a motion for certification and appeals to the Divisional Court, the Court of Appeal, and a motion for leave to appeal to the Supreme Court of Canada, retaining expert witnesses and delivering expert reports for mediation purposes, extensive documentary production, and conducting examinations for discovery;

AND WHEREAS there has been no determination of wrongdoing or liability in this action and the Defendant has denied (and continues to deny) wrongdoing or liability to the Class, and the Parties agree that nothing in this Agreement, nor any aspect of its implementation, shall be deemed to be an admission of liability by the Defendant;

AND WHEREAS the Parties estimate that a further 1-3 years of litigation would be required to litigate this matter through the common issues trial (excluding appeals);

AND WHEREAS the Parties participated in mediations before Ronald Slaght and Stephen Morrison, and have continued arm's-length settlement discussions facilitated by Mr. Morrison since the mediation with him in July 2019;

AND WHEREAS after an extensive analysis of the facts and law and taking into account the ongoing burden and expense of litigating the Proceeding, including the uncertain state of the law on certain issues raised in the Proceeding and the risks associated with a trial and possible appeals, as well as the delays associated with addressing the Third Party Claims including pleadings and jurisdiction motions and appeals and further discovery, and taking into account the maximum recovery for the Class weighed against those costs and risks, the Representative

Plaintiff and Class Counsel have concluded that this Agreement is in the best interests of the Class;

AND WHEREAS the Parties enter into this Agreement in order to achieve a full and final resolution and termination of all Released Claims pursuant to this Agreement, and in order to avoid the delay, expense, inconvenience, and burdens of protracted litigation;

NOW THEREFORE, in consideration of the covenants, agreements, and releases set forth herein and for other good and valuable consideration, the Parties agree, subject to the approval of the Court, that any and all Released Claims are finally settled and resolved on the following terms and conditions:

Definitions

1. The following terms, as used in this Agreement, including the recitals, mean:

(a) “Agreement” means this agreement, including all schedules attached hereto;

(b) “Certification Order” means the order of the Court of Appeal for Ontario dated December 6, 2016 certifying the Proceeding as a class action under the *CPA*;

(c) “Claim Deadline” has the meaning provided in paragraph 23;

(d) “Claimant” means a Class Member who submits a claim for compensation out of the Settlement Fund in accordance with this Agreement;

(e) “Claimant’s Fund” has the meaning provided in paragraph 18;

(f) “Claims Administrator” means Epiq Class Action Services Canada Inc. or such other entity appointed by the Court, to administer, manage, and direct the processing of the Claimants’ claims, and to oversee publication of notices to the Class Members under this Agreement;

(g) “Class” or “Class Member” means, as defined in the Certification Order:

All persons or entities who purchased investment units (“Units”) of Expedite 4, Inc. between March 29, 2010 and December 23, 2010, and who continued to hold any of the shares or warrants comprising the Units as of December 23, 2010, other than Excluded Parties, where the Excluded Parties are:

(a) the Defendant, including its partners, employees, successors and assigns;

(b) the officers, directors, employees, agents, legal representatives, subsidiaries, affiliates, predecessors, successors and assigns of Expedite 4, Inc. (the “Company”), Southern China Livestock International Inc. or Southern China Livestock Inc., and any entity in which any of the foregoing have or had any legal or *de facto* controlling interest; and

(c) Rodman & Renshaw LLC and Newbridge Securities Corporation, including their officers, directors, senior management employees, predecessors, successors and assigns.

(h) “Class Counsel” means Paliare Roland Rosenberg Rothstein LLP;

(i) “Class Counsel Fees and Disbursements” means all fees, costs, disbursements, interest, HST, and other applicable taxes or charges of Class Counsel as approved by the Court, except for disbursements incurred by Class Counsel in connection with the notices, implementation, and/or administration of this Agreement which will be reimbursed separately out of the Settlement Fund as provided herein;

(j) “Class List” means the list of investors in SCL, which shows the size of their investments, that was compiled from the SCL’s public reporting regarding investors and updated by Class Counsel during this Proceeding;

(k) “Court” means the Ontario Superior Court of Justice;

(l) “CPA” means the *Class Proceedings Act, 1992*, S.O. 1992, as amended;

(m) “Defendant” means Schwartz Levitsky Feldman LLP;

(n) “Honorarium” has the meaning provided in paragraph 13;

(o) “Parties” means the Representative Plaintiff and the Defendant;

(p) “Proceeding” means the class proceeding commenced in the Ontario Superior Court of Justice in Toronto bearing file number CV-12-466694-00CP;

(q) “Released Claims” means any and all claims, demands, actions, suits, or causes of action, damages incurred, liabilities of any kind, including interest, costs, and expenses, in law, under statute, or in equity, arising out of the factual allegations in the Proceeding, including those arising out of, or in any way related to, the audit opinions of the Defendant provided to SCL;

(r) “Releasees” means the Defendant and its past and present partners, insurers, and assigns;

(s) “Releasers” means the Representative Plaintiff and all other Class Members and their predecessors, successors, heirs, executors, administrators, and assigns;

(t) “Representative Plaintiff” means Excalibur Special Opportunities LP;

(u) “SCL” means Expedite 4, Inc., Southern China Livestock, Inc., and Southern China Livestock International, Inc. and their predecessors, successors, assigns, and affiliates;

(w) “Settlement Approval Date” means (i) the date on which any and all appeals from the Settlement Approval Order are completed, or (ii) at the end of the appeal period if there is no appeal from the Settlement Approval Order;

(x) “Settlement Approval Hearing” means the hearing to be conducted by the Court for the approval of this Agreement and the motion for the Settlement Approval Order;

(y) “Settlement Approval Hearing Notice” has the meaning provided in paragraph 5;

(z) “Settlement Approval Order” means the order of the Court approving this Agreement and the Parties’ settlement, substantially in the form attached as Schedule “A”;

(aa) “Settlement Fund” has the meaning provided in paragraph 9; and

(bb) “Third Party Claims” means the claims issued by the Defendant against third parties to the Proceeding.

Cooperation

2. The Parties will use their best efforts to effectuate this Agreement, and will cooperate to seek and obtain the Court’s approval of this Agreement and all other matters addressed herein.
3. The Representative Plaintiff will make a motion to the Court seeking approval of this Agreement and providing the relief specified herein, which relief is subject to the terms and conditions of this Agreement and the Parties’ performance of their rights and obligations hereunder. The Defendant will support the Representative Plaintiff’s motion to approve this Agreement.
4. Subject to Court approval, following the Settlement Approval Order, the Proceeding will be dismissed.

Notice of Settlement Approval Hearing

5. As soon as practicable, the Parties will seek approval of the Court for the notice to the Class Members of the Settlement Approval Hearing (the “Settlement Approval Hearing Notice”) and appointment of the Claims Administrator. For greater certainty, the Parties agree that such approval may be sought in writing. The Parties will seek an order substantially in the form attached as Schedule “B”.
6. Once appointed, the Claims Administrator will create a dedicated website for this Agreement that will contain relevant information and documents, including, for example, the Certification Order, the Settlement Approval Order (once issued), and the Court’s reasons for the Settlement Approval Order (once issued).
7. Subject to Court approval, Class Counsel and/or the Claims Administrator will arrange for publication and distribution of the Settlement Approval Hearing Notice, substantially in the form attached as Schedule “C”, as follows:
 - (a) on Class Counsel’s website;
 - (b) on the dedicated website created by the Claims Administrator; and
 - (c) by email or mail to all Class Members at the addresses in the Class List, as well as at any other contact information provided by Class Members to Class Counsel.
8. The costs associated with providing the Settlement Approval Hearing Notice will be paid as provided in paragraph 10.

Settlement Fund

9. The Defendant will pay \$4,200,000 (Canadian dollars), in trust, to Class Counsel (the “Settlement Fund”), within 30 days after the Court issues the Settlement Approval Order.
10. In addition to the payment in paragraph 9, the Defendant will pay costs of up to \$60,000 (inclusive of HST) associated with notices, implementation, and administration of this Agreement. Any costs in excess of \$60,000 (inclusive of HST) will be paid out of the Settlement Fund. Class Counsel will engage the Claims Administrator, but the Defendant will be responsible for paying invoices of the Claims Administrator up to \$60,000 (inclusive of HST) within 60 days after such invoices are delivered to counsel for the Defendant.
11. Provided that they comply with the process described herein, each Class Member, including the Representative Plaintiff, will have a claim to compensation from the Claimants’ Fund.

Class Counsel Fees and Disbursements

12. Class Counsel will seek Court approval of Class Counsel Fees and Disbursements which will be paid out of the Settlement Fund. Class Counsel may seek approval of Class Counsel Fees and Disbursements on a motion to be heard at the same time as the Settlement Approval Hearing. The Defendant will not oppose Class Counsel's motion for approval of Class Counsel Fees and Disbursements. This Agreement is not conditional upon Court approval of the Class Counsel Fees and Disbursements sought by Class Counsel.

Honorarium

13. The Representative Plaintiff will seek Court approval for an honorarium to be paid to it out of the Settlement Fund in the amount of \$35,000 (the "Honorarium"). The Representative Plaintiff may seek approval of the Honorarium on a motion to be heard at the same time as the Settlement Approval Hearing. The Defendant will not oppose the Representative Plaintiff's motion for the Honorarium. This Agreement is not conditional upon Court approval of the Honorarium sought by the Representative Plaintiff.

Settlement Approval

14. As soon as practicable following the Court's approval of the Settlement Approval Hearing Notice and subject to Court availability, the Parties will schedule the Settlement Approval Hearing at which the Representative Plaintiff will seek approval of the Settlement Approval Order. The Parties agree that the Settlement Approval Hearing may be conducted in writing or by teleconference, as may be directed by the Court.
15. If a Class Member wishes to object to this Agreement, the Class Counsel Fees and Disbursements, and/or the Honorarium, the Class Member must advise Class Counsel or the Claims Administrator of any objection in writing at least four days in advance of the Settlement Approval Hearing, including whether the Class Member intends to attend and/or otherwise participate (or be represented by counsel) in the Settlement Approval Hearing to object.
16. If the Representative Plaintiff, Class Counsel, or the Defendant are, or become, aware that a Class Member or other person intends to object to this Agreement, the Class Counsel Fees and Disbursements, and/or the Honorarium, they will advise the Parties in writing within two days of learning of the objection, and, in any event, will advise the Parties in writing no later than one day before the Settlement Approval Hearing of any anticipated objections.
17. If the Settlement Approval Order is granted by the Court, subject to Court approval, notice of the Settlement Approval Order will be disseminated to Class Members as follows:
 - (a) on Class Counsel's website;
 - (b) on the dedicated website created by the Claims Administrator;

(c) by email or mail to all Class Members at the addresses in the Class List, as well as at any other contact information provided by Class Members to Class Counsel.

Such notice will include information about the claims process described in paragraphs 20-28.

18. If the Settlement Approval Order is granted by the Court, within 7 days after the Defendant delivers the Settlement Fund to Class Counsel in accordance with paragraph 9, Class Counsel will transfer to the Claims Administrator the “Claimants’ Fund” which shall consist of all amounts remaining of the Settlement Fund after payment of:
 - (a) any approved amount for Class Counsel Fees and Disbursements,
 - (b) any approved amount for the Honorarium;
 - (c) any notice, implementation, and administration costs of this Agreement initially incurred by Class Counsel as a disbursement if those costs are not paid by the Defendant in accordance with paragraph 10; and
 - (d) a conservative estimate of the amount that will be required to complete the administration of the settlement pursuant to this Agreement.
19. The Claims Administrator will maintain the Claimants’ Fund in an interest-bearing account and any interest accrued on the amounts in the Claimants’ Fund during the administration of this Agreement will form part of the Claimants’ Fund as if they had been paid by the Defendant under paragraph 9.

Claims Process

20. To receive compensation from the Claimants’ Fund, each Class Member must submit a claim in accordance with this Agreement. If a Class Member fails to do so, such Class Member will not be entitled to compensation under this Agreement.
21. Following the appointment of the Claims Administrator, Class Counsel will provide the Claims Administrator with the Class List. The Claims Administrator will update the contact information of Class Members on the Class List using any information from Class Counsel and from the Claims Administrator’s own reasonable and proportionate investigation to locate the current contact information of Class Members. For greater certainty, the Claims Administrator will make three attempts to contact any Class Member that does not respond to the initial communication made to the Class Member at the contact information in the Class List.
22. Within 7 days after the Court issues the Settlement Approval Order, the Claims Administrator will distribute the notice described above in paragraph 17, and will open a claims portal on the website created for this Agreement. If requested by a

Class Member, the Claims Administrator will deliver a claim form by mail to the Class Member that will require all of the same information as claims made through the website.

23. To submit a claim, a Class Member must provide the Class Member's name, address, and information about the Class Member's investment in SCL satisfactory to the Claims Administrator within 30 days after the notice is provided under paragraph 22 (the "Claim Deadline"). The Class Member must provide such information through the claims portal on the website created by the Claims Administrator for this Agreement, or by mail on a form created by the Claims Administrator under paragraph 22.
24. The Claims Administrator will review all claims submitted by the Claim Deadline against the Class List as updated under paragraph 21. The Claims Administrator may, where in the Claims Administrator's sole discretion it believes it is necessary to do so, contact Class Counsel to assist in attempting to verify the identity of any Claimant.
25. The Claims Administrator will determine in its sole discretion whether each Claimant is a Class Member and has a claim to compensation from the Claimants' Fund. There will be no appeal, review, or other supervision of the Claims Administrator's decisions.
26. Claimants with valid claims will receive compensation from the Claimants' Fund calculated as follows:
 - (a) the Claims Administrator will use the Class List to calculate the aggregate subscription amounts of all Claimants (the "Subscribed Total");
 - (b) the Claims Administrator will calculate each Claimant's subscription amount from the Class List (the "Principal Amount");
 - (c) the Claims Administrator will divide each Claimant's Principal Amount by the Subscribed Total (the "Percentage of Total"); and
 - (d) the Claims Administrator will multiply each Claimant's Percentage of Total by the Claimants' Fund to obtain the "Payment to Claimant".
27. Within 60 days after the Claim Deadline, the Claims Administrator will issue cheques or electronic transfers (as the Claims Administrator may decide for each Claimant in its sole discretion having regard to the request of the Claimant) to Claimants in the amount of each Claimant's Payment to Claimant.
28. Within eight months after all funds are distributed out of the Settlement Fund as contemplated in paragraph 27, the Claims Administrator will prepare a report on all of the payments made out of the Settlement Fund. The Claims Administrator's report will be provided to Class Counsel and counsel for the Defendant. The report will also be made available to the Court and any other person to whom the report may be made available as required by law. Except as required by law, when making the Claims Administrator's report available, the Claims Administrator will redact the personally-identifying information of Class Members.

Releases and Jurisdiction of the Court

29. On the date on which the Court issues the Settlement Approval Order, the Releasers will be deemed by this Agreement to have released and forever discharged the Releasees and each of them from the Released Claims. The Releasers and anyone through or on behalf of them will be barred from commencing, instituting, or prosecuting the Released Claims against the Releasees or any of them in any action, application, assessment, litigation, investigation, or other proceeding in any court of law or equity, arbitration, tribunal, proceeding, or any other forum relating to the Released Claims.
30. The Parties agree that the Court will retain exclusive and continuing jurisdiction over the Proceeding, the Parties, and Class Members to interpret and enforce the terms, conditions, and obligations under the Agreement.

Termination

31. This Agreement will be automatically terminated if the Court declines to approve this Agreement. In the event of termination, the Parties will be restored to their positions immediately prior to the date on which this Agreement was executed by the Parties.

Miscellaneous

32. Whether or not this Agreement is terminated, this Agreement and anything contained herein, and any and all negotiations, documents, and discussions associated with this Agreement, and any action taken to carry out this Agreement, will not be referred to, offered as evidence, or received in evidence in any pending or future civil, criminal, or regulatory proceeding, except (a) a proceeding approve or enforce this Agreement, (b) to defend against the assertion of Released Claims, or (c) as otherwise required by law.
33. This Agreement, including all schedules, will constitute the entire agreement between the Parties with regard to the subject matter of this Agreement, and will supersede any previous agreements, representations, communications, and understandings between the Parties with respect to the subject matter of this Agreement.
34. This Agreement may not be changed, modified, or amended except in writing signed by the Parties, subject to Court approval, except that the notices contemplated under this Agreement may be modified by the Court and by subsequent agreement of Class Counsel, the Defendant, and the Claims Administrator.
35. No waiver of any provision of this Agreement will be binding unless consented to in writing by the Parties. No waiver of any provision of this Agreement will constitute a waiver of any other provision.
36. This Agreement will bind upon and inure to the benefit of the Parties and their respective heirs, predecessors, administrators, successors, and assigns.
37. The Parties each represent and warrant that:

(a) they have the power and authority to execute, deliver, and perform this Agreement and make the contemplated payments and other actions contemplated herein; and

(b) the execution, delivery, and performance of this Agreement have been duly authorized.

38. The Representative Plaintiff represents and warrants that it has duly authorized Class Counsel to execute this Agreement on its behalf.
39. The Defendant represents and warrants that it has duly authorized its counsel to execute this Agreement on its behalf and on behalf of all partners, insurers and assigns of the Defendant.
40. The recitals in this Agreement are true and form part of the Agreement.
41. This Agreement will be governed by, and construed in accordance with, the laws of the Province of Ontario.
42. This Agreement may be executed by the Parties in counterparts all of which together will constitute one and the same instrument, and a pdf signature will be deemed to be an original signature for purposes of executing this Agreement.
43. The terms “this Agreement”, “herein”, “hereunder”, “hereof”, and similar expressions refer to this Agreement as a whole and not to any particular paragraph or other portion of this Agreement.
44. In the computation of time in this Agreement, except where a contrary intention appears:
- (a) where there is a reference to a number of days between two events, the number of days will be counted by excluding the day on which the first event happens and including the day on which the second event happens, including all calendar days; and
- (b) only in the case where the time for doing an act expires on a weekend or holiday, the act may be done on the next day that is not a weekend or holiday.
45. Either of the Parties may apply to the Court for directions with respect to the interpretation, implementation, and administration of this Agreement. All motions and any request for directions will be on reasonable notice to the other Party.
46. This Agreement has been the subject of negotiations and discussions between the Parties, each of which has been represented and advised by competent counsel, so that any statute, case law, or rule of interpretation or construction that may cause any provision to be interpreted or construed against the drafter of this Agreement will have no force or effect.

The Parties agree that the language contained or not contained in any previous drafts of this Agreement or any associated communications will have no bearing upon the proper interpretation or construction of this Agreement and will not be admissible for the purpose of interpreting or construing this Agreement.

47. The representations and warranties contained in this Agreement will survive its execution and implementation.

IN WITNESS WHEREOF, each of the Parties has caused this Agreement to be executed on its behalf by its duly authorized counsel of record:

Paliare Roland Rosenberg Rothstein LLP, for the
Representative Plaintiff, Excalibur Special
Opportunities LP

A handwritten signature in black ink, appearing to be 'Reain Lui', written over a horizontal line.

Reain Lui Stock LLP, for the Defendant, Schwartz
Levitsky Feldman LLP

SCHEDULE “B”

Court File No. CV-12-466694-00CP

ONTARIO

SUPERIOR COURT OF JUSTICE

JUSTICE PAUL M. PERELL) , THE TH
) DAY OF , 2020

BETWEEN:

EXCALIBUR SPECIAL OPPORTUNITIES LP

Plaintiff

- and -

SCHWARTZ LEVITSKY FELDMAN LLP

Defendants

Proceedings under the *Class Proceedings Act*, 1992

ORDER

THIS MOTION made by the Plaintiff for an order approving the payment of legal fees and disbursements of Paliare Roland Rosenberg Rothstein LLP (“Class Counsel”), and the payment of an honorarium to the Plaintiff was heard this day electronically due to the COVID-19 emergency;

ON READING the motion record, factum, and authorities and on hearing the submissions of Class Counsel, and on being advised that defendant does not oppose this order,

THIS COURT ORDERS that the retainer agreement entered into between the Plaintiff and Class Counsel dated August 30, 2012 (the “Retainer Agreement”) is approved.

1. **THIS COURT ORDERS** that the fees plus applicable taxes of Class Counsel are approved in the amount of \$1,141,817.17.

 2. **THIS COURT ORDERS** that the disbursements plus applicable taxes are approved in the amount of \$341,146.12.

 3. **THIS COURT ORDERS** that the outstanding amounts for fees, disbursements, and applicable taxes approved in this order in the total amount of \$1,299,986.51 be paid out of the Settlement Fund established pursuant to the Settlement Agreement dated March 31, 2020 entered into between the Plaintiff and the Defendant.

 4. **THIS COURT ORDERS** that payment of an honorarium to the Plaintiff in the amount of \$35,000 is approved and will be paid out of the Settlement Fund established pursuant to the Settlement Fund dated March 31, 2020 entered into between the Plaintiff and the Defendant.

 5. **THIS COURT ORDERS** that this Order is effective on this day without having been entered because of the COVID-19 emergency.
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CITATION: Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP, 2020
ONSC 2793
COURT FILE NO.: CV-12-466694CP
DATE: 2020/05/04

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

EXCALIBUR SPECIAL OPPORTUNITIES LP

Plaintiff

- and -

SCHWARTZ LEVITSKY FELDMAN LLP

Defendant

REASONS FOR DECISION

PERELL J.

Released: May 4, 2020