

2021 FC 968, 2021 CF 968

Federal Court

Eaton v. Teva Canada Limited

2021 CarswellNat 4137, 2021 CarswellNat 5386, 2021 FC 968, 2021 CF 968, 336 A.C.W.S. (3d) 622

**KATHRYN EATON (Plaintiff00 and TEVA CANADA LIMITED, TEVA PHARMACEUTICALS USA, INC., ACTAVIS HOLDCO U.S., INC., ACTAVIS ELIZABETH LLC, ACTAVIS PHARMA, INC., ACTAVIS PHARMA COMPANY, BARR PHARMACEUTICALS, LLC, AKORN, INC., AKORN SALES, INC., HI-TECH PHARMACAL CO., INC., AMNEAL PHARMACEUTICALS, INC., IMPAX LABORATORIES, INC., APOTEX INC., APOTEX CORP., AUROBINDO PHARMA USA, INC., AURO PHARMA INC., AVET PHARMACEUTICALS INC., MARCAN PHARMACEUTICALS INC., BRECKENRIDGE PHARMACEUTICAL, INC., DR. REDDY'S LABORATORIES, INC., DR. REDDY'S LABORATORIES CANADA INC., GLENMARK PHARMACEUTICALS INC., USA, GLENMARK PHARMACEUTICALS CANADA INC., LANNETT COMPANY, INC., LUPIN PHARMACEUTICALS, INC., LUPIN PHARMA CANADA LTD., MAYNE PHARMA INC., MYLAN N.V., MYLAN PHARMACEUTICALS ULC, MYLAN INC., MYLAN PHARMACEUTICALS INC., MYLAN INSTITUTIONAL INC., DAVA PHARMACEUTICALS, LLC, GENERICS BIDCO I, LLC, PAR PHARMACEUTICAL COMPANIES, INC., PAR PHARMACEUTICAL, INC., PERRIGO INTERNATIONAL INC., PERRIGO NEW YORK, INC., PFIZER INC., PFIZER CANADA ULC/PFIZER CANADA SRI, GREENSTONE LLC, SANDOZ INC., SANDOZ CANADA INC., FOUGERA PHARMACEUTICALS INC., SUN PHARMACEUTICAL INDUSTRIES, INC., SUN PHARMA CANADA INC., TARO PHARMACEUTICALS INC., TARO PHARMACEUTICALS U.S.A., INC., TELIGENT, INC., TELIGENT CANADA INC., UPSHER-SMITH LABORATORIES, LLC, WOCKHARDT USA LLC, MORTON GROVE PHARMACEUTICALS, INC., AND ZYDUS PHARMACEUTICALS (USA), INC. (Defendants)**

Paul S. Crampton C.J.

Heard: May 26, 2021; June 28, 2021

Judgment: September 20, 2021

Docket: T-607-20

Counsel: Kyle R. Taylor, Annie (Qurrat-ul-ain) Tayyab, for Plaintiff

Subject: Civil Practice and Procedure; Corporate and Commercial; Criminal; Torts

**Related Abridgment Classifications**

Civil practice and procedure

V Class and representative proceedings

V.2 Representative or class proceedings under class proceedings legislation

V.2.e Costs, fees and disbursements

V.2.e.v Class proceedings funding

**Headnote**

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Costs, fees and disbursements — Class proceedings funding

Plaintiff represented class of persons who purchased generic drugs in Canada between 2012 and 2020 — Plaintiff claimed \$2.75 billion in damages and related relief against 74 defendants allegedly responsible for most generic drug sales in Canada

— Plaintiff alleged that defendants conspired to allocate market, fix prices and maintain supply of generic drugs in North America — To fund action, plaintiff entered into litigation funding agreement (LFA) with PP — Among other things, LFA contemplated substantial amount of funding for sophisticated economic analysis and document management services in relation to vast amount of data and documents that plaintiff expected defendants would disclose — Pursuant to LFA, PP would be entitled to return of 10 percent of claim proceeds, after PP was reimbursed for any funds advanced under LFA — That 10 percent fee was subject to cap of between \$5 million and \$45 million, depending upon when overall claim proceeds were received — Plaintiff brought motion for approval of litigation funding agreement — Motion granted — Basic procedural and evidentiary requirements for entering into LFA were met — Plaintiff had independent legal advice before entering into LFA and defendants were given notice of approval motion — Several million dollars would likely be required to advance action — Third party funding was necessary to facilitate meaningful access to Court for purposes of seeking redress for damages caused by alleged anti-competitive conduct of defendants — LFA was not champertous — LFA was fair and reasonable to current and prospective class members as group — Funding fee fairly reflected level of risk being incurred by PP in respect of extent and timing of any recovery — LFA would facilitate access to justice and behaviour modification for any wrongdoing by defendants, which would not otherwise be possible — LFA would not interfere with solicitor-client relationship, counsel's duty to class members, or with carriage of proceeding — LFA would protect relevant legal information and confidentiality of parties' information as well as legitimate interests of defendants by way of signed undertaking to pay court-ordered costs — LFA was approved.

#### Table of Authorities

##### Cases considered by *Paul S. Crampton C.J.*:

*David v. Loblaw* (2018), 2018 ONSC 6469, 2018 CarswellOnt 17950, 43 C.P.C. (8th) 418 (Ont. S.C.J.) — considered  
*Difederico v. Amazon.com, Inc.* (2021), 2021 FC 311, 2021 CarswellNat 1053 (F.C.) — followed  
*Drynan v. Bausch Health Companies Inc.* (2020), 2020 ONSC 4379, 2020 CarswellOnt 10854, 53 C.P.C. (8th) 297 (Ont. S.C.J.) — referred to  
*Dugal v. Manulife Financial Corp.* (2011), 2011 ONSC 1785, 2011 CarswellOnt 1889, 105 O.R. (3d) 364, 18 C.P.C. (7th) 105 (Ont. S.C.J.) — referred to  
*Flying E Ranche Ltd. v. Canada (Attorney General)* (2020), 2020 ONSC 8076, 2020 CarswellOnt 19021, 62 C.P.C. (8th) 114 (Ont. S.C.J.) — referred to  
*Heyder v. Canada (Attorney General)* (2018), 2018 FC 432, 2018 CF 432, 2018 CarswellNat 3653, 2018 CarswellNat 3654 (F.C.) — referred to  
*Houle v. St. Jude Medical Inc.* (2017), 2017 ONSC 5129, 2017 CarswellOnt 13215, 9 C.P.C. (8th) 321 (Ont. S.C.J.) — considered  
*Houle v. St. Jude Medical Inc.* (2018), 2018 ONSC 6352, 2018 CarswellOnt 17713, 429 D.L.R. (4th) 739, 29 C.P.C. (8th) 409 (Ont. Div. Ct.) — referred to  
*JB & M Walker Ltd / 1523428 Ontario Inc. v. TDL Group* (2019), 2019 ONSC 999, 2019 CarswellOnt 1750, 48 C.P.C. (8th) 199 (Ont. S.C.J.) — referred to  
*Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.* (2013), 2013 ONSC 4974, 2013 CarswellOnt 11197, 117 O.R. (3d) 150, 55 C.P.C. (7th) 437, 6 C.C.P.B. (2nd) 82 (Ont. S.C.J.) — referred to  
*Schenk v. Valeant Pharmaceuticals International Inc.* (2015), 2015 ONSC 3215, 2015 CarswellOnt 8651, 74 C.P.C. (7th) 332 (Ont. S.C.J.) — referred to

##### Statutes considered:

*Class Proceedings Act, 1992*, S.O. 1992, c. 6

Generally — referred to

*Competition Act*, R.S.C. 1985, c. C-34

Generally — referred to

s. 45 — referred to

s. 46 — referred to

*Law Society Act*, R.S.O. 1990, c. L.8

Generally — referred to

s. 59.3 [en. 1992, c. 7, s. 3] — referred to

**Rules considered:**

*Federal Courts Rules*, SOR/98-106

Generally — referred to

R. 3 — referred to

R. 334.21(1) [en. SOR/2007-301] — referred to

MOTION by plaintiff for approval of litigation funding agreement.

***Paul S. Crampton C.J.:***

**I. Introduction**

1 In this Motion, the plaintiff seeks approval of a litigation funding agreement [*LFA*] and certain ancillary relief.

2 The plaintiff, Kathryn Eaton, represents a class of persons who purchased generic drugs in Canada between 2012 and 2020 [the *Class Period*]. In her capacity as representative plaintiff, she claims \$2.75 billion in damages and related relief against the 74 defendants. Those defendants are alleged to be responsible for most of the generic drug sales in Canada.

3 In support of her claim, the plaintiff alleges that the defendants conspired to "allocate the market, fix prices and maintain the supply of generic drugs" in North America, contrary to [sections 45 and 46 of the Competition Act, RSC 1985, c C-34 \[the Act\]](#).

4 To fund this action, the plaintiff entered into an LFA with Parabellum Partners II, LP [*Parabellum*]. Among other things, the LFA contemplates a substantial amount of funding for sophisticated economic analysis and document management services in relation to a vast amount of data and documents that the plaintiff expects the defendants will disclose. The amount of funding contemplated by the LFA is represented as being among the largest ever sought to be approved by a court in this country.

5 Pursuant to the LFA, Parabellum would be entitled to a return of 10% of the claim proceeds, after Parabellum has first been reimbursed for any funds advanced under the agreement [the *Remaining Claim Proceeds*]. This 10% fee [the *Funding Fee*] is subject to a cap of between \$5 million and \$45 million, depending upon when the overall claim proceeds are received. The extent of funding to be advanced under the LFA is expected to be in the range of several millions of dollars.

6 For the reasons that follow, I have concluded that it is in the best interests of justice to approve the LFA, as amended to address certain concerns that I raised [the *Amended LFA*]. Among other things, the Amended LFA is necessary to facilitate access to justice by the Class Members, it will make a meaningful contribution to deterring wrongdoing, it is fair and reasonable to current and prospective Class Members, and it will not overcompensate Parabellum.

**II. Background**

7 In her Fresh as Amended Statement of Claim, the plaintiff alleges that the defendants have conspired to allocate among themselves a "fair share" of sales of generic drugs. This conspiracy is alleged to also include price fixing, market allocation, customer allocation and the restriction of supply, contrary to [section 45 of the Act](#). Among other things, these anti-competitive activities are estimated to have contributed to prices for generic drugs in Canada exceeding the median generic drug price of seven comparator countries by 30% during the Class Period. The plaintiff further alleges that some of the defendants contravened [section 46 of the Act](#) by implementing directives, instructions, intimations of policy or other communications for the purpose of giving effect to a foreign conspiracy.

8 The purported conspiracy in Canada is said to be part of a broader North American conspiracy that has been the subject of an ongoing investigation by U.S. state attorneys general and the U.S. Department of Justice. As of the date of the Fresh as

Amended Statement of Claim, that investigation had resulted in the filing of two civil complaints by state attorneys general as well as agreements by four of the defendants to pay fines.

9 To the extent that some defendants may not sell drugs in Canada, their participation in the alleged conspiracy is claimed to have harmed consumers in this country by improperly limiting competition, and thereby supporting the purported price increases that have resulted from the conspiracy.

### III. The Parties

#### A. The Representative Plaintiff and the Class

10 The representative plaintiff, Kathryn Eaton, is a resident of Toronto, Ontario who purchased generic drugs in the private sector during the Class Period. She seeks to represent a class of consumers [the *Class Members*] defined as follows:

All persons or entities in Canada who, from January 1, 2012 to the present (the "Class Period"), purchased generic drugs in the private sector. Excluded from the class are the defendants and their parent companies, subsidiaries, and affiliates.

#### B. The Defendants

11 The defendants are described as being the leading generic drug makers in North America, and certain of their affiliates.

#### C. Parabellum

12 Parabellum is one of the funds managed by Parabellum Capital LLC, which in turn is described as one of the largest, longest tenured and internationally recognized litigation funders in the United States.

### IV. The LFA

13 Parabellum, the representative plaintiff and her legal counsel executed the LFA in the fall of 2020. Before entering into the LFA, the plaintiff sought and received independent legal advice from Ms. Alexi Wood, a partner at St. Lawrence Barristers LLP who has experience with class actions.

14 In broad terms, the LFA provides that Parabellum will fund the following:

- i. Disbursements up to a maximum of [text omitted];
- ii. Any adverse cost awards up to [text omitted]; and
- iii. The costs incurred in obtaining independent legal advice as described above.

15 In exchange for its funding commitment and in the event of the recovery of any proceeds, the LFA states that Parabellum will be (i) reimbursed for all payments advanced for disbursements and adverse costs, and (ii) paid the Funding Fee, subject to the cap described above.

16 Pursuant to Article 3 of the LFA, the claim proceeds are required to be distributed in the following order of priority:

- i. To reimburse Parabellum for amounts advanced under the agreement;
- ii. To reimburse legal counsel for any disbursements that they have funded in excess of the [text omitted] cap on Parabellum's commitment to fund adverse cost awards;
- iii. To reimburse costs incurred in implementing and administering any final resolution of the proceedings (as defined in the LFA);
- iv. On a *pro rata* and *pari passu* basis:

- a) To pay legal counsel a fee of 25% (subject to the Court's approval) — this corresponds to the 25% contingency fee to which the representative plaintiff agreed in her Contingency Fee Retainer Agreement with class counsel; and
- b) To pay Parabellum the Funding Fee; and

v. To Class Members

17 As will be further discussed below, the initial version of the LFA that was executed in the fall of 2020 was amended to address concerns I identified in two hearings with class counsel. Among other things, the Amended LFA clarifies that:

- i. The plaintiff is *required* to obtain Court approval of the LFA, its termination and any amendments (other than as they relate to a change in class counsel);
- ii. In no event will the sum of the Funding Fee and the return to any third party funder who may take Parabellum's place exceed 10% of the Remaining Claim Proceeds;
- iii. The General Terms and Conditions prevail over the Key Terms, in the event of any inconsistency between those two parts of the Amended LFA;
- iv. Certain obligations of the plaintiff will only crystalize after Parabellum has become entitled to receive the Funding Fee and the reimbursement of funds it has advanced, i.e., after a resolution has been reached in respect of this proceeding; and
- v. References to an obligation to pay legal costs (over and above court-ordered costs and disbursements to experts and other third parties) relate solely to the costs of obtaining independent legal advice, as described at paragraph 13 above.

## V. Issues

18 This Motion raises two principal issues for the Court's determination: (i) whether to approve the LFA, and (ii) whether to maintain the confidentiality of all the terms that have been redacted from the Redacted Version of the LFA.

## VI. Assessment

### A. The test for approval of an LFA

19 The general test for approving an LFA is whether it would be in the interests of justice to do so: [Difederico v Amazon.com, Inc.](#), 2021 FC 311 at para 35 [.

20 In considering whether that test is met, it is appropriate to consider the following factors:

- i. Have the basic procedural and evidentiary requirements for the Court's consideration of the LFA been satisfied?
- ii. Is third party funding necessary to facilitate meaningful access to justice?
- iii. Is the LFA champertous?
- iv. Is the LFA fair and reasonable to current and prospective class members as a group?
- v. Will the LFA make a meaningful contribution to deterring wrongdoing?
- vi. Does the LFA interfere with the solicitor-client relationship, counsel's duty to the class members, or the carriage of the proceeding?
- vii. Does the LFA protect relevant legal privileges and the confidentiality of the parties' information?
- viii. Does the LFA protect legitimate interests of the defendants?

*Difederico*, above, at para 36.

21 A negative response to any of the questions listed above can be fatal to an LFA.

22 I will address each of those questions below.

***B. Have the basic procedural and evidentiary requirements for the Court's consideration of the LFA been satisfied?***

23 The basic procedural and evidentiary requirements that should be met before the Court's consideration of an LFA consist of:

- i. the plaintiff obtaining independent legal advice prior to entering into the LFA;
- ii. prompt disclosure of the LFA and any legal retainer agreement to the Court;
- iii. a prompt request for approval of the LFA;
- iv. the provision of reasonable notice to the other parties of the motion requesting approval of the LFA;
- v. the provision of a copy of the LFA to the other parties, subject to appropriate redactions; and
- vi. the provision to the Court of evidence of the relevant background circumstances pertaining to the LFA.

*Difederico*, above, at para 38; *Houle v St. Jude Medical Inc.*, 2017 ONSC 5129 at paras 68-70 and 74 [*Houle I*].

24 I am satisfied that each of these requirements has been met. For greater certainty, I will note that the plaintiff's motion record was addressed to legal counsel for all but a few of the named defendants, and to the remaining named defendants themselves. Certain of those defendants then made representations on the motion, and ultimately advised the Court on May 3, 2021, that an agreement had been reached on the terms of an undertaking by Parabellum for the benefit of each defendant. That undertaking is further discussed in parts VI.H and VI.I below.

25 Having regard to the foregoing, this factor weighs in favour of approving the Amended LFA.

***C. Is third party funding necessary to facilitate meaningful access to justice?***

26 In her affidavit, the plaintiff states that she has been advised by class counsel that expenses in the range of several millions of dollars will likely be required to advance her proceeding in this Court. She asserts that she does not have the means to pay for those expenses, and that she would not be willing to continue in her role as representative plaintiff in the absence of third party funding. Stated differently, she maintains that without Parabellum's financial support, this action could not be properly prosecuted.

27 In her written representations, the plaintiff explained that the nature of the generic drug industry and the breadth of the alleged conspiracy by the defendants are such that sophisticated expert economic evidence will be required to advance this proceeding. She added that the large number of well-resourced defendants will result in the disclosure of a vast amount of data and documents, which will be costly to manage and analyze.

28 Given the plaintiff's evidence, and considering the extent of funding provided for in the LFA, I find that third party funding is indeed necessary to facilitate meaningful access to the Court for the purposes of seeking redress for the damages caused by the alleged anti-competitive conduct of the defendants. This weighs in favour of approving the Amended LFA.

***D. Is the LFA champertous?***

29 For the reasons explained in *Difederico*, above, at paras 48-53, the Court's assessment of this factor should address two considerations. The first is whether there is any evidence of any actual improper motive, as opposed to one that may be deemed to be improper based on the quantum of the return contemplated by the LFA. There is no such evidence in this case.

30 The second consideration that is relevant to assess at this step in the analysis is whether fees set forth in the LFA exceed the outer limit of what might *possibly* be considered reasonable, fair or proportionate. Once again, there is no evidence to suggest that this may be so and I have no reason to be concerned in this regard. This is because the Funding Fee (10% of the Remaining Claim Proceeds) is within the range of similar fees that have been approved by Canadian courts: see e.g., *Difederico*, above at para 55; *Flying E Rancho Ltd. v Canada (Attorney General)*, 2020 ONSC 8076, at para 34 [; *Houle 1*, above, at para 83.

31 This is particularly so when one considers that the Funding Fee is subject to a sliding scale cap that ranges from \$5,000,000 to \$45,000,000, depending on when the Class Proceeds are received. Considering that the plaintiff is seeking damages of \$2.75 billion in this proceeding, these caps will ensure that the Funding Fee will be well below 10% for more than 80% of the potential outcomes in the proceeding between complete success (recovery of \$2.75 billion) and complete failure (a zero recovery).<sup>1</sup>

32 Based on the foregoing, this factor weighs in favour of approving the Amended LFA.

### ***E. Is the LFA fair and reasonable to current and prospective class members as a group?***

33 The determination of what is fair and reasonable is highly contextual: *Houle 1*, above, at para 81.

34 In her sworn affidavit, the plaintiff states that she believes the LFA is fair and reasonable to herself and to the class of people she proposes to represent. Although this is relevant, it is "by no means determinative": *Dugal v Manulife Financial Corp.*, 2011 ONSC 1785 at para 17; *Difederico*, above at para 66.

35 The plaintiff states that she reached this conclusion based on the advice she received from independent counsel and on the fact that she could not prosecute this action without Parabellum's financial support.

36 In her written submissions, the plaintiff adds that the Funding Fee reasonably reflects the investment being made by Parabellum and the market for litigation funding. Regarding the level of the investment being made, class counsel states that it is greater than any known funding agreement approved in Canada to date. However, that was before this court's decision in *Difederico*, above. Nevertheless, the fact remains that the level of investment being made by Parabellum appears to be among the largest ever made in the litigation funding context in this country.

37 Regarding the market for litigation funding, an affidavit sworn by Pujan Modi explained that class counsel approached three litigation funders to obtain the funding required to advance this action. After determining that Parabellum's proposal was in the best interest of Class Members, class counsel engaged in negotiations with Parabellum to secure the most favourable terms possible for Class Members.

38 As recognized in *Difederico*, above, at para 59, the risk of failure in these types of cases is significant and can occur at multiple stages, including the certification stage, trial and appeal, for reasons related to the legal theory as well as the damages methodology. In each of those scenarios, Parabellum may not receive any return whatsoever on its investment, or even a return of the funding it has advanced. Moreover, pursuant to Article 7 of the LFA, Parabellum will be required to seek the approval of the Court before it can terminate or amend the LFA, except if the amendment relates solely to a change in class counsel. In short, at this point in time, the level of return that Parabellum will receive is highly uncertain, and Parabellum will have to wait for an indefinite period before receiving any fee or even reimbursement of the funds it advances.

39 The plaintiff also maintains that the Funding Fee is fair and reasonable by comparison with other cases under *the Act* that have been approved.

40 In this regard, the plaintiff notes that in *Jensen v Samsung* (February 6, 2019), Ottawa, Ont FC T-809-18 (interlocutory decision) [*Jensen*], this Court approved a level of recovery that was uncapped and could reach as much as 15% of any proceeds recovered by the class. The plaintiff further represents that in *David v Loblaw*, 2018 ONSC 6469 at para 12 [; a funding agreement that is "comparable" to the LFA in this proceeding was approved.<sup>2</sup> The agreement in that case provides the funder with a return of 10% of the litigation proceeds, subject to a cap that varies between \$30 million and \$60 million, depending

on the timing of any settlement or judgment: *Loblaw*, above, at paras 9-10. In addition, this Court recently approved a funding agreement that provides for a return that is the greater of five times the funds advanced by the funder and 10% of the claim proceeds, subject to a cap of US\$100,000,000: *Difederico*, above, at para 4.

41 In addition to the foregoing, the plaintiff also notes that the terms of the LFA are more favourable to the Class Members than the terms applicable when a proceeding is funded by Ontario's Class Proceedings Fund [*CPF*], for proceedings commenced under the Class Proceedings Act: Law Society Act, RSO 1990, c L.8, s 59.3. This is because the CPF is entitled to an uncapped 10% levy in proceedings that it funds, whereas the Funding Fee in the LFA is subject to a cap that ranges from \$5 million to \$45 million, depending on when Claim Proceeds become available.

42 I agree that the considerations discussed above support a finding that the Funding Fee is fair and reasonable to the current and prospective members of the class.

43 This is particularly so because the maximum cap provided for in the LFA (\$45,000,000) will ensure that Parabellum's return will progressively decline from 10% to less than 2% as any settlement or award increases above \$450 million and approaches the \$2.75 billion claimed in this proceeding. As noted above, this range of potential outcomes accounts for over 80% of the possible outcomes in this proceeding, between complete success (recovery of \$2.75 billion) and complete failure (zero recovery).

44 It is also relevant to note that in *Difederico*, the amici represented to the Court that the jurisprudence has established a "presumptive range of validity" of 30-35% of the claim proceedings, for a combined return to the litigation funder and class counsel: *Difederico*, above, at para 65. See also *JB & M Walker Ltd. / 1523428 Ontario Inc. v TDL Group Corp.*, 2019 ONSC 999, at para 25 [; *Drynan v Bausch Health Companies Inc.*, 2020 ONSC 4379, at paras 91, 98 and 111 [; and *Houle I*, above, at para 33. The 10% fee to which Parabellum would be entitled, together with the 25% contingency fee to which class counsel would be entitled (subject to the Court's approval) under the terms of their Contingency Fee Retainer Agreement with the plaintiff, would fall within this range.

45 I will pause to observe that during one of the hearings on this motion, class counsel confirmed that the combined return of class counsel and Parabellum will not exceed 35%.

46 Finally, although the "waterfall" provisions in the LFA contemplate that the Class Members would be the last to collect (see paragraph 16 above), this is common in class action proceedings: *Difederico*, above, at para 71.

47 In summary, for the reasons set forth above, I find that the Amended LFA is fair and reasonable to current and prospective Class Members as a group.

48 In brief, the Funding Fee fairly reflects the level of risk being incurred by Parabellum in respect of the extent and timing of any recovery (including of the amounts it advances under the LFA). It is also within the range of the returns to litigation funders (or litigation funders and class counsel combined) that have been approved by the courts in Canada, including in *Competition Act* cases. Moreover, as the level of any settlement or court order rises above \$450 million and approaches the \$2.75 billion claim being made in this proceeding, the Funding Fee as a percentage of the total return to the class will decline from 10% to less than 2%. This range of potential outcomes accounts for over 80% of the potential outcomes in this proceeding, between complete success (\$2.75 billion return) and complete failure (zero return). Finally, the Funding Fee compares favourably with the uncapped 10% levy to which the CPF is entitled in proceedings that it funds in Ontario.

49 In addition, the Court will maintain its supervisory role in respect of the level of the combined compensation to which Parabellum and class counsel would be entitled. Moreover, any Class Member who is unhappy with the LFA will be entitled to opt out of the proceeding within the time and in the manner specified in any order certifying the proceeding as a class action: *Federal Courts Rules*, SOR/98-106, r 334.21(1) [the Rules].

50 Having regard to all of the foregoing, this factor (the fairness and reasonableness of the LFA) weighs in favour of approving the Amended LFA.



51 For the record, I will observe that the Amended LFA makes it clear that Court approval is *required* in respect of the LFA, as well as in respect of any termination of the LFA by Parabellum, any withdrawal of class counsel and any amendments to the LFA (except in relation to a change of counsel).

52 The Amended LFA also makes it clear that, if Parabellum is replaced by another litigation funder, the combined return of Parabellum and the replacement funder will not exceed 10% of the Remaining Class Proceeds or the sliding scale cap that has been discussed above.

53 In addition, the General Terms and Conditions of the Amended LFA, which are attached at Exhibit A thereto, now make it clear that they prevail over the Key Terms therein, to the extent of any inconsistency. This is important because several of the matters discussed in these reasons are addressed more clearly, and in some cases exclusively, in the General Terms and Conditions.

54 Other changes that were made in the Amended LFA simply serve to clarify matters that were not entirely clear. They do not have a bearing on my consideration of the fairness and reasonableness of the LFA.

***F. Will the LFA make a meaningful contribution to deterring wrongdoing?***

55 The plaintiff maintains that access to justice for those harmed by the alleged conspiracy, and behaviour modification by the defendants, can only be achieved if the action in this proceeding poses a credible threat to the defendants. By providing the financial resources that will be required to effectively advance this action, the LFA will facilitate such access to justice and behaviour modification, which would not otherwise be possible.

56 I agree that the Amended LFA will greatly assist the plaintiff in advancing this action against the defendants and that without Parabellum's funding, the prospect for meaningful behavioural modification on the part of the defendants is likely to be significantly reduced. To the extent that this action is successful, either by resulting in a favourable judgment or award, or in a settlement that reflects a sound claim, it is reasonable to expect that such behaviour modification is likely to occur. Indeed, firms in other markets also will likely be deterred from engaging in similar alleged conduct.

57 Accordingly, this factor weighs in favour of approving the Amended LFA.

***G. Does the LFA interfere with the solicitor-client relationship, counsel's duty to the class members, or the carriage of the proceeding?***

58 An LFA must "not interfere with the lawyer-client relationship, the lawyer's duties of loyalty and confidentiality, or the lawyer's professional judgment and carriage of the litigation on behalf of the representative plaintiff or class members": *Houle I*, above, at para 88.

59 The plaintiff maintains that the LFA ensures that there will be no scope for such interference.

60 In this regard, the Amended LFA contains the following terms:

- i. Class counsel are to be instructed by, and owe their obligations to, the plaintiff (Key Terms, Article 4.1);
- ii. The plaintiff will have the sole and exclusive right to direct the conduct of, and to settle, this action (General Terms and Conditions, Article 5.1);
- iii. Nothing in the LFA will create a solicitor-client relationship between class counsel and Parabellum, and it is understood that class counsel's professional obligations are owed exclusively to the plaintiff (General Terms and Conditions, Article 7.4);
- iv. Any entitlement to receive documents and other information is expressly stated to be "without interfering in the solicitor-client relationship" between class counsel and the plaintiff (General Terms and Conditions, Article 6.3);

v. The plaintiff's obligation to refrain from engaging in any acts or conduct or make any material omissions, agreements or arrangements that would jeopardize Parabellum's right to receive the Funding Fee is not triggered until Parabellum becomes entitled to receive that return — which will only occur once a final judgment or settlement is reached (General Terms and Conditions, Article 8.1.1); and

vi. Court approval is *required* in respect of any termination of the LFA by Parabellum, any withdrawal of class counsel and any amendments to the LFA (except in relation to a change of counsel) (Key Terms, Article 7; General Terms and Conditions, Articles 7.2.2 and 10.1).

61 Having regard to the foregoing, I consider that the Amended LFA will not interfere with the solicitor-client relationship, counsel's duty to the Class Members, or with the carriage of the proceeding. Accordingly, this factor weighs in favour of approving the Amended LFA.

#### ***H. Does the LFA protect relevant legal privileges and the confidentiality of the parties' information?***

62 An LFA must ensure that the third party funder will be bound by the deemed undertaking rule and will be bound not to disclose confidential or privileged information: *Houle 1*, above, at para 65.

63 With respect to legal privileges, Article 6.2 of the Amended LFA's General Terms and Conditions provides that the plaintiff does not waive any privilege that may attach to any documents or other information provided to Parabellum. In addition, Article 6.4 provides that the provision of any confidential information to a recipient will not constitute a waiver of any solicitor-client privilege, litigation privilege, common interest privilege, or any other applicable or available similar privilege or protection. Moreover, several other provisions provide that the plaintiff's obligation to provide information is subject to class counsel's reasonable judgment with respect to the preservation of all legal privileges: General Terms and Conditions, Articles 6.3, 7.2.3, 7.2.4. Finally, paragraph 6 of the Order that I will grant provides that the parties' obligation to comply with the Rules regarding service of materials relating to any relief sought in respect of the LFA, is subject to any rights of the parties and/or Parabellum to redact information in the materials that is subject to legal privilege or confidentiality. A similar provision is contained at subparagraph (e)(ii) of the undertaking included in Schedule A to that Order, which was negotiated between Parabellum and the defendants [the *Undertaking*].

64 Likewise, the Undertaking, the LFA and the Order attached to these reasons each address confidentiality. In particular, the Undertaking contains several provisions (including paragraphs (c), (e) and (g) - (k)) that are expressly directed towards protecting the confidentiality of any confidential information of the defendants that Parabellum may obtain. The same is true with respect to paragraphs 5 and 6 of the attached Order, the language of which was provided to the Court on consent by Parabellum and the defendants.

65 In view of the foregoing, I consider that the Amended LFA, as supplemented by the Undertaking and the attached Order, will protect relevant legal information and the confidentiality of the parties' information. Accordingly, this factor weighs in favour of approving the Amended LFA.

#### ***I. Does the LFA protect the legitimate interests of the defendants?***

66 Insofar as the Amended LFA is concerned, the defendants' legitimate interests relate to the issues of privilege, confidentiality and costs. The first two of those issues are addressed above and do not need to be revisited here.

67 With respect to costs, the Amended LFA requires Parabellum to fund up to [text omitted] in costs on behalf of the plaintiff, and provides that any court-ordered costs in excess of that amount will be the sole responsibility of class counsel: Key Terms, Articles 2.1 and 2.2; General Terms and Conditions, Article 2.1. Parabellum's obligation in this regard survives the termination of the LFA: General Terms and Conditions, Article 10.3.3.2. This obligation is reiterated in [paragraph 5\(g\)](#) of the attached Order.

68 Moreover, paragraph 14 of the plaintiff's Contingency Fee Retainer Agreement with class counsel stipulates that the plaintiff will not personally have to satisfy any adverse cost award. It adds that, to the extent a litigation funder does not provide

indemnification, class counsel will indemnify the plaintiff against any such award. This obligation is also provided for in the General Terms and Conditions to the Amended LFA at Article 7.2.2.2.

69 In addition, in paragraph (a) of the Undertaking, Parabellum agrees to comply with and satisfy any court-ordered costs, without qualification. In paragraph (c), Parabellum also agrees to attorn to the jurisdiction of the Court in relation to its obligations under the LFA, the attached Order and/or the Undertaking. These obligations are reinforced by several other provisions relating to costs in the Undertaking.

70 Considering all of the foregoing, I find that the Amended LFA, as supplemented by paragraphs 5 and 6 of the attached Order, and the Undertaking, will protect the legitimate interests of the defendants.

71 Accordingly, this factor weighs in favour of approving the Amended LFA.

### ***J. Conclusion regarding the approval of the LFA***

72 Given the findings I have reached in relation to each of the factors in parts VI.B - VI.I above, addressed above, I will approve the Amended LFA.

### **VII. Confidentiality Issue**

73 In its Notice of Motion and request for relief, the plaintiff requested an Order permitting her "to serve and file the motion record with the terms in the [LFA] sensitive to the plaintiff's litigation strategy redacted and to file with the Court an unredacted copy of the [LFA] under seal ..."

74 The redacted version of the LFA that was filed with the Court has very limited redactions. They concern the maximum amounts of disbursements and court-ordered costs that Parabellum has agreed to fund, the 10% Funding Fee, the specific amounts of the sliding scale cap, and the points in time at which each of them is triggered.

75 I readily accept that information pertaining to the maximum amount of funding provided under the LFA is competitively sensitive. The same is true for *the points in time* at which the specific amounts in the sliding scale Funding Fee cap are triggered. This information is also sensitive in the sense that its release to the defendants could well affect how they conduct themselves in this proceeding.

76 However, I reject the plaintiff's position that the amount of the Funding Fee and *the range* of the overriding sliding scale cap to which the Funding Fee is subject should be kept confidential. For greater certainty, that Funding Fee is 10% of the Remaining Class Proceeds, subject to a sliding scale cap of between \$5 million and \$45 million. To the extent that members of the media or the general public have any interest in this motion, it would be difficult for them to fully appreciate the issues it has raised without knowing those amounts.

77 I pause to observe that in *Difederico*, above, at para 113, I noted and accepted the amici's advice that I ought to be guided by the approach that has been taken in other cases, where information regarding caps and "multipliers" has not been kept confidential: see e.g., *Jensen*, above, at Exhibit "A", paragraph 5.1: *Bayens v Kinross Gold Corporation*, 2013 ONSC 4974 at para 15; *Loblaw*, above at paras 9-10; *Drynan*, above at paras 14 and 109; *Flying E*, above at para 25; *Houle v St. Jude Medical Inc.*, 2018 ONSC 6352 at para 17; *TDL*, above at para 24; and *Schenk v Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215 at para 15.

78 Considering all of the foregoing, I will grant the plaintiff's request to maintain the confidentiality of the maximum amount of funding that Parabellum will provide for disbursements and court-ordered costs under the LFA. I will also maintain the confidentiality of the points in time at which the various amounts of the sliding scale cap will be triggered, as well as the specific amounts of the cap, other than the two ends of the range. However, I do not consider it to be appropriate to maintain the confidentiality of Parabellum's 10% Funding Fee or the range of the overriding cap.

### **VIII. Designation of Counsel**

79 In her Notice of Motion, the plaintiff requested that her counsel, Orr Taylor LLP, be designated as counsel in this proposed class proceeding. She further requested an order directing that no other proceeding be commenced in this Court in respect of the allegations in this proceeding without leave of the Court, on notice to counsel in this action.

80 I consider it appropriate to grant these requests. Among other things, to the extent that this will help to avoid duplicative, costly and potentially conflicting proceedings, as well as potential delays to the present proceeding, it would be in the best interests of the Class Members, the defendants and judicial economy. If a prospective class member wishes to commence an overlapping proceeding, they will remain free to seek the Court's leave to do so. Likewise, Class Members will remain free to opt out of this proceeding within the time and in the manner specified in any Order certifying this proceeding as a class action: [Rule 334.21\(1\)](#). The granting of these requests would also be consistent with Rule 3 (securing the just, most expeditious and least expensive determination of every proceeding on its merits). It would do so "by providing a common and convenient vehicle for class members who live in widely different parts of the country to enforce their legal rights": [Heyder v Canada \(Attorney General\), 2018 FC 432 at para 12](#).

81 I will add in passing that class counsel represented to the Court that they are not aware of any related actions having been filed in Canada to date. Therefore, there is no present potential for prejudice to other parties and counsel involved in any overlapping claims.

## **IX. Conclusion**

82 For the reasons set forth above, I will approve the Amended LFA and grant the plaintiff's request to maintain the confidentiality of (i) the maximum amounts of funding that Parabellum will provide under the LFA to cover disbursements and court-ordered costs, and (ii) the specific amounts of the cap, other than the two endpoints of the range. However, I will not maintain the confidentiality of the percentage of the Funding Fee (10% of the Remaining Class Proceeds) or *the range* of the overriding cap.

## **ORDER in T-607-20**

*THIS COURT ORDERS that:*

1. The Amended and Restated Litigation Funding Agreement [*LFA*], effective as of October 20, 2020 and sent to the Court on July 5, 2021, between Parabellum Partners II, LP [*Parabellum*], the representative plaintiff Kathryn Eaton and her counsel, Orr Taylor LLP, is approved, subject to paragraph 5 below.
2. The terms relating to the maximum amounts of funding that Parabellum will provide under the LFA shall be redacted from the public version of the LFA. For greater certainty, the range of the overriding fee cap (which is \$5,000,000 to \$45,000,000, depending on when the Class Proceeds are received) shall not be redacted.
3. Orr Taylor LLP is designated as class counsel in this proceeding.
4. No other proceeding shall be commenced in this Court in respect of the allegations in this proceeding without leave of the Court on notice to Orr Taylor LLP.
5. The approval of the LFA is subject to the following:
  - a) The delivery by Parabellum of a signed undertaking to the defendants in the form of undertaking attached to this Order as Schedule "A";
  - b) The plaintiff and/or Parabellum shall not assign the LFA in whole or in part to any other person without prior notice to the defendants and Court approval of such assignment, provided that no such approval shall be required in the event Parabellum remains party to and fully liable for its obligations under the LFA;

c) Parabellum is bound by the implied undertaking of confidentiality imposed upon the parties to the proceeding in respect of non-public documents, information or data provided by the defendants in respect of the proceeding [*Defendant Information*];

d) To the extent that any Defendant Information relating to the proceeding disclosed to and/or used by Parabellum pursuant to the LFA is governed by a Confidentiality Order and/or other protective order issued by the Court, Parabellum shall be bound by the terms of such order. For greater certainty, Defendant Information produced or disclosed by a defendant to the plaintiff and designated by such a defendant as confidential when so produced or disclosed shall not be disclosed to Parabellum unless and until a confidentiality and/or other protective order has been issued by the Court;

e) To the extent Parabellum provides Defendant Information to Parabellum Capital LLC and/or any of their affiliates, insurers, legal advisors, or potential or actual assignees [*Third Party Recipients*], those Third Party Recipients shall be provided with a copy of this Order and be bound by the implied undertaking of confidentiality and any such confidentiality order and/or other protective order issued by the Court;

f) If there is any inconsistency between the terms of the LFA and those in this Order, any confidentiality order and/or any other protective order issued by the Court, the terms of this Order, the confidentiality order and/or other protective order will prevail; and

g) If the Court approves the termination of the Agreement in accordance with Part 10 of the General Terms and Conditions of the LFA, Parabellum is obligated to pay all outstanding Court Ordered Costs (as defined in the LFA) accrued up to the date of such approval, regardless of the date the cost award is made.

6. The parties and/or Parabellum will comply with the *Federal Courts Rules* in respect of service of materials relating to any relief sought in respect of the LFA, subject to any rights of the parties and/or Parabellum to redact information in the materials that is subject to legal privilege or confidentiality. No motions in respect of the LFA shall be brought *ex parte* unless the court determines that an *ex parte* motion is appropriate in the circumstances.

*Motion granted.*

#### **Schedule "A" — UNDERTAKING**

Capitalized terms used in this document and not defined herein will have the meanings ascribed to them in the Litigation Funding Agreement between Parabellum Partners II, LP, Kathryn Eaton and Orr Taylor LLP, dated October 20, 2020 ("the Agreement").

<i>PARTY</i>	NAME	<i>Parabellum Partners II, LP</i>
	ADDRESS	810 Seventh Avenue, Suite 1700, New York, NY 10019
	ATTENTION	Aaron Katz
		Chief Investment Officer of Parabellum Capital LLC (Investment Manager of Parabellum Partners II, LP and Authorized Representative of PBLM General Partner II, LLC as General Partner of Parabellum Partners II, LP)
	E-MAIL	akatz@parabellumcap.com
<i>DEFINITIONS</i>		
COURT ORDERED COSTS		Means any legal fees and disbursements (including any interest thereon) that the Court orders the Claimant to pay to one or more of the Defendants, whether such order is made before or after the effective date of any termination of the Agreement, up to but not exceeding an aggregate of [the redacted amount specified at section 2.2 of the Agreement] for all Defendants, provided that the applicable legal fees and disbursements were incurred by one or more of the Defendants after being served with the Statement of Claim or the Fresh as Amended Statement of Claim, whichever is earlier, and prior to the effective date of any termination of the Agreement.
CLAIMANT		Kathryn Eaton

COURT	The Federal Court of Canada, or any other court in Canada having jurisdiction over the Proceedings.
PROCEEDINGS	The legal proceedings in connection with all claims, actions and/or proceedings under the case captioned <i>Kathryn Eaton v. Teva Canada Limited et al.</i> , pending in Federal Court of Canada, File No. T-607-20, including any appeals therefrom.
DEFENDANTS	Means, individually or collectively, the entities named as defendants in the Fresh as Amended Statement of Claim filed by the Claimant in respect of the Proceedings.

BY THIS UNDERTAKING, Parabellum Partners II, LP, for the benefit of each Defendant:

- (a) agrees to comply with and satisfy any Court Ordered Costs made by the Court;
  - (b) this Undertaking is governed by the laws of the Province of Ontario and the federal laws of Canada applicable therein, provided that the *Federal Courts Rules* will continue to govern the Proceedings and any Court Ordered Costs made by the Court therein;
  - (c) attorns to the jurisdiction of the Court in relation to its obligations under the Agreement, the litigation funding approval order and/or this Undertaking, including without limitation its obligations relating to any order that the Claimant and/or Parabellum Partners II, LP pay Court Ordered Costs, including enforcement by the Defendants for such Court Ordered Costs, and its obligations pursuant to any confidentiality and/or protective order;
  - (d) in the event that any Court Ordered Costs are not paid by the Claimant within twenty-eight (28) days of falling due, and no appeal or motion is pending with respect to such Court Ordered Costs, hereby:
    - (i) consents to any application made by any of the Defendants in the Proceedings for the purpose of seeking an order that Parabellum Partners II, LP pay such Court Ordered Costs, and agrees that this Undertaking is good and sufficient proof of such consent; and
    - (ii) agrees to pay to the Defendants the final, quantified amount of any such Court Ordered Costs such that the Defendants may enforce the payment of that amount as a debt due and owing by Parabellum Partners II, LP to the Defendants;
  - (e) agrees to:
    - (i) notify the Defendants in writing of any termination of the Agreement within 10 days of any such termination becoming effective;  
  
comply with the *Federal Courts Rules* in respect of service of materials relating to any relief sought in respect of the Agreement, subject to any rights to redact information in the materials that is subject to legal privilege or confidentiality. No motions in respect of the Agreement shall be brought on an *ex parte* basis unless the court determines that an *ex parte* motion is appropriate in the circumstances;
    - (ii) remain liable, upon termination of the Agreement, for any Court Ordered Costs that accrued up to and as of the date of the Court's order approving such termination, regardless of the date the cost award is made;
- (For the purpose of paragraph (e)(i), Parabellum Partners II, LP's obligations will be satisfied by delivery of the required notice by email to counsel for the Defendants in the Proceedings at the email addresses attached as Appendix "A");
- (f) agrees that it will not revoke or withdraw this Undertaking prior to satisfying any obligations to pay Court Ordered Costs in favour of the Defendants;

(g) agrees to be bound by the implied undertaking of confidentiality applicable to the parties to the Proceedings in respect of non-public documents, information or data provided by the Defendants in respect of the proceeding ("Defendant Information");

(h) agrees that notwithstanding anything in the Agreement, it shall maintain the confidentiality of Defendant Information that is governed by a confidentiality order and/or other protective order issued by the Court disclosed to or used by it pursuant to the Agreement;

(i) agrees to be bound by any confidentiality order and/or protective order issued by the Court;

(j) agrees to the extent it provides Defendant Information to Parabellum Capital LLC and either of their affiliates, insurers, legal advisors, or potential or actual assignees ("*Third Party Recipients*") those Third Party Recipients shall be provided a copy of the order approving the Agreement and shall be bound by the implied undertaking of confidentiality and any such confidentiality order and/or protective order issued by the Court;

(k) agrees that if there is any inconsistency between the terms of the Agreement and those in the order approving the Agreement, any confidentiality order and/or any other protective order issued by the Court, the terms of the Agreement approval order, the confidentiality order and/or other protective order will prevail; and

(l) acknowledges having received valuable consideration for this Undertaking.

DATED this ..... day of ....., 2021

Executed as an Undertaking

.....

BY *PARABELLUM PARTNERS II, LP*, by its General Partner, PBLM GENERAL PARTNER II, LLC

BY:

.....

Name: Aaron Katz

Title: Chief Investment Officer, Parabellum Capital LLC (Investment Manager of Parabellum Partners II, LP and Authorized Representative of PBLM General Partner II, LLC as General Partner of Parabellum Partners II, LP)

#### Footnotes

- 1 A recovery of \$450 million would represent approximately 16.4% of the \$2.75 billion claimed in this proceeding.
- 2 Class counsel were also involved in that case.