

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**E. EDDY BAYENS, JOHN SINCLAIR, LUC FORTIN, PIERRE RACICOT and
STANLEY SHORTT, in their capacity as TRUSTEES OF THE MUSICIANS' PENSION
FUND OF CANADA**

Plaintiffs

- and -

**KINROSS GOLD CORPORATION, TYE W. BURT, PAUL H. BARRY,
GLEN J. MASTERMAN and KENNETH G. THOMAS**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**FACTUM OF THE MOVING PLAINTIFFS
(Motion to Approve Funding, July 22, 2013)**

KOSKIE MINSKY LLP
900-20 Queen Street West
Toronto, ON M5H 3R3

Kirk M. Baert (LSUC#: 309420)
Tel: 416.595.2117
Fax: 416.204.2889

Celeste Poltak (LSUC#: 46207A)
Tel: 416-595-2701
Fax: 416-204-2909

Jonathan Bida (LSUC#: 54211D)
Tel: 416-595-2072
Fax: 416-204-2907

Lawyers for the plaintiffs

TO: **OSLER, HOSKIN & HARCOURT LLP**
1 First Canadian Place
100 King Street West, Suite 4600
Toronto, ON M5X 1B8

Mark Gelowitz
Tel: (416) 862-4743
Fax: (416) 862-6666

Robert Carson
Tel: (416) 862-4235
Fax: (416) 862-6666

Lawyers for the defendants

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PART I - INTRODUCTION

1. The plaintiffs bring this motion for approval of a litigation funding agreement with Harbour Fund II, L.P. (“HF2”). The funding agreement provides that HF2 will indemnify the plaintiffs for adverse costs awards in this class proceeding in exchange for a percentage of net recovery from any settlement or judgment in this action.

2. The funding agreement ensures that the plaintiffs maintain control over the direction of this proceeding, subject to their overriding obligation to act in the best interests of the class. HF2 is entitled to periodic reporting of the status of the action, but is not entitled to interfere with or make any decisions respecting the plaintiffs’ or class counsel’s prosecution of the action.

3. The defendants do not oppose the approval of the HF2 funding agreement. There are provisions in the funding agreement and in the proposed funding approval order that (a) ensure that HF2 bears the same responsibility as the parties for protecting the confidentiality of documents produced in the litigation; and (b) provides security for costs in an amount that is satisfactory to the defendants.

4. The plaintiffs will not proceed with this action if there is no funding in place in respect of adverse costs awards, nor will class counsel assume this risk on top of the substantial risks it has already assumed in the form of incurring expensive disbursements and working without the certainty of pay.

PART II - THE FACTS

5. The plaintiffs brought this securities action on behalf of purchasers of Kinross Gold Corporation shares between February 16, 2011 and January 16, 2012. The plaintiffs allege that Kinross Gold Corporation and four of its current and former senior officers made misrepresentations in the company's public filings.

Affidavit of Stanley Shortt at para. 2, Plaintiffs' Record Tab 3.

6. The plaintiffs advance claims at common law and under the Ontario *Securities Act*. The motions for certification and for leave to proceeding with statutory claims under the *Securities Act* are scheduled for four days in October 22-25, 2013. All steps leading up to the certification and leave motion have been completed but for the exchange of facts.

Affidavit of Stanley Shortt at para. 3, Plaintiffs' Record Tab 3.

7. The plaintiffs are committed to pursuing this action on behalf of and in the best interests of the entire class, including participation in motions, examinations and trial. However, the plaintiffs are not willing to act as plaintiffs without any indemnity for adverse costs awards. It is possible that any potential adverse costs award could exceed potential recovery.

Affidavit of Stanley Shortt at paras. 6 and 7, Plaintiffs' Record Tab 3.

8. Accordingly, from the outset of this action, class counsel undertook to secure funding for adverse costs awards. The plaintiffs ultimately entered a funding agreement with HF2. However, HF2 was not the only funder that the plaintiffs approached for this action.

9. The plaintiffs first applied to the Ontario Class Proceedings Fund ("CPF") in June 2012 for funding of this action. The CPF considered the application for 6 months, but ultimately determined in the late fall of 2012 not to provide funding.

Affidavit of Michael Mazzuca at para. 8, Plaintiffs' Record Tab 2.

10. Class counsel then approached Harbour Litigation Funding (together with HF2, “Harbour”) to provide funding for adverse costs in this action. Harbour considered the request for funding over several months and ultimately determined to fund the action through one of its investment funds, HF2. Class counsel negotiated the terms of HF2’s indemnity over the course of several more months.

Affidavit of Michael Mazzuca at para. 9, Plaintiffs’ Record Tab 2.

11. On May 30, 2013, the plaintiffs entered into the funding agreement, whereby HF2 would provide an indemnity in respect of adverse costs award and in return, receive a fixed percentage of any net recovery in favour of the class. Class counsel views the funding agreement as a reasonable alternative to the CPF that is fair to both the plaintiffs and the class as a whole.

Affidavit of Michael Mazzuca at paras. 2 and 10, Plaintiffs’ Record Tab 2.

A. Terms of the Funding Agreement

12. The funding agreement provides that HF2 will provide an indemnity for adverse cost awards in an amount up to \$1 million for the motions for certification and leave and \$5 million afterwards, in respect of any common issues trial. In return, if the action succeeds, HF2 would be repaid any adverse costs it paid and receive a percentage of net recovery to the class (net of class counsel fees, taxes, and disbursements and administration and notice costs). HF2 would receive 7.5% of any net recovery if the action is resolved before certification or 10% of net recovery if resolved afterwards.

Affidavit of Michael Mazzuca at para. 3 and Ex. A (funding agreement, §2.1 and Sch. 2), Plaintiffs’ Record Tab 2.

13. The funding agreement requires periodic reporting to HF2 regarding the progress and status of the action. However, the plaintiffs shall maintain sole control over the litigation:

The Claimants [the plaintiffs] shall have control over the conduct of the Proceedings and, in accordance with the Overriding Objective, shall have the right to conduct the Proceedings as the Claimants consider appropriate, including the right:

- (a) to compromise the Causes of Action and/or the Proceedings against any Defendant on any terms they consider appropriate; and
- (b) to abandon, withdraw or discontinue the Proceedings or any part of the Proceedings;

Affidavit of Michael Mazzuca at para. 5 and Ex. A (funding agreement, §6.2), Plaintiffs' Record Tab 2.

14. The funding agreement also imposes a duty of confidentiality on HF2 in respect of any information or material it receives in the action. HF2 is required to return and destroy any such information or material at the end of the action.

Affidavit of Michael Mazzuca at para. 6 and Ex. A (funding agreement, §5), Plaintiffs' Record Tab 2.

B. Background on Harbour and HF2

15. HF2 is a limited partnership with \$191 million available to invest in commercial litigation and arbitrations worldwide. HF2 is authorized and regulated by the Financial Conduct Authority, the regulatory for financial services in the United Kingdom. Harbour Litigation Funding Limited, headquartered in London, England, acts as investment advisor to HF2.

Affidavit of Brett Carron at para. 2, Harbour's Record Tab 2.

16. Harbour is the most experienced litigation funder in the UK having reviewed over 1,500 disputes for funding since 2007. As well as cases in the UK, Harbour and its predecessors have funded litigation and arbitration disputes in Bermuda, the British Virgin Islands, the Channel Islands, Hong Kong, New Zealand and the United States. These cases include claims based on alleged misrepresentations by public issuers.

Affidavit of Brett Carron at para. 3, Harbour's Record Tab 1.

17. Harbour is a founding member of the Association of Litigation Funders of England and Wales, the regulatory body responsible for litigation funding in England and Wales. As a member, Harbour has adopted the Code of Conduct for Litigation Funders, which sets out standards of best practice and behavior for litigation funders in England and Wales. The Code of Conduct includes provisions that ensure (i) non-interference in litigation; (ii) confidentiality; and (iii) capital adequacy of litigation funders.

Affidavit of Brett Carron at paras. 4 and 5, Harbour's Record Tab 1.

18. For example, the code of conduct requires that each funder "maintain adequate financial resources to meet its obligations to fund all of the disputes that it has agreed to fund, and in particular will maintain the capacity: (i) to pay all debts when they become due and payable; and (ii) to cover aggregate funding liabilities under all of its [litigation funding agreements] for a minimum period of 36 months."

Affidavit of Brett Carron at para. 5, Harbour's Record Tab 1.

C. The Proposed Funding Order

19. The proposed order approving the HF2 funding agreement also provides terms to address concerns raised by the defendants.

20. First, the order requires HF2 to post security for costs at different stages of the action:

- (i) \$300,000 CDN on or before August 22, 2013;
- (ii) an additional \$700,000 CDN by no later than 30 days after any order certifying this proceeding as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6; and
- (iii) an additional \$2,000,000 CDN by no later than 90 days prior to the scheduled trial date;

Draft funding order, Plaintiffs' Supp. Record Tab 2.

21. Second, the order provides that HF2 would be bound by the deemed undertaking rule in respect of any productions it receives in the litigation:

...To the extent any evidence obtained from the defendants is provided to Harbour, then Harbour shall be bound by Rule 30.1.01 of the *Rules of Civil Procedure* and shall be deemed to be a party for the purposes of that Rule;

Draft funding order, Plaintiffs' Supp. Record Tab 2.

PART III - ISSUES AND THE LAW

22. Third party funding of class proceedings is permitted in Ontario as an appropriate manner of allowing plaintiffs and class counsel to mitigate the substantial litigation risks in class proceedings. There have been two Ontario class proceedings where this court has approved third party funding arrangements.

Dugal v. Manulife Financial Corporation, 2011 ONSC 1785, Plaintiffs' Authorities Tab 1.

The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation, 2012 ONSC 2937, Plaintiffs' Authorities Tab 2.

23. The HF2 funding agreement should be approved for two reasons:

- (a) this action will not proceed without third party funding as neither a counsel indemnity nor funding from the Class Proceedings Fund is available in this case; and
- (b) the HF2 agreement is fair and reasonable to the class.

A. This Action Will Not Proceed Without Third Party Funding

24. Some form of funding for adverse costs is, as a practical matter, a necessity in every class proceeding. As Justice Strathy recognized in *Dugal v. Manulife Financial Corporation*, no "rational" plaintiff in a class proceeding would risk an adverse cost award that would far exceed his or her potential recovery in the action.

Dugal v. Manulife Financial Corporation, 2011 ONSC 1785 at para. 28, Plaintiffs' Authorities Tab 1.

Ontario Law Reform Commission, *Report on Class Actions* (1982) at 659, 660 and 661, Plaintiffs' Authorities Tab 3.

25. There are limited choices for funding of adverse costs in Ontario class proceedings. A plaintiff in a class proceeding may seek an indemnity from the Class Proceedings Fund (CPF), from class counsel or from a private third party funder.¹

26. In this case, the CPF has refused to fund this action and class counsel will not assume the additional and substantial risk of an indemnity for adverse costs awards. Class counsel has already assumed responsibility for paying the expensive disbursements in this action and the risk of working for years without pay. Accordingly, third party funding is the only option remaining if this action is to proceed.

B. The HF2 Agreement Is Fair And Reasonable To The Class

27. The funding arrangement with HF2 is fair and reasonable to the class. After protracted negotiations, the plaintiffs and HF2 arrived at an arrangement that provides adequate protections for the plaintiffs (\$5 million indemnity), provides substantial security for costs for the defendants (\$3 million before trial) and provides a payment to HF2 that is a reasonable percentage of net recovery.

28. In addition, the HF2 funding agreement provides for funding terms that are similar to the CPF. The CPF provides for funding of disbursements and adverse costs in exchange for 10% of

¹ In fact, in the reports leading to the enactment of the *Class Proceedings Act, 1992*, it was never contemplated that an indemnity from class counsel was the solution to the problem of adverse cost awards in class proceedings. The Ontario Law Reform Commission's *Report on Class Actions* (1982), Plaintiffs' Authorities Tab 3 noted that the question of costs was the single most important issue it considered and recommended against any adverse costs for class proceedings. The *Report of the Attorney General's Advisory Committee on Class Action Reform* (1990), Plaintiffs' Authorities Tab 4 did not accept this recommendation. Instead, it recommended that the problem be addressed through (a) permitting the court discretion to depart from the ordinary cost rules where the action was a test case, novel point or was in the public interest; and (b) the Government should establish a fund to assist parties to class proceedings. The large quantum of recent adverse costs in Ontario class proceedings and the history of the CPF demonstrate that the Advisory Committee was incorrect. The problem of adverse costs persists in Ontario as a major disincentive to class proceedings. This is particularly true for securities action as a result of special cost rules applicable to actions under the *Securities Act* (see. *Securities Act*, R.S.O. 1990, c. S.5, s.138.11).

any net recovery. HF2 has agreed to provide funding for adverse costs in exchange for 7.5% of net recovery if it occurs before certification and 10% of net recovery afterwards.

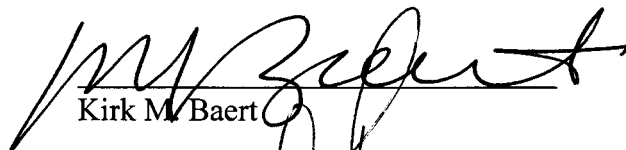
29. Finally, the HF2 funding agreement includes terms to ensure that the plaintiffs maintain control over the direction of this proceeding. HF2 is entitled to information regarding the status of the action, but cannot interfere with its prosecution.

PART IV - ORDER REQUESTED

30. The plaintiffs request an order

- (a) approving the funding agreement with HF2;
- (b) requiring HF2 to provide security for costs at the following stages of the action:
 - (i) \$300,000 CDN on or before August 22, 2013;
 - (ii) an additional \$700,000 CDN by no later than 30 days after any order certifying this proceeding as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6; and
 - (iii) an additional \$2,000,000 CDN by no later than 90 days prior to the scheduled trial date;
- (c) protecting the confidentiality of documents and information shared with HF2.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of July 2013.


Kirk M. Baert

Celeste Poltak



Jonathan Bida

Koskie Minsky LLP
Lawyer for the Plaintiffs

SCHEDULE “A” - LIST OF AUTHORITIES

1. *Dugal v. Manulife Financial Corporation*, 2011 ONSC 1785.
2. *The Trustees of the Labourers’ Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2012 ONSC 2937.
3. Ontario Law Reform Commission, *Report on Class Actions* (1982).
4. *Report of the Attorney General’s Advisory Committee on Class Action Reform* (1990).

SCHEDULE "B" - RELEVANT STATUTES

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

Court may determine conduct of proceeding

12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

RULE 30.1 DEEMED UNDERTAKING

APPLICATION

30.1.01 (1) This Rule applies to,

- (a) evidence obtained under,
 - (i) Rule 30 (documentary discovery),
 - (ii) Rule 31 (examination for discovery),
 - (iii) Rule 32 (inspection of property),
 - (iv) Rule 33 (medical examination),
 - (v) Rule 35 (examination for discovery by written questions); and
- (b) information obtained from evidence referred to in clause (a).

(2) This Rule does not apply to evidence or information obtained otherwise than under the rules referred to in subrule (1).

Deemed Undertaking

(3) All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

Exceptions

(4) Subrule (3) does not prohibit a use to which the person who disclosed the evidence consents.

(5) Subrule (3) does not prohibit the use, for any purpose, of,

- (a) evidence that is filed with the court;
- (b) evidence that is given or referred to during a hearing;
- (c) information obtained from evidence referred to in clause (a) or (b).

(6) Subrule (3) does not prohibit the use of evidence obtained in one proceeding, or information obtained from such evidence, to impeach the testimony of a witness in another proceeding.

(7) Subrule (3) does not prohibit the use of evidence or information in accordance with subrule 31.11 (8) (subsequent action).

Order that Undertaking does not Apply

(8) If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that subrule (3) does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just.

Securities Act, R.S.O. 1990, c. S.5

138.11 Despite the *Courts of Justice Act* and the *Class Proceedings Act, 1992*, the prevailing party in an action under section 138.3 is entitled to costs determined by a court in accordance with applicable rules of civil procedure.

E. EDDY BAYENS, ET AL
Plaintiffs

KINROSS GOLD CORPORATION, ET AL.
Defendants

Court File No: CV-12-44865100CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE MOVING PLAINTIFFS
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Koskie Minsky LLP
900-20 Queen Street West
Toronto, ON M5H 3R3

Kirk M. Baert (LSUC#: 309420)
Tel: 416.595.2117
Fax: 416.204.2889

Celeste Poltak (LSUC#: 46207A)
Tel: 416-595-2701
Fax: 416-204-2909

Jonathan Bida (LSUC#: 54211D)
Tel: 416-595-2072
Fax: 416-595-2907

Lawyers for the plaintiffs