



Federal Court of Australia
District Registry: Victoria
Division: General

No: VID1375/2017

PAWEL KUTERBA and another named in the schedule
Applicant

SIRTEX MEDICAL LIMITED (ACN 78 166 122)
Respondent

ORDER

JUDGE: JUSTICE MURPHY

DATE OF ORDER: 26 June 2019

WHERE MADE: Melbourne

THE COURT ORDERS THAT:

Settlement Approval Hearing

1. The application pursuant to section 33V of the *Federal Court of Australia Act 1976* (Cth) (**Act**) for orders approving the proposed settlement be listed for hearing before a Judge other than Murphy J, on 23 August 2019 or the earliest available date thereafter (**Approval Hearing**).

Notice to Group Members

2. Group Members be given notice pursuant to ss 33X(1)(a) and 33X(5) of the Act:
 - (a) of the date, time and place of the Approval Hearing on the date specified in paragraph 1 of these orders;
 - (b) of the fact that they must register their claim in accordance with paragraph 5 of these orders in order to be assessed for compensation as part of the proposed settlement; and
 - (c) of the fact that they may oppose the proposed settlement in accordance with paragraph 6 of these orders.



3. The form and content of the Notice of Proposed Settlement to all Group Members (**Notice**) which is Annexure A to these orders be approved pursuant to s 33Y(2) of the Act.
4. Pursuant to s 33Y(3) of the Act, the Notice will be distributed according to the following procedure:
 - (a) by no later than 1 July 2019, the Applicants will provide the Respondent with a list of group members who opted out of the proceeding by 1 November 2018 in accordance with the orders made on 24 September 2018 as well as the four group members who filed opt out notices in the week following 1 November 2018 (**Former Group Members**);
 - (b) by no later than 10 July 2019, the Respondent shall cause the Notice to be sent to all shareholders recorded on the Respondent's share register (**Share Register**) who acquired an interest in shares in the Respondent during the period from 24 August 2016 to 6.09 pm on 16 December 2016 (inclusive), excluding the Former Group Members:
 - (i) by email, where an email address for the shareholder is available to the Respondent; or
 - (ii) where no email address for the shareholder is available to the Respondent, by prepaid ordinary post at the address recorded for that shareholder on the Share Register;
 - (c) where the Respondent receives notice of a delivery failure in relation to any email sent to a shareholder, the Respondent shall send the Notice by prepaid ordinary post to that shareholder at the address recorded for that person on the Share Register, within two (2) business days of receiving that delivery failure notice;
 - (d) by 4.00 pm on 10 July 2019, the Applicants shall cause the Notice to be displayed on the website of the Applicants' solicitors (**Maurice Blackburn**) and on the website of IMF Bentham Ltd (**IMF**) and to remain so displayed until 7 August 2019.



Settlement Participation

5. Pursuant to s33ZF of the Act, 7 August 2019 be fixed as the date on or before which any Group member, other than those who registered before or immediately following 1 November 2018, who wishes to receive compensation in the proposed settlement must:
- (a) complete and submit the online registration notice at the domain hosted by IMF at <https://www.imf.com.au/cases/sirtex-medical-ltd> (**Registration Notice**); and
 - (b) submit the following information as part of the Registration Notice:
 - (i) the Group member's name and postal and email addresses;
 - (ii) any relevant Holder Identification Number (HIN) or Security Reference Number (SRN) associated with that Group member;
 - (iii) the number of Sirtex securities held by the Group member immediately prior to the commencement of trade on 24 August 2016;
 - (iv) for each purchase by the Group member of Sirtex securities during the period from 24 August 2016 to 6.09 pm on 16 December 2016 (inclusive), all transactional information regarding the purchase, including in respect of each such purchase:
 - A. the date of purchase;
 - B. the quantity of securities purchased; and
 - C. the consideration paid (including brokerage); and
 - (v) for each sale by the Group member of Sirtex securities during the period from 24 August 2016 to 6.09 pm on 16 December 2016 (inclusive), all transactional information regarding the sale, including in respect of each such sale:
 - A. the date of sale;
 - B. the quantity of securities sold; and
 - C. the consideration received (net of brokerage).
6. Pursuant to s 33ZF of the Act, 4.00 pm on 7 August 2019 be fixed as the date by which any group member who wishes to oppose the proposed settlement of the proceeding



must provide written notice to the applicants' solicitors, Maurice Blackburn, at PO Box A266 Sydney South NSW 1235 or SClassAction4@mauriceblackburn.com.au.

7. By 4.00 pm on 7 August 2019, any group member who has provided written notice of an objection to the proposed settlement of the proceeding must file with the Court:
 - (a) any evidence upon which the group member relies; and
 - (b) any written submissions upon which the group member relies,in support of the group member's objection.
8. Pursuant to s 33ZF of the Act, the Notice may be amended by the Respondent on the request of Maurice Blackburn before it is posted, emailed or published in order to correct any postal, website, email address or telephone number or any typesetting or typographical error.
9. Pursuant to s 33ZF of the Act, notwithstanding Orders 8(a) and (b) made by Murphy J on 24 September 2018, Maurice Blackburn be granted leave to provide the names of Registered Group Members to any insurer who is liable to indemnify the Respondent in relation to the proposed settlement on whose behalf a request for such information is made, for the sole purpose of the insurer conducting sanctions checks.
10. Leave be granted to solicitors of the parties to inspect the Court file for, and make copies of, any purported notices of objection and any evidence or submissions filed in support in relation to the proposed settlement.

Approval of the Settlement

11. By 4.00 pm on 16 August 2019, the Applicants file and serve any further affidavit evidence upon which they intend to rely in support of the approval of the settlement (and serve any non-confidential materials).
12. Leave be granted to the Applicants to file any affidavit or exhibit or part thereof in respect of which confidentiality orders are to be sought in a sealed envelope marked "*Confidential Affidavit – Not to be Opened Except by Direction of a Judge of the Court*" and the Applicants be excused from any requirement to serve any such affidavit or exhibit on any party.



13. By 4.00 pm on 20 August 2019, the Respondent file and serve any affidavit material in relation to the Approval Hearing.
14. Liberty be granted to both parties to apply on three (3) days' notice or on such shorter notice as a Judge might allow.

Confidentiality

15. Subject to further order, until the settlement is approved by the Court, copies of the Deed of Settlement which are contained at confidential exhibit BJS-5 to the affidavit of Ben Slade affirmed 25 June 2019 and confidential exhibit BJS-6 to the supplementary affidavit of Ben Slade affirmed 25 June 2019 be suppressed and not disclosed, pursuant to sections 37AF(1), s37AI and/or 33ZF of the Act on the grounds that the Deed of Settlement relates to a proceeding before the Court and the order is necessary to prevent prejudice to the proper administration of justice.


Costs Reference

16. Pursuant to section 33ZF(1) and/or section 37P(2) and/or section 54A of the Act, and Division 28.6 of the Federal Court Rules 2011 (FCR), Liz Harris of 247 Richardson Street, Princes Hill, Victoria (**Referee**) is appointed for the purpose of conducting an inquiry (**Reference**) and making a report in writing to the Court (**Report**) stating, with reasons, the Referee's opinion on the following two issues:
 - (a) the reasonableness of the applicants' legal costs for work done up to the date of the hearing of the Section 33V Application (including costs anticipated but yet to be incurred as at the date of the Report); and
 - (b) the reasonableness of the sum proposed for settlement administration costs, and whether the Referee can propose a cheaper and equally efficient way of conducting the administration.
17. The Referee is to submit the Report to the Court in accordance with FCR 28.66, addressed to the chambers of the Approval Hearing Judge on or before 9 August 2019 or such further date as the Court may determine. Unless the Approval Hearing Judge so orders, the Referees' fees shall not exceed \$25,000 inclusive of GST.
18. Without affecting the power of the Court as to costs, the Applicants are to be liable to the Referee for the Referee's fees.



19. The costs of the Reference shall form part of the Applicants' costs and shall be deducted from the settlement sum prior to any distribution of the settlement sum to eligible group members, if the settlement is approved.
20. The Referee shall provide a copy of the Report to the Applicants and the Applicants' solicitors.
21. The Referee is not bound to conduct the Reference in accordance with the rules of evidence; and in the Report shall, to the extent it was necessary for the Referee to make any findings of fact in order to express her opinion on the issues:
 - (a) make a statement of the facts found by the Referee from which the Court may draw such inferences as it thinks fit; and/or
 - (b) submit any matter arising on the Reference for the decision of the Court, and provide alternative opinions on the issue, depending on how the Court determines the matter submitted to the Court.
22. If, for any reason, the Referee is unable to comply with the order for delivery of the Report to the Court by 9 August 2019, the Referee is to communicate that fact to the Associate of the Approval Hearing Judge as soon as it becomes apparent to the Referee that she will be unable to do so.
23. The Referee has liberty to seek directions with respect to any matter arising in the Reference.

Date that entry is stamped: 26 June 2019


Registrar



Schedule

No: VID1375/2017

Federal Court of Australia
District Registry: Victoria
Division: General

Second Applicant TODD HAYWARD



Annexure A

SIRTEX CLASS ACTION **(Pawel Kuterba and Anor v Sirtex Medical Limited (ACN 78 166 122) VID 1375 of 2017)**

NOTICE OF PROPOSED SETTLEMENT

This Notice is provided pursuant to Orders made by the Federal Court of Australia on 26 June 2019. **This Notice is an important legal document and you should read it carefully as it concerns your legal rights.** If you have not already registered to participate in the class action, and you do not take steps to register in accordance with the instructions below, you will not be able to receive any compensation under the proposed settlement.

1. You have received this Notice because you have been identified as a potential group member (also known as a “class member”) in the Federal Court of Australia proceeding *Pawel Kuterba and Anor v Sirtex Medical Limited (ACN 78 166 122) VID1375 of 2017 (Sirtex Class Action)*.
2. In summary, this Notice is to inform you that an in-principle settlement of AU\$40 million has been reached in the proceeding between the Respondent (Sirtex Medical Limited (**Sirtex**)) and the Applicants (Mr Pawel Kuterba and Mr Todd Hayward). The Applicants (who bring the action on behalf of themselves and group members) are represented by solicitors Maurice Blackburn, and the class action has been funded by IMF Bentham Limited (**IMF**) and (prior to 30 April 2018) Australian Funding Partners Limited (**AFPL**). As a potential group member, you may be entitled to receive compensation from any settlement of this proceeding.
3. The in-principle settlement requires Court approval to be effective and for monies to be distributed to eligible group members. The Court has been asked to approve the settlement at a hearing to be held on 23 August 2019. You are entitled to attend the hearing if you wish to.
4. If there is anything in the Notice that you do not understand or if you have any questions, you should **not** contact the Federal Court and should instead seek independent legal advice or contact Maurice Blackburn (for contact details see Part G of this Notice, below). If you have a query as to whether you are a Group Member, please contact IMF on 403354@imf.com.au or free call 1800 016 464.
5. **Key points to be aware of:**
 - (a) Unless you have already registered by submitting a Registration Form, retaining Maurice Blackburn and/or entering into a litigation funding agreement with IMF, in order to receive compensation from the proposed settlement of this proceeding you must register as a group member **before 4:00pm Australian Eastern Standard Time (AEST) on 7 August 2019** by completing and submitting an online registration form on IMF’s website: <https://www.imf.com.au/sirtex-medical-ltd> (**Registration Form**). The Registration Form requires you to provide information about any Sirtex securities you held during the period from 24 August 2016 to 6.09 pm on 16 December 2016. Further details about the information required is at Part E of this Notice.



- (b) **If you have already submitted a Registration Form**, retained Maurice Blackburn and/or entered into a litigation funding agreement with IMF, **you do not need to re-register**. Some group members have already submitted a Registration Form as part of a registration process that took place in October and November 2018. You were sent a Court-approved notice about this in October 2018. If you have already submitted your trade data to IMF as part of this earlier registration process, there is nothing else you need to do *at this stage* in order to participate in the proposed settlement of this proceeding.

- (c) Group members are entitled to ask the Court not to approve the settlement. If you wish to do this you must follow the steps at Part F of this Notice, below.

A. WHAT IS A CLASS ACTION?

- 6. A class action is a legal proceeding brought by one or more persons (the applicant/s) on their own behalf and on behalf of a class of people (“group members”), where the applicant/s and the group members have similar claims against the respondent/s.
- 7. Group members are bound by any judgment or settlement in the class action, unless they have opted out of the proceeding. This means that:
 - (a) if the class action is successful, group members may be eligible for a share of any settlement monies or Court-awarded damages;
 - (b) if the class action is unsuccessful, group members are bound by that result; and
 - (c) regardless of the outcome of the class action, group members will not be able to pursue their claims against the respondent/s for the causes of action prosecuted in the class action in separate legal proceedings unless they have opted out of the class action.

B. SUMMARY OF THE SIRTEX CLASS ACTION

- 8. The Sirtex Class Action alleges that in the period from 24 August 2016 to 6.09 pm 16 December 2016 Sirtex failed to advise the ASX of information which was likely to have a material impact on the value of Sirtex’s shares and made statements that misled the market about Sirtex’s expected earnings and financial position. In broad terms, it is alleged that Sirtex ought to have disclosed information which contradicted or cast doubt upon Sirtex’s statements to the market to the effect that it anticipated double digit sales growth to continue in the financial year ending on 30 June 2017.
- 9. Mr Kuterba and Mr Hayward allege that this conduct breached Sirtex’s continuous disclosure obligations under the *Corporations Act 2001* (Cth) and the prohibition against misleading or deceptive conduct under the *Corporations Act 2001* (Cth), the *Australian Securities and Investments Commission Act 2001* (Cth) and/or the *Australian Consumer Law*.
- 10. Mr Kuterba and Mr Hayward claim that they and the group members suffered loss as a result of these alleged breaches. Sirtex denies these allegations. In agreeing to settle the claims, Sirtex does not admit liability. Full details of the allegations made by the applicants and of Sirtex’s defence against those allegations are set out in the Fifth



Further Amended Statement of Claim and Fourth Further Amended Defence. See Part G of this Notice, below, for details on how to access these documents.

11. The proceeding has been ongoing since 2017 and a hearing of the matter commenced on 27 May 2019. An in-principle settlement was reached between the parties late in the second week of the trial.

C. GROUP MEMBERS

12. You are receiving this Notice because you have been identified as a potential group member in the Sirtex Class Action.
13. A group member (or “class member”) is defined in the Fifth Further Amended Statement of Claim as someone who:
 - (a) acquired an interest in Sirtex (SRX) Securities during the period from 24 August 2016 to 6.09 pm on 16 December 2016 by the purchase of those securities on the financial market operated by the ASX;
 - (b) has suffered loss or damage by reason of the conduct of Sirtex pleaded in the Fifth Further Amended Statement of Claim; and
 - (c) is not a related party, related body corporate, associated entity or an office or a close associate of Sirtex.
14. You are group member if you meet this criteria and did not elect to opt out of the proceeding before the opt-out date of 1 November 2018.

D. PROPOSED SETTLEMENT

15. On 7 June 2019, during the second week of the hearing of the proceeding, the parties notified the Court that they had agreed in-principle to settle the Sirtex Class Action, subject to the approval of the Court. The proposed settlement is without admission of liability by Sirtex.
16. The proposed settlement must be approved by the Court under section 33V of the *Federal Court of Australia Act 1976* (Cth). The approval hearing will take place on 23 August 2019 in the Victoria Registry of the Federal Court of Australia located at **Owen Dixon Commonwealth Law Courts Building, 305 William Street, Melbourne Victoria 3000**. You are entitled to attend the hearing if you wish to.
17. In considering the approval application, the Court must determine whether the proposed settlement is fair and reasonable and in the interests of group members. If the proposed settlement is not approved by the Court, the Sirtex Class Action will continue and there will be no distribution of compensation to group members unless and until the Applicants are successful in the proceeding, or a further settlement is reached. The Court will also determine whether the legal costs in the proceeding have been reasonably incurred.
18. If the proposed settlement is approved, all group members will be bound by the settlement and will not be permitted to make any further claims against Sirtex or its related parties in relation to the allegations advanced in the proceeding or in relation to any matters which were at any time the subject of the proceeding, part of the proceeding or raised in the proceeding.
19. Under the terms of the proposed settlement, Sirtex will pay \$40 million, inclusive of legal costs and interest (**Settlement Sum**), to settle the Sirtex Class Action. The \$40 million is to be paid into an interest bearing account pending the approval of the



settlement and, in the event that the settlement is approved, interest on that sum will form part of the Settlement Sum.

20. The process by which the settlement sum is proposed to be distributed will be outlined in a "Settlement Distribution Scheme". The Settlement Distribution Scheme will contain detailed terms and conditions on which distribution of the settlement sum will be made, including a "Loss Assessment Formula" which details how each group member's entitlement to a share of the settlement sum will be calculated
21. The Settlement Distribution Scheme and the Loss Assessment Formula must be approved by the Court and may be subject to change, but current versions of these documents may be provided to group members on request to Maurice Blackburn. A confidentiality undertaking must be signed by those group members wishing to see the Settlement Distribution Scheme and Loss Assessment Formula. Details about how to obtain copies of these documents are at Part G of this Notice, below.
22. The amount of compensation to be paid to each group member under the proposed settlement will depend on factors such as the number of shares purchased by that group member, the date of purchase, whether any of those shares were sold, and the overall losses of all group members who choose to participate in the proposed settlement.
23. As advised in previous correspondence to some group members, on 30 April 2018 Justice Murphy made orders for a common fund providing for continued funding of the proceeding by IMF (**Common Fund Orders**). Throughout the course of the proceeding, IMF and AFPL have paid part of the costs incurred in conducting the class action and were required to pay any adverse costs orders that may have been made against the Applicants and/or group members. Pursuant to the Common Fund Orders, IMF and AFPL are entitled to receive, out of any settlement or judgment amount, reimbursement of the costs they have paid or are liable to pay in respect of the Sirtex Class Action and a commission not exceeding 28%, as consideration for funding the Sirtex Class Action, being a percentage (to be fixed by the Court) of the Settlement Sum.
24. The Common Fund Orders have the effect that group members who have not signed a funding agreement with IMF or a retainer with Maurice Blackburn will be required to make the same proportionate contribution to IMF's funding commission and/or legal costs as those group members that have signed a funding agreement or retainer with Maurice Blackburn. Put another way, the litigation costs and commission are spread evenly among all participating group members.
25. In applying for approval of the proposed settlement, the Applicants intend to ask the Court to make an order that:
 - (a) \$10 million of the \$40 million Settlement Sum be used to pay the legal costs incurred by them in conducting the proceeding;
 - (b) \$10 million be paid as funding commission to IMF and AFPL; and
 - (c) they each be paid \$40,000 to reimburse them for time, trouble and expenses incurred in representing the class in Sirtex Class Action.
26. The costs of administering the settlement will be payable to the administrator and subject to the approval of the Court.



E. WHAT MUST GROUP MEMBERS DO?

27. If you wish to participate in the proposed settlement, there are different actions that you can take depending on whether you are a Registered Group Member or an Unregistered Group Member:
- (a) **Registered Group Members** are those persons who registered as a group member in the Sirtex Class Action by completing the online Registration Form via IMF's website, retaining Maurice Blackburn and/or entering into a litigation funding agreement with IMF. You received a court-approved notice about this in October 2018. If you are Registered Group Member, there is nothing that you need to do at this stage in order to participate in the proposed settlement. If the settlement is approved by the Court, you will receive correspondence at a later date about your entitlement (if any) to receive compensation from the settlement amount.
 - (b) **Unregistered Group Members** are those group members who did not either:
 - (i) register as a group member by completing an online registration form via IMF's website; or
 - (ii) file with the Court a valid opt out notice, indicating their desire to opt out of the Sirtex Class Action.

In order to receive compensation from the proposed settlement of the proceeding, Unregistered Group Members must register their claim before **4:00pm Australian Eastern Standard Time (AEST) on 7 August 2019** by completing the Registration Form on IMF's website: <https://www.imf.com.au/sirtex-medical-ltd>. The Registration Form requires information about your Sirtex securities, including any relevant Holder Identification Number (HIN) or Security Reference Number (SRN), the number of Sirtex securities held immediately prior to the commencement of trade on 24 August 2016 and details about any Sirtex securities purchased or sold during the period 24 August 2016 to 6.09 pm 16 December 2016.

28. If you are not sure whether you are a Group Member, please contact IMF on 403354@imf.com.au or free call 1800 016 464.
29. Registered and Unregistered Group Members who wish to oppose the proposed settlement must follow the steps in Part F of this Notice.

F. OPPOSE THE PROPOSED SETTLEMENT

30. You are entitled to ask the Court not to approve the settlement. If you wish to take that step, you must:
- (a) By 4:00pm **AEST** on 7 August 2019 send a written notice to Maurice Blackburn at PO Box A266 Sydney South NSW 1235 or SClassAction4@mauriceblackburn.com.au stating that you wish to oppose the settlement and providing reasons why; and
 - (b) By 4.00 pm AEST on 7 August 2019 file with the Court written submissions stating that you wish to oppose the settlement and providing reasons why and any evidence upon which you may wish to rely in support of your objection; and



- (c) Attend (or send a representative to) the hearing at [x time] on 23 August 2019, when the Federal Court will consider whether to approve the settlement and you or your representative may make oral submissions in support of your objection. The hearing will take place at:

Victoria Registry
Federal Court of Australia
Owen Dixon Commonwealth Law Courts Building
305 William Street
Melbourne VIC 3000

31. You or your representative will need to be in a position on 23 August 2019 to explain to the Court why you consider that the settlement should not be approved. You should also be in a position to inform the Court whether you are willing to become the 'representative applicant' and take over the conduct of the Sirtex Class Action.
32. If you think you might wish to oppose the proposed settlement of the class action, you should obtain independent legal advice immediately.

G. RELEVANT DOCUMENTS AND FURTHER INFORMATION

33. Copies of relevant documents, including the Further Amended Originating Application, Fifth Further Amended Statement of Claim, Fourth Further Amended Defence can be obtained by:
- (a) downloading them from Maurice Blackburn's website;
 - (b) inspecting them between 9am and 5pm between Monday and Friday at the offices of Maurice Blackburn; or
 - (c) inspecting them on the Federal Court website: www.fedcourt.gov.au or by visiting a District Registry of the Federal Court in Sydney, Canberra, Melbourne, Brisbane, Adelaide, Perth, Hobart or Darwin. The addresses for these registries are available at www.fedcourt.gov.au.
34. On 26 July 2019, being four weeks prior to the settlement approval hearing, copies of the proposed Settlement Distribution Scheme and the Loss Assessment Formula may be provided to group members on request to Maurice Blackburn at SClassAction4@mauriceblackburn.com.au. A confidentiality undertaking must be signed by those group members wishing to see the Settlement Distribution Scheme and Loss Assessment Formula.
35. If you have any questions about this Notice, the Registration Form and/or whether or not you are a group member, please contact IMF on 403354@imf.com.au or free call 1800 016 464.