Court File No.: CV-19-00620507-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE JUSTICE E.M. MORGAN	))	WEDNESDAY THE 23RD DAY OF MARCH, 2022

B E T W E E N:

TAKWIHIN KIBALIAN and YEGHIA KIBALIAN

Plaintiffs

-and-

ALLERGAN PLC, ALLERGAN LIMITED, ALLERGAN, INC.,
ALLERGAN USA, INC. and ALLERGAN INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, C.6

ORDER

(Motion for Leave to Amend the Statement of Claim and for Partial Certification)

THIS MOTION, made by the Plaintiffs, unopposed by the Defendants, for an Order granting leave to amend the Statement of Claim, and

THIS MOTION made by the Plaintiffs, on consent of the Defendants, for an Order certifying a portion of the within action as a class proceeding only as against the Defendant, Allergan Inc., and appointing Takwihin Kibalian, Yeghia Kibalian, Karen Basal and Samara Bunsko as representative plaintiffs pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("***CPA***"),

were each heard this day by judicial videoconference at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

ON READING all the materials filed by the Parties, and on hearing submissions from counsel for the Plaintiffs and counsel for the Defendants,

A. Amendment of Statement of Claim

1. THIS COURT ORDERS that Karen Basal and Samara Bunsko be added as proposed representative plaintiffs to the action.

2. THIS COURT ORDERS that leave is granted to amend the title of proceedings as follows:

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ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

TAKWIHIN KIBALIAN, ~~and~~ YEGHIA KIBALIAN,
KAREN BASAL and SAMARA BUNSKO

Plaintiffs

-and-

ALLERGAN PLC, ALLERGAN LIMITED, ALLERGAN, INC.,
ALLERGAN USA, INC. and ALLERGAN INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992,* S.O. 1992, C.6

3. THIS COURT ORDERS that leave is granted to amend the Statement of Claim in the form of the Amended Statement of Claim attached hereto as Schedule "A".

B. Partial Certification

4. THIS COURT ORDERS that this proceeding be partially certified as a class proceeding only as against the Defendant, Allergan Inc., on behalf of the following classes:

(a) All persons who, between May 31, 1999 and May 29, 2019, were implanted in Canada with one or more BIOCELL® textured breast implants supplied by Allergan Inc. and enumerated in **Note 1**,[1] below (the "**Textured Breast Implants**") (the "**Primary Class Members**");

and

(b) All persons who, by virtue of a family relationship with one or more Primary Class Members, have standing to claim damages pursuant to section 61(1) of the *Family Law Act*, R.S.O. 1990, c. f.3, as amended, or analogous provincial legislation (the "**Family Class Members**", and together with the Primary Class Members, the "**Class Members**").

5. THIS COURT ORDERS that Takwihin Kibalian, Karen Basal and Samara Bunsko are hereby appointed as the Representative Plaintiffs on behalf of the Primary Class Members.

6. THIS COURT ORDERS that Yeghia Kibalian is hereby appointed as the Representative Plaintiff on behalf of the Family Class Members.

7. THIS COURT DECLARES that Rochon Genova LLP, Thomson Rogers Lawyers and Rice Harbut Elliott LLP are hereby appointed lawyers for the Class Members.

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[1] **Note 1:** "Textured Breast Implants" includes the following BIOCELL® textured breast implant models/styles: Natrelle Saline-Filled Breast Implants (Textured); Natrelle 410 Truform Silicone-Filled Breast Implants, Natrelle Silicone-Filled Breast Implants (Biocell Round), Natrelle Inspira Truform 1 (Responsive) Breast Implants (Textured Shell), and Natrelle Inspira Truform 2 (Soft Touch) Breast Implants (Textured Shell).

8. **THIS COURT DECLARES** that the following claims are asserted on behalf of the Class Members: design negligence, negligent failure to warn, and breach of Consumer Protection Acts.

9. **THIS COURT DECLARES** that the relief sought on behalf of the Class Members is as set out in the Amended Statement of Claim attached hereto as Schedule "A".

10. **THIS COURT DECLARES** that the consent common issues for claims regarding alleged risks of breast implant associated-anaplastic large cell lymphoma ("**BIA-ALCL**") are certified as follows:

1) Are any of the Textured Breast Implants defective in that they have the propensity to cause BIA-ALCL?
2) Did Allergan Inc. have a duty to warn the Plaintiffs and Class Members of a risk of developing BIA-ALCL in relation to any of the Textured Breast Implants?
3) If so, when did that duty arise, did the content of the duty change over time between 1999 and 2019, and if so, how did it change?
4) Did Allergan Inc. fulfil that duty at the applicable times?
5) Did Allergan Inc.'s sale of the Textured Breast Implants breach any of the provincial Consumer Protection Acts, and if so, when and how?
6) Does Allergan Inc.'s conduct warrant an award of punitive damages?

11. **THIS COURT ORDERS** that the partial certification of this proceeding referenced in paragraphs 4 to 10 (inclusive) above shall not take effect unless and until the proceeding previously certified by the Court of Queen's Bench of Alberta under Court File No. 1901-08347 (the "*Skands* Action") is dismissed, discontinued and/or permanently stayed with prejudice, and that the Defendants reserve their rights to re-open for a fresh hearing and adjudication this order of partial certification in its entirety or any component of it, if the

dismissal/discontinuance/permanent stay order is not granted or implemented in the *Skands* Action.

C. Contested Certification

12. THIS COURT ORDERS that the balance of the Plaintiffs' motion for certification in this proceeding shall be heard at a future date on a contested basis, at which time the Plaintiffs will be permitted to seek to certify the proceeding as a class proceeding on behalf of the following expanded classes of individuals:

(a) All persons who, between May 31, 1999 and May 29, 2019, were implanted in Canada with one or more BIOCELL® textured breast implants enumerated in **Note 1**, and/or other silicone gel-filled breast implants supplied by the Defendants (the "**Allergan Breast Implants**"), and their estates, administrators or other legal representatives, heirs or beneficiaries (the "**Expanded Primary Class**" or "**Expanded Primary Class Members**");

and

(b) All persons who, by virtue of a personal relationship with one or more Expanded Primary Class Members, have standing to claim damages pursuant to section 61(1) of the *Family Law Act*, R.S.O. 1990, c. f.3, as amended, or analogous provincial legislation (the "**Expanded Family Class**" or "**Expanded Family Class Members**").

13. THIS COURT ORDERS that at the return of the contested motion for certification, the Plaintiffs will be permitted to seek to have Takwihin Kibalian, Karen Basal and Samara Bunsko appointed as Representative Plaintiffs on behalf of the Expanded Primary Class and Yeghia Kibalian appointed as the Representative Plaintiff on behalf of the Expanded Family Class and to seek to certify the following additional common issues on behalf of the Expanded Primary Class

Members and Expanded Family Class Members (collectively, the "**Expanded Class Members**"), in addition to those common issues previously certified on a consent basis:

Negligence and Failure to Warn Issues

1) Did the Defendants, or any of them, owe a duty of care to the Expanded Class Members, and if so, who, when and how?

2) Were the Allergan Breast Implants defective or unfit for their intended use due to a propensity to cause and/or materially contribute to the development of Rupture and/or ASIA/BII?

3) If the answer to question (2) is yes, did the Defendants, or any of them, know or ought they to have known that the Allergan Breast Implants were defective or unfit for their intended use and if so, who and when?

4) Did the risks of BIA-ALCL, Rupture and/or ASIA/BII arise due to any of the Defendants' negligent design, manufacture, testing, and/or post-market surveillance and/or monitoring of the Allergan Breast Implants?

5) Did the Defendants, or any of them, breach their duty to the Expanded Class Members in their design, manufacturing, testing and/or post-market surveillance of the Allergan Breast Implants and if so, who, when and how?

6) Did the Defendants, or any of them, fail to warn, or fail to adequately warn, Expanded Class Members and surgeons with respect to the risks of Rupture, and/or ASIA/BII associated with the Allergan Breast Implants and if so, who, when and how?

Competition Act Issues

7) Did the Defendants, or any of them, make false and misleading representations and/or omissions about the risks posed by the Allergan Breast Implants contrary to s. 36 and s. 52 of the Competition Act, R.S.C. 1985, c.34 (the "Competition Act"), and if so, who, when and how?

Damages Issues

8) Are Expanded Class Members "insured persons" who are entitled to recovery from the Defendants for the cost of health care services provided by Provincial Health Insurers ("PHIs"), in relation to which PHIs have a subrogated interest pursuant to s. 30(1) of the *Health Insurance Act*, R.S.O. 1990, c. H-6, including all applicable "insured services" as defined in s. 1 therein and pursuant to the related applicable health care cost recovery legislation of the other Provinces and Territories?

9) Do monitoring and testing procedures exist which make early detection of BIA-ALCL, Rupture, and/or ASIA/BII associated with Allergan Breast Implants, or some of them, possible and reasonably beneficial?

10) If so, do the Expanded Class Members or any of them have an increased need for medical and testing procedures for early detection of BIA-ALCL, Rupture, and/or ASIA/BII associated with the Allergan Breast Implants?

11) If so, and if the Defendants, or any of them, are liable for any or all of the breaches alleged by the Plaintiffs, are the Defendants, or any of them, required to fund, or otherwise compensate Expanded Class Members for, the costs of operating and administrating an adequate system for health monitoring to screen for BIA-ALCL, Rupture, and/or ASIA/BII associated with Allergan Breast Implants?

12) Are the Defendants, or any of them, liable to pay compensatory damages to the Expanded Class Members? If so, which Defendants and in what amount?

13) Can the value of any or all of the claims of the Expanded Class Members, including compensation for medical monitoring, compensation for a 'base level' of physical and/or psychological harm, compensation for removal of Allergan Breast Implants, and damages or refunds pursuant to the Competition Act and/or applicable consumer protection legislation, be assessed on an aggregate basis?

14) Is the gain-based remedy of disgorgement for wrongful conduct available to the Expanded Class Members and if so, can this be assessed on an aggregate basis?

14. THIS COURT ORDERS that the form, content and manner of dissemination of notice of the certification of any and all portions of the within action as a class proceeding, including the timing and procedure for opting out, shall be determined by a further order of this Court, after the contested aspects of the motion for certification have been determined.

15. THIS COURT ORDERS that any other putative class action relating to the subject matter of this proposed class proceeding is hereby stayed.

16. **THIS COURT ORDERS** that there shall be no order as to costs of the Plaintiffs' motion for certification in relation to claims respecting the alleged risk of BIA-ALCL, or of the Plaintiffs' motion for an order granting leave to amend the Statement of Claim.

Morgan J.

KIBALIAN et al.
Plaintiffs

-and-

ALLERGAN PLC et al.
Defendants

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SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED IN TORONTO

ORDER
(Motion for Leave to Amend the Statement of Claim and for Partial Certification)

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