



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: 24 September 2018

WHERE MADE: Melbourne

THE COURT ORDERS THAT:

1. Pursuant to s 33J and s 33ZF of the *Federal Court of Australia Act 1976* (Cth) (**Act**), 4.00 pm on 1 November 2018 be fixed as the date and time on or before which a class member may opt out of this proceeding (**Class Deadline**).
2. Pursuant to s 33Y of the Act, the form and content of the Opt Out and Class Member Registration Notice (**Notice**), which is Schedule A to these Orders, be approved.
3. Pursuant to s 33X and s 33Y of the Act, the Notice be distributed on or before 5 October 2018 in accordance with the following procedure:
 - (a) the Respondent 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):
 - (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;



- (b) to the extent that 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;
- (c) the Applicants shall cause a copy of the Notice, together with copies of the current Originating Application, the Statement of Claim, Defence and any orders of the Court relating to the matters addressed in the Notice to be displayed on the website of the Applicants' solicitors (Maurice Blackburn), <https://www.mauriceblackburn.com.au/current-class-actions/sirtex-class-action/>, and to remain continuously so displayed up to and including the Class Deadline;
- (d) the District Registrar of the Victorian District Registry of the Federal Court of Australia cause a copy of the Notice, together with copies of the current Originating Application, Statement of Claim and Defence to be:
 - (i) displayed on the Federal Court website (www.fedcourt.gov.au); and
 - (ii) available for inspection at the District Registry of the Federal Court in Melbourne, Sydney, Canberra, Brisbane, Adelaide, Perth, Hobart and Darwin

and to remain continuously available up to and including the Class Deadline.

- 4. Pursuant to s 33Y and/or s 33ZF of the Act, the costs of and incidental to distributing the Notice (including, without limitation, costs incurred in answering enquiries by Notice Addressees and members of the public in relation to the Notice) will be costs in the proceeding.

Opt Out

- 5. Pursuant to s 33ZF of the Act:
 - (a) any class member who wishes to opt out of this proceeding must, on or before the Class Deadline, deliver to the Victorian District Registry of the Court an opt out notice in the form of Annexure A to the Notice;



- (b) if, on or before the Class Deadline, the solicitors for either party to the proceeding receive a notice purporting to be an opt out notice referable to this proceeding, the solicitors must file the notice in the Victorian Registry of the Federal Court of Australia within 14 days after receiving the notice, and the notice shall be treated as an opt out notice received by the Court at the time it was received by the solicitors;
- (c) the Applicants' solicitors and the Respondent's solicitors have leave to inspect the Court file and to copy any opt out notice.

Registration

- 6. Pursuant to s 33ZF of the Act, by the Class Deadline, class members who have not opted out of the proceeding and who wish to participate in any settlement which is reached should register as class members in the proceeding by:
 - (a) completing and submitting the online registration notice at the domain hosted by IMF Bentham Limited (**IMF**) <https://www.imf.com.au/cases/register/sirtex-medical-limited> (**Registration Notice**); and
 - (b) submitting the following information as part of the Registration Notice:
 - (i) the class member's name and postal and email addresses;
 - (ii) any relevant Holder Identification Number (HIN) or Security Reference Number (SRN) associated with that class member;
 - (iii) the number of Sirtex securities held by the class member immediately prior to the commencement of trade on 24 August 2016;
 - (iv) for each purchase by the class 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 class 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).

7. Pursuant to s 33ZF of the Act:

- (a) class members who, by the Class Deadline, have retained Maurice Blackburn to act for them in connection with the proceeding and/or entered into a litigation funding agreement with IMF in writing to provide litigation funding services to that class member in connection with this proceeding, be deemed to have registered their status as class members in the proceeding (**Deemed Registrants**);
- (b) any class member who by the Class Deadline both registers and opts out of the proceeding shall be deemed to have opted out.

Orders to facilitate mediation

8. Pursuant to s 33ZF of the Act, by 4.00 pm on 20 November 2018, the Applicants be required to:

- (a) deliver to the solicitors for the Respondent the following information, in respect of each class member who has registered or is deemed to have registered (together, **Registered Class Members**):
 - (i) a unique identification number for each Registered Class Member;
 - (ii) the number of SRX shares held at the commencement of trading on 24 August 2016;
 - (iii) the number of SRX shares acquired, and the dates on which they were acquired, in the period from 24 August 2016 to 6.09 pm on 16 December 2016 (inclusive);



- (iv) the number of SRX shares disposed of, and the dates on which they were disposed of, in the period from 24 August 2016 to 6.09 pm on 16 December 2016 (inclusive); and
- (v) any amendments to the information referred to in (ii) to (iv) above, as notified to Maurice Blackburn,

with such information anonymised so as not to identify the Registered Class Members other than by the unique identification number referred to in (a)(i) above (**Confidential List of Registered Class Members**); and

- (b) file the Confidential List of Registered Class Members in a sealed envelope marked '*Confidential List of Class Members - Not to be opened without leave of the Court or a Judge*'.

9. By 4.00pm on 20 November 2018, the Applicants are to provide to a firm nominated by the Respondent (**Audit Firm**) in electronic form the Confidential List of Registered Class Members for the purpose of the Audit Firm auditing (on behalf of the Respondent) the data in the Confidential List of Registered Class Members, on the condition that it will not disclose the identity of any Registered Class Member to any person and that it does not otherwise communicate with the class members concerning this proceeding.

10. The Audit Firm may request from the Applicants' solicitors:

- (a) a copy of any Class Member Registration Form (or equivalent original information source for a Deemed Registrant);
- (b) any transaction records provided by any Registered Class Member;
- (c) further information to enable it to identify any Registered Class Member,

on the condition that it will not disclose the identifying information contained in those documents to any person. The Applicants' solicitors must use their best endeavours to comply with any such request within 3 business days.

11. Pursuant to s 33ZF of the Act, the Confidential List of Registered Class Members, and any information contained therein, is, subject to further order, to be kept confidential and not to be disclosed to any person or persons other than:



- (a) the Applicants' legal advisors;
 - (b) the Respondent's external legal advisors retained in connection with this proceeding;
 - (c) any employee or contractor of the Respondent engaged to verify the information in the Confidential List of Registered Class Members, and then only after giving that employee or contractor written notice that the Confidential List of Registered Class Members is confidential and, pursuant to orders of the Federal Court of Australia, may not be disclosed by him, her or it; and
 - (d) the Docket Judge and any staff of the Court authorised by the Docket Judge to review the materials.
12. Pursuant to s 23 and s 33ZF of the Act, by 4.00 pm on 23 November 2018, the Respondent must deliver to the solicitors for the Applicants the following information in respect of each class member:
- (a) a unique identification number for each class member;
 - (b) the number of SRX shares held at the commencement of trading on 24 August 2016;
 - (c) the number of SRX shares acquired, and the dates on which they were acquired, in the period from 24 August 2016 to 6.09 pm on 16 December 2016 (inclusive);
 - (d) the number of SRX shares disposed of, and the dates on which they were disposed of, in the period from 24 August 2016 to 6.09 pm on 16 December 2016 (inclusive);

with such information anonymised so as not to identify the class members other than by the unique identification number referred to in 1(a)) above (**List of Class Members**).

General

13. Pursuant to s 33ZF of the Act, any class member who does not opt out of the proceeding and who does not validly register by the Class Deadline will remain a



class member for all purposes, including for the purpose of being bound by any judgment in this proceeding and being entitled to participate in any settlement or award of damages by the Court.

14. The Applicants' interlocutory application dated 18 September 2018 is adjourned to a date to be fixed. The Applicants shall pay the Respondent's costs incurred to date in relation to that application.
15. The parties' costs of the applications dated 20 August 2018 and 23 August 2018 shall be costs in the proceeding.

Date that entry is stamped: 24 September 2018

Warrick Soden
Registrar



Schedule

No: VID1375/2017

Federal Court of Australia
District Registry: Victoria
Division: General

Second Applicant TODD HAYWARD



Schedule A

OPT OUT AND CLASS MEMBER REGISTRATION NOTICE FEDERAL COURT OF AUSTRALIA

Sirtex Class Action

THIS NOTICE IS VERY IMPORTANT - PLEASE READ IT CAREFULLY, AS IT MAY AFFECT YOUR LEGAL RIGHTS

What is this Notice?

On 15 December 2017 a class action was commenced in the Federal Court of Australia (**Court**) against Sirtex Medical Limited (**Sirtex**). On 20 September 2018, the Court made orders (the **Opt Out and Class Member Registration Orders**) which required publication of this Notice for the information of persons who are members of the class on whose behalf the action is brought.

You have received this Notice because you have been identified as someone who may have purchased shares in Sirtex during the period from 24 August 2016 to 6.09 pm on 16 December 2016 (inclusive). If you did purchase shares in Sirtex during that period, you should read this notice carefully.

If there is anything in this notice that you do not understand, you should seek legal advice. Any questions you have concerning the matters contained in this notice should not be directed to the Court.

Summary of this Notice

1. If you wish to have your rights determined through the Sirtex Class Action and share in any distribution following any settlement or judgment in the Sirtex Class Action, you must not opt out. The Opt Out and Class Member Registration Orders provide that if you do not opt out and wish to participate in any settlement reached, you should submit a Registration Notice available on IMF Bentham Limited (**IMF**) website <https://www.imf.com.au/cases/register/sirtex-medical-limited>, doing so **before 4.00pm AEDT on 1 November 2018**.
2. If you do not wish to be involved in the class action and/or wish to reserve the right to pursue a separate claim against Sirtex, you must complete and submit an Opt Out Notice (see below at Annexure A) **before 4.00 pm AEDT on 1 November 2018**.
3. If you wish to challenge the orders of the Court concerning opt out and class member registration described below, you must write to Maurice Blackburn, Lawyers, with your reasons by **4.00 pm AEDT on 1 November 2018**.

What is a class action?

A class action is a legal proceeding brought by one or more persons (applicant) on his or her own behalf, and on behalf of a number of people (**Class Members**), where the applicant and the Class Members have similar claims against the respondent.

Class members are bound by any judgment or settlement in the class action, unless they have opted out of the proceeding. This means that:



1. If the class action is successful, Class Members may be eligible for a share of any settlement monies or Court-awarded damages;
2. If the class action is unsuccessful, Class Members are bound by that result; and
3. Regardless of the outcome of the class action, Class Members will not be able to pursue their claim against the respondent in separate legal proceedings unless they have opted out.

The applicant does not need to seek the consent of Class Members to commence a class action on behalf of those persons. However, Class Members can cease to be Class Members by opting out of the class action. Unless you opt out, you will be bound by the outcome of the class action. An explanation of how Class Members may opt out of this proceeding is set out below.

Sirtex Class Action

The Sirtex Class Action was commenced on 15 December 2017 against Sirtex by Pawel Kuterba. At the time of filing Mr Kuterba's claim, Sirtex was facing another class action in the Court brought on behalf of Mr Todd Hayward, funded by Australian Funding Partners Limited (**AFPL**). In the interests of the efficient prosecution of the claims against Sirtex, Mr Kuterba and Mr Hayward and their respective funders agreed to consolidate the proceedings into a single proceeding. On 30 April 2018, the Court made orders that:

- (a) Mr Kuterba and Mr Hayward be joint representative applicants in a consolidated claim against Sirtex and Mr Kuterba's pleaded claim be amended to include Mr Hayward's claim; and
- (b) Maurice Blackburn be the solicitors on the record for the joint applicants.

Mr Kuterba and Mr Hayward bring the proceeding on their own behalf, and on behalf of all persons who are Class Members as defined in the proceeding. The definition of Class Member is set out below.

Mr Kuterba and Mr Hayward are represented by Maurice Blackburn in the Sirtex Class Action, and the proceeding is being funded by IMF. Further details in relation to how the funding arrangement may affect Class Members are set out below.

Mr Kuterba and Mr Hayward's principal allegations relate to the information Sirtex provided to the Australian Securities Exchange (**ASX**) in 2016 in relation to its earnings and sales growth, followed by a further announcement confirming an external investigation into the share trading activities of then-CEO Gilman Wong.

In summary, Mr Kuterba and Mr Hayward allege 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.



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 the *Australian Consumer Law*.

Mr Kuterba and Mr Hayward claim that they and the Class Members suffered loss as a result of these alleged breaches.

Sirtex denies the allegations and is defending the Sirtex Class Action.

Are you a Class Member?

You are a Class Member in the Sirtex Class Action if you:

1. Purchased ordinary shares in Sirtex during the period from 24 August 2016 to 6.09 pm on 16 December 2016 (inclusive); and
2. Suffered loss or damage by or resulting from the conduct of Sirtex, as alleged in the Statement of Claim; and
3. Are not any of the following:
 - (a) A related party of Sirtex;
 - (b) A related body corporate of Sirtex;
 - (c) An associated entity of Sirtex; or
 - (d) An officer or a close associate of Sirtex.

If you are not a Class Member in the Sirtex Class Action, you may disregard this Notice. If you are a Class Member, you should read this Notice carefully as it will affect your rights. If you are unsure whether you are a Class Member, you should contact Maurice Blackburn at SClassAction4@mauriceblackburn.com.au or by telephone on 1800 991 534, or seek your own legal advice without delay.

You may inspect copies of the key documents filed in connection with the Sirtex Class Action:

1. During business hours at the Sydney office of Maurice Blackburn (Level 32, 201 Elizabeth Street Sydney, NSW 2000);
2. On the website of Maurice Blackburn (<https://www.mauriceblackburn.com.au/current-class-actions/sirtex-class-action/>);
3. On the Federal Court website (<http://www.fedcourt.gov.au/>); or
4. At a District Registry of the Federal Court in Melbourne, Sydney, Canberra, Brisbane, Perth, Adelaide, Hobart or Darwin.



Class Member Options

If you have already signed a retainer agreement with Maurice Blackburn and/or a funding agreement with IMF in relation to the Sirtex Class Action, you are deemed to have already registered - you therefore need not (and should not) do anything in response to this notice (unless you no longer wish to participate in the proceeding, in which case, see the section below headed '*Option 2- Opt out and cease to be a class member*'). IMF will contact you if any further information is required from you.

If you are a class member in the Sirtex Class Action and you have not retained Maurice Blackburn or entered a funding agreement with IMF, you can select and complete one of the following options by **1 November 2018**:

Option 1 - Register your interest in receiving compensation

If you wish to participate in any settlement which the parties are able to reach, the Opt Out and Class Member Registration Orders provide that you should register as a class member by completing the Registration Notice.

Registration will inform the parties of the details of your potential claim. This is particularly important if you held shares on behalf of beneficiaries as a custodian or nominee, or if a custodian or nominee held shares on your behalf.

Registration is also important because providing details of your potential claim will assist the applicants and the respondent to understand the potential total claim amount of all class members which should facilitate settlement being achieved.

You should register your interest by **1 November 2018**. There is no cost to register, and you may do so by completing and submitting the online registration form (**Registration Form**) via IMF's website, accessible at:

<https://www.imf.com.au/cases/register/sirtex-medical-limited>

Option 2 - Opt out and cease to be a class member

If you do not wish to remain a class member in the Sirtex Class Action, you can opt out of the proceeding by completing the Opt Out Notice in the form attached to this Notice. The Opt Out Notice is also available on the Maurice Blackburn website at:

<https://www.mauriceblackburn.com.au/current-class-actions/sirtex-class-action/>

If you opt out of the Sirtex Class Action, you will:

1. Not be affected by any orders made in the Sirtex Class Action;
2. Not be permitted to participate in the distribution of any damages award or settlement outcome; and
3. Be entitled to commence separate legal proceedings against Sirtex in relation to the matters the subject of the Sirtex Class Action on your own behalf if you so wish.



Completed Opt Out Notices must be submitted to the Victorian District Registry of the Federal Court of Australia (Level 7, Commonwealth Law Courts, 305 William Street, Melbourne) in hard copy on or before **4:00 pm AEDT on 1 November 2018**. Opt Out Notices received by the Court after this time will not be accepted and you will be treated as having not responded to this Notice (*see Option 4 below*).

Option 3 - Apply to the Federal Court to vary orders regarding opt out and registration

If you wish to challenge the orders made by the Federal Court in relation to either Option 1 or Option 2 above, you must send a written notice to Maurice Blackburn setting out the challenge you will make and the reasons for that challenge. You may then be required to attend the Federal Court in Melbourne at a later date to have your challenge heard and decided by the Court.

Any notice challenging the Federal Court's orders must be delivered to Maurice Blackburn before **4:00 pm AEDT on 1 November 2018**. Any such notice received after this time will not have any effect and you will be treated as having not responded to this Notice (see Option 4 below).

Option 4 - Not respond to this notice

If you do nothing (i.e. you do not act in accordance with Options 1, 2 or 3 above before **4:00 pm AEDT on 1 November 2018**) you will remain a class member in the Sirtex Class Action and be bound by any orders made in the Sirtex Class Action, including any judgment or approved settlement agreement in the proceeding. You will still be permitted to participate in any distribution from any settlement or judgment of the proceeding.

Funding of this Class Action

As noted above, the Sirtex Class Action is funded by IMF.

The Court has ordered that, if the Sirtex Class Action resolves by way of judgment in favour of Mr Kuterba and Mr Hayward or by way of a negotiated settlement arrangement, IMF will be reimbursed, from the damages or settlement monies received, for the legal costs it has paid on behalf of the applicants and class members. In addition, IMF will be entitled to a commission, representing a percentage of the total amount recovered in return for funding the action.

The amount of this commission will be determined by the Court at a later stage in the proceeding, likely at settlement approval (for a settlement sum) or at trial (for a damages award). The Court has ordered that the percentage will be no more than 28%. The Court will set it at a level that it considers to be reasonable and the amount sought may vary depending on the circumstances surrounding any settlement or award of damages.

A copy of the Court's orders is available at:

<https://www.comcourts.gov.au/file/Federal/P/VID1375/2017/3809204/event/29273743/document/1162204>. The Funding Terms also refer to a confidential underlying Cooperation and Participation Deed (**Deed**) between IMF, Mr Hayward, and AFPL. The terms of the Deed are subject to a confidentiality order and cannot be disclosed to any person (other than Mr



Kuterba and the signatories to the Deed) other than on provision of a confidentiality undertaking. If you have any questions concerning these matters, please contact IMF.

Any commission to be paid to IMF will be deducted from any amount that may be payable to you out of the proceeds of any settlement or judgment. You will not, under any circumstances, be required to make a separate payment to IMF, or to Maurice Blackburn - in other words, you will not be 'out of pocket' simply by remaining as a class member for the determination of common questions at trial or by registering your interest in receiving compensation.

Sirtex scheme of arrangement has no effect upon your legal rights through the class action

You may be aware that Sirtex was acquired by CDH Genetech Ltd and others via a scheme of arrangement in September 2018, and is no longer a listed public company. The scheme of arrangement has no effect upon your legal rights as a former Sirtex shareholder. You are still a member of the class action, which is going ahead. If you do not wish to opt out you should register as a class member by completing the Registration Notice.

Will you be liable for legal costs?

You will not become liable for legal costs simply by remaining as a class member for the determination of common questions at trial or by registering your interest in receiving compensation. As noted above, the legal costs are paid by IMF and will only be reimbursed to IMF in the event of a successful outcome. Further, if the Sirtex Class Action is unsuccessful, IMF will pay any costs that Mr Kuterba and Mr Hayward is ordered to pay to Sirtex.

Questions

If you are unclear about whether you are a class member, or if you have any other questions regarding the Sirtex Class Action, you should contact Maurice Blackburn at SClassAction4@mauriceblackburn.com.au by telephone on 1800 991 534, or by writing to Maurice Blackburn at Level 32, 201 Elizabeth Street, Sydney, NSW 2000. Alternatively, you can seek legal advice from other solicitors.



Annexure A

Form 21
Rule 9.34

OPT OUT NOTICE

No: (P)VID1375/2017

Federal Court of Australia

District Registry: Victoria

Division: General

Pawel Kuterba and another named in the schedule

Applicants

Sirtex Medical Limited (ACN 78 166 122)

Respondent

To: The Registrar
 Federal Court of Australia Victoria District Registry
 Owen Dixon Commonwealth Law Courts Building 305 William Street
 Melbourne VIC 3000

..... (print name), a Class Member
in this representative proceeding, gives notice under section 33J of the *Federal Court of
Australia Act 1976* (Cth), that [he, she or it] (circle as applicable) is opting out of the
representative proceeding.

Date:

Signed by (print name)

Class Member/Lawyer for the Class Member

[(please complete the next page)]



Class Member details

Telephone:

Email:

Address:

.....

ACN/ABN (if a company or trustee):

HIN/SRN:

If the shares were acquired on behalf of another person/entity, name of that person/entity:

.....

If you are signing as the solicitor or representative of the Class Member:

Name:

Capacity in which you are signing:

Telephone:

Email:

Address:

.....