

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**THE HONOURABLE  
JUSTICE PERELL**

) **TUESDAY, THE 12<sup>th</sup> DAY**  
) **OF DECEMBER, 2023**  
)

**BETWEEN:**

JOSEPH FANTL

Plaintiff

-and-

ivari

Defendant



*Proceeding under the Class Proceedings Act 1992*

**JUDGMENT**

**THIS MOTION**, made by the Plaintiff, on his own behalf and on behalf of the Class, for an Order approving the settlement agreement entered into between the Plaintiff and the Defendant dated September 11, 2023 (the “Settlement Agreement”) as being fair and reasonable and in the best interests of the Class, was heard on December 11, 2023 by videoconference in Toronto, Ontario.

**ON READING** the Certification Order herein dated April 18, 2013 as varied by the Order of the Divisional Court dated March 9, 2015 (which together sets out the common issues and describe the class and the nature of the claims asserted on behalf of the class) attached to this Judgment as Schedule “A” and Schedule “B” respectively, the Notice of Motion and evidence filed by the parties, including the Settlement Agreement attached to this Judgment as Schedule “C”, and on hearing submissions of counsel for the Plaintiff and the Defendant, and any objectors or reading submissions of any objectors, fair and adequate notice of this hearing having been provided to Class Members in English and French and in accordance with the Order of this Court dated September 11, 2023,

1. **THIS COURT ORDERS & DECLARES** that the settlement of this Class Action on the terms set forth in the Settlement Agreement, is fair, reasonable and in the best interests of the Class and is hereby approved pursuant to s. 29 of the *Class Proceedings Act, 1992* S.O. 1992, c.C.6, (as it then was) and shall be implemented and enforced in accordance with its terms.
2. **THIS COURT ORDERS** that the use of capitalized terms in this Judgment shall have the same meaning as found in the Settlement Agreement except to the extent that the definition of a term in the Settlement Agreement and this Judgment conflict, in which case the definition of the term as set out in this Judgment shall govern.
3. **THIS COURT ORDERS, ADJUGES AND DECLARES** that the Settlement Agreement is expressly incorporated by reference into this Judgment, and this Judgment and the Settlement Agreement are binding upon all Class Members, whether or not such Class Members receive or claim compensation, including persons who are minors or are mentally incapable, and the need for service or notice of this or any further steps in these proceedings on the Public Guardian and Trustee, as well as all other requirements in the *Public Guardian and Trustee Act, R.S.O. 1990, c. P.51*, and any other service or notice required by the *Rules of Civil Procedure, R.S.O. 1990, Reg 194* is hereby dispensed with .
4. **THIS COURT ORDERS, ADJUGES AND DECLARES** that the requirements of Rules 7.04(1) and 7.08(4) are hereby dispensed with.
5. **THIS COURT ORDERS** that Epiq Class Action Services Canada Inc. (the “Settlement Administrator”) shall administer and oversee implementation of the Settlement Agreement, including the Distribution Protocol, in accordance with its terms.

6. **THIS COURT ORDERS** that the costs of the administration of this Settlement, including, but not limited to the reasonable fees and disbursements of the Settlement Administrator and the costs of the notice program described below, shall be paid from the Settlement Fund without further approval of the Court.
7. **THIS COURT ORDERS** that the Notice of Approved Settlement (the "Notice") attached hereto as Schedule "D" is approved and shall be published or distributed as specified in paragraphs 8a and 8b of this Order, subject to the right of the Parties to make minor, non-material amendments to the form of the Notice by mutual agreement, as may be necessary or desirable.
8. **THIS COURT ORDERS** that within sixty (60) days of the date of this Judgment, the Plaintiff, through Class Counsel and the Settlement Administrator, shall cause the Notice to be distributed to the Class in English and French by:
  - a. causing the Notice to be sent to the last known email addresses of the Class Members and, where no email address is available, cause the Notice to be sent by regular mail to the Class Members' last known mailing addresses; and,
  - b. causing the Notice to be posted on the website(s) controlled by Class Counsel ([www.canamfundclassaction.ca](http://www.canamfundclassaction.ca)).
9. **THIS COURT ORDERS** that for the purposes of the administration and enforcement of the Settlement Agreement and this Judgment that this Court will retain ongoing jurisdiction and supervisory role.
10. **THIS COURT ORDERS** that pursuant to section 10(3) of O. Reg. 771/92 the Administrator shall deduct 10% from any compensation payable to individual Class Members under the

Settlement and hold that money in trust pending the final determination of the quantum of the Class Proceeding Fund's levy.

11. **THIS COURT ORDERS** that, no amounts shall be distributed to any Class Members until the Class Proceedings Committee has had an opportunity to review and confirm the calculation of the levy in paragraph 10. If there is any dispute or question as to the calculation of the levy to the Fund, Class Counsel and counsel for the Fund shall arrange an appearance before the Class Action Case Management Judge to resolve the issues and that, pending any appearance, no amounts shall be distributed to any Class Members.
12. **THIS COURT FURTHER ORDERS, DECLARES AND ADJUGES** that as of the date of this Judgment, each Class Member shall be deemed to have consented to the dismissal of any other action or proceeding they may have commenced asserting Released Claims as against the Releasees, including ivari, without costs and with prejudice.
13. **THIS COURT ORDERS** that the persons who have opted-out from the Class Action are not entitled to any relief or given any rights under the Settlement Agreement.
14. **THIS COURT ORDERS** that the Action is hereby dismissed against the Defendant without costs and with prejudice.
15. **THIS COURT ORDERS** that there be no costs of this motion.

Perrell, J.

Schedule A to the Judgment – Certification Order dated April 18, 2013

File No.:06-CV-306061CP

ONTARIO

SUPERIOR COURT OF JUSTICE

THE HONOURABLE  
MR. JUSTICE PERELL

) THURSDAY, THE 18<sup>TH</sup>  
)  
) DAY OF APRIL, 2013

BETWEEN:

JOSEPH FANTL

Plaintiff/Moving Party

- and -

TRANSAMERICA LIFE CANADA

Defendant /Respondent

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

ORDER

THIS MOTION by the Plaintiff/Moving Party Joseph Fantl ("Plaintiff") for an Order certifying this action as a class proceeding was heard on April 9 and 10, 2013 at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

**ON READING** all material filed, and on hearing the submissions of all counsel:

1. **THIS COURT ORDERS** that the claims and causes of action for breach of implied terms of contract and breach of collateral warranty or collateral contract all as set out in the Second Fresh as Amended Statement of Claim ("Claim") are hereby struck and dismissed.
2. **THIS COURT ORDERS** that this action is certified as a class proceeding with respect to the claim for breach of express terms of contract and related relief requested as set out in the Claim on behalf of the following class of persons (the "Class"):

All persons in Canada who were invested in the Can-Am Fund after December 30, 1997 under IMS III contracts of insurance with revision dates 11/94, 02/95, 09/95 and 11/96 and IMS RRIF contracts of insurance with revision date 10/95 offered by NN Life Insurance Company of Canada or Transamerica Life Canada, excluding any claims by beneficiaries statute-barred by absolute limitation periods as follows:

Any beneficiaries to whom a death benefit was paid prior to December 29, 2002 under a contract of insurance issued in the Provinces of Ontario, Alberta, British Columbia, Manitoba, Saskatchewan, New Brunswick, Nova Scotia, or Prince Edward Island.

**Representative Plaintiff & Class Counsel**

3. **THIS COURT ORDERS** that Joseph Fantl is appointed as the Representative Plaintiff on behalf of the Class and that Roy Elliott O'Connor LLP ("REO") is hereby appointed as counsel for the Class.

**Common Issues**

4. **THIS COURT ORDERS** that the common issues shall be:

Common Issue 1: Was it a term of contracts IMS III revision dates 11/94, 02/95, 09/95 and 11/96 and IMS RRIF revision date 10/95 between Transamerica and Class Members that Transamerica would use Best-Efforts to make the Can-Am Fund replicate the performance of the S&P Total Return Index?

Common Issue 2: If the answer to Common Issue 1 is "yes", did Transamerica breach the "Best-Efforts" term?

**Notice of Certification and Opt Outs**

5. **THIS COURT ORDERS** that the form of notice of this certification order, the manner and timing of giving notice or opting out of this class action, and all other related matters shall be determined by further Order of this Court.

**Costs**

6. **THIS COURT ORDERS** that the costs of this motion shall be determined by further Order of this Court.

ENTERED AT / INSCRIT À TORONTO  
ON / BOOK NO:  
LE / DANS LE REGISTRE NO.:

APR 30 2013

AB DOCUMENT NO.:  
À TITRE DE DOCUMENT NO.:  
PER / PAR:

*Perrell, J*

**JOSEPH FANTIL**

- and -

**TRANSAMERICA LIFE CANADA**

Plaintiff

Defendant

Court File No. 06-CV-306061-CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**ORDER**

**ROY ELLIOTT O'CONNOR LLP**  
200 Front Street West, 23<sup>rd</sup> Floor  
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Toronto, ON M5V 3K2

**David F. O'Connor (LSUC No. 33411E)  
J. Adam Dewar (LSUC No. 46591J)**

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Solicitors for the Plaintiff



Schedule B to the Judgment – Order of the Divisional Court dated March 9, 2015

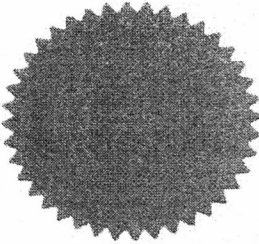
Divisional Court File No. 395/13

ONTARIO  
SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT

THE HONOURABLE JUSTICE SACHS )  
THE HONOURABLE JUSTICE CORBETT )  
THE HONOURABLE JUSTICE GILMORE )  
)  
)

MONDAY, THE 9<sup>TH</sup>  
DAY OF MARCH, 2015

BETWEEN:



JOSEPH FANTL

Appellant/Plaintiff

- and -

TRANSAMERICA LIFE CANADA

Respondent/Defendant

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

**ORDER**

THIS APPEAL, made by the Appellant from the Order of the Honourable Mr. Justice Perell of the Superior Court of Justice, dated April 18, 2013 (the "Certification Order") was heard on February 2, 2015 at the court house, Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

ON READING all material filed, and on hearing the submissions of all counsel:

1. THIS COURT ORDERS that the Appellant's appeal is allowed.

2. THIS COURT ORDERS that paragraph 2 of the Certification Order be varied to read as follows:

**2. THIS COURT ORDERS** that this action is certified as a class proceeding with respect to:

(a) the claim for breach of express terms of contract and related relief requested as set out in the Claim on behalf of the following:

All persons in Canada or elsewhere who were invested in the Can-Am Fund after December 30, 1997 under IMS III contracts of insurance with revision dates 11/94, 02/95, 09/95 and 11/96 and IMS RRIF contracts of insurance with revision date 10/95 offered by NN Life Insurance Company of Canada or Transamerica Life Canada, excluding any claims by beneficiaries statute-barred by absolute limitation periods as follows:

Any beneficiaries to whom a death benefit was paid prior to December 29, 2002 under a contract of insurance issued in the Provinces of Ontario, Alberta, British Columbia, Manitoba, Saskatchewan, New Brunswick, Nova Scotia, or Prince Edward Island.

(b) the claim for negligent misrepresentation and related relief as set out in the Claim on behalf of the following:

All persons in Canada or elsewhere who were invested in the Can-Am Fund after December 30, 1997 under contracts of insurance offered by NN Life Insurance Company of Canada or Transamerica Life Canada where the corresponding summary information folder or information folder contained a best efforts replication statement (whether in English or in French).

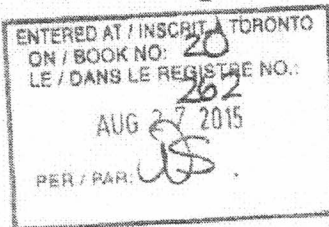
3. **THIS COURT ORDERS** that paragraph 4 of the Certification Order be varied to add the following certified common issues:

Common Issue 3: Did Transamerica owe Class Members a duty of care in making statements in the Summary Information Folders?

Common Issue 4: Did Transamerica represent to Class Members that (a) it had an objectively reasonable, reliable, considered and sufficient basis for stating that the Can-Am Fund would replicate the S&P 500 on a best efforts basis and an honest and reasonable intent to use best efforts to achieve replication of the S&P 500; and/or (b) replication of the S&P 500 on a best efforts basis was a material term of Class Members' contracts?

Common Issue 5: Were those representations untrue, inaccurate or misleading and, if so, were they negligently made by Transamerica?

3. AND THIS COURT ORDERS that if the parties are unable to agree on the issue of costs, the Plaintiff may make written submissions on costs within ten days of this order and the Defendant shall have ten days thereafter to respond.



JOSEPH FANTL -and- TRANSAMERICA LIFE CANADA  
Plaintiff (Appellant) Defendant (Respondent)

Divisional Court File No. 395/13

ONTARIO

**SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT**

Proceeding commenced at Toronto

**ORDER**

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Lawyers for the defendant/respondent,  
Transamerica Life Canada

Schedule C to the Judgment – Signed Settlement Agreement

Court File No. 06-CV-306061-CP

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN:

JOSEPH FANTL

Plaintiff

-and-

ivari

Defendant

Proceeding under the *Class Proceedings Act 1992*

SETTLEMENT AGREEMENT

RECITALS

- A. **WHEREAS** the Plaintiff Joseph Fantl (“**Plaintiff**”) is the representative plaintiff in this certified class action proceeding bearing Court File Number 06-CV-306061-CP, which was commenced against the Defendant ivari (“**Defendant**”) in the Ontario Superior Court of Justice at Toronto pursuant to the *Class Proceedings Act, 1992* (Ontario) (“**Action**”) in relation to the Defendant’s management of the Can-Am Fund (as defined below);
- B. **AND WHEREAS** the Parties (as defined below) previously settled the management fee overcharge allegations which formed part of the Action and which were the subject matter of the settlement approval order of Justice Perell dated March 5, 2009;
- C. **AND WHEREAS** by orders of the Superior Court of Justice and the Court of Appeal for Ontario the remaining part of the Action advancing claims in respect of the Best Efforts Replication Claim for breach of contract on behalf of “Category A Class Members” or “Contract Class Members”, as defined below, and for negligent misrepresentation on behalf of “Category B Class Members” or “Misrepresentation Class Members”, as defined below was certified as a class proceeding;
- D. **AND WHEREAS** the Class (as defined below) was years ago notified of the certification

of this action as a class proceeding and the opt-out period is now closed;

E. **AND WHEREAS** the discovery process has been largely completed;

F. **AND WHEREAS** the Parties attended a mediation before the Honourable Dennis O'Connor, which took place from May 2 through 3, 2023;

G. **AND WHEREAS** the Parties wish to conclusively resolve all remaining issues which were or could have been advanced against the Defendant in the Action (the "**Settlement**") on the terms set out in this Settlement Agreement (defined below);

H. **AND WHEREAS** the Parties understand and acknowledge that this Settlement Agreement, including the Schedules hereto, must be approved by the Ontario Superior Court of Justice and incorporated into a final Settlement Approval Order (as defined below);

**NOW THEREFORE** in consideration of the covenants, agreements and releases set forth herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, it is agreed that, subject to the Court's approval, the Best Efforts Replication Claim in the above-captioned proceeding shall be finally and fully compromised, settled, released and dismissed, upon and subject to the terms and conditions of this Settlement Agreement, as follows:

## **DEFINITIONS**

1. In this Settlement Agreement, in addition to terms that are defined elsewhere herein, the following terms have the meanings specified below. The plural of any defined term includes the singular, and the singular of any defined term includes the plural, as the case may be.
  - (a) "**Administration Expenses**" means all fees, disbursements, expenses, costs, taxes and any other amounts incurred or payable relating to the implementation and administration of this Settlement Agreement, including the costs of publishing and mailing notices, and the fees, disbursements and taxes payable by the Settlement Administrator and any other expenses approved by the Court;
  - (b) "**Affected Contract**" means all contracts of insurance that are referenced in the Class Definitions for Contract Class Members and Misrepresentation Class Members;

- (c) **“Affiliate”** means any current or former affiliate of the Defendant as defined in the *Insurance Companies Act*, S.C., 1991, c.47 as amended;
- (d) **“Approval Hearing”** means the hearing of the motion initiated by the Plaintiff for the Settlement Approval Order;
- (e) **“Best Efforts Replication Claim”** means the claim by the Plaintiff in this Action for damages related to the alleged failure of the Can-Am Fund to track the performance of the S&P 500 Total Return Index, including alleged promises or misrepresentations in respect thereto, as more particularly set out in the Third Fresh as Amended Statement of Claim, including, without limiting the generality of the foregoing, all claims related to the Common Issues certified by Order of Justice Perell dated April 18, 2013 as varied by Order of the Divisional Court dated March 9, 2015;
- (f) **“CAF”** means the Can-Am Fund;
- (g) **“Claim”** means the Third Fresh as Amended Statement of Claim issued on November 27, 2017;
- (h) **“Class Action Case Management Judge”** means the judge assigned by the Court to case manage or oversee the Action;
- (i) **“Class Counsel”** means Roy O’Connor LLP, inclusive of its predecessor firms Roy Elliott Kim O’Connor LLP and Roy Elliott O’Connor LLP;
- (j) **“Class Counsel Fees”** means the fees, disbursements, and applicable taxes of Class Counsel as may be approved or fixed by the Court as reflected in the Class Counsel Fee Approval Order;
- (k) **“Class Counsel Fee Approval Order”** means an order or orders of the Ontario Superior Court of Justice approving or fixing Class Counsel Fees.
- (l) **“Class”** and **“Class Members”** and **“Class Definition”** means all persons that satisfy the following court-approved class definition and who did not validly opt-out of this class proceeding:
  - A. in respect of the claim for breach of express terms of contract and related relief requested as set out in the Claim,

All persons in Canada or elsewhere who were invested in the Can-Am Fund after December 30, 1997 under IMS III contracts of insurance with revision dates 11/94, 02/95, 09/95 and 11/96 and IMS RRIF contracts of insurance with revision date 10/95 offered by NN Life Insurance Company of Canada or Transamerica Life Canada, excluding any claims by beneficiaries statute-barred by absolute limitation periods as follows:

Any beneficiaries to whom a death benefit was paid prior to December 29, 2002 under a contract of insurance issued in the Provinces of Ontario, Alberta, British Columbia, Manitoba, Saskatchewan, New Brunswick, Nova Scotia, or Prince Edward Island.

(hereinafter defined as “**Category A Class Members**” or “**Contract Class Members**”)

- B. in respect of the claim for negligent misrepresentation and related relief as set out in the Claim,

All persons in Canada or elsewhere who were invested in the Can-Am Fund after December 30, 1997 under contracts of insurance offered by NN Life Insurance Company of Canada or Transamerica Life Canada where the corresponding summary information folder or information folder contained a best efforts replication statement (whether in English or in French).

(hereinafter defined as “**Category B Class Members**” or “**Misrepresentation Class Members**”)

- (m) “**Common Issues**” means the certified common issues appended hereto as Schedule “**D**”;
- (n) “**Company**” means ivari, Transamerica Life Canada or such of its predecessor and successor corporations which sold the Affected Contracts;
- (o) “**Contract**” means a contract of life insurance between the Company and a Policyholder or Policyholders as that term is defined under the Provincial Laws of the jurisdiction in which the Policyholder was resident at the time that the contract of insurance was entered into;
- (p) “**Court**” means the Ontario Superior Court of Justice;



- (q) “*CPA*” means the *Class Proceedings Act, 1992* (Ontario), S.O. 1992, c.6, as amended;
- (r) “*CPF*” means the Class Proceedings Fund created pursuant to Section 59.1 of the *Law Society Act*, R.S.O. 1990, c. L8 and administered by the Class Proceedings Committee of the Law Foundation of Ontario;
- (s) “*CPF Levy*” means a levy from the Settlement Fund equal to the amount of financial support paid to the Plaintiff by the CPF plus 10% of the balance of the Settlement Fund (net of Class Counsel Fees, and Administration Expenses) to which the CPF is entitled pursuant to Ontario Regulation 771/92, having approved the Plaintiff for financial support in 2016;
- (t) “*Defence Counsel*” means Blake, Cassels & Graydon LLP;
- (u) “*Distribution Protocol*” means the proposed plan for distributing the Net Settlement Fund attached to this Settlement Agreement as Schedule “A” or amendments thereto (or such other protocol) as may be requested or required by the Court and accepted by Plaintiff or Class Counsel acting reasonably;
- (v) “*Effective Date*” means either: (i) the date on which the ability to appeal, if any appeals lie, from both the Settlement Approval Order and the Class Counsel Fee Approval Order has expired without any appeals being taken, namely, thirty (30) days after the later of the date of the Settlement Approval Order and the date of the Class Counsel Fee Approval Order; or (ii) if any appeals have been taken from the Settlement Approval Order or the Class Counsel Fee Approval Order, the date on which all such appeals from the Settlement Approval Order are dismissed and all such appeals from the Class Counsel Fee Approval Order are concluded by way of a final order or judgment;
- (w) “*Execution Date*” means the date on which this Settlement Agreement is signed by the Parties or by their respective designated representatives;

- (x) ***“Net Settlement Fund”*** means the amount of the Settlement Fund available for distribution to the Class Members following the deduction (as approved by the Court) of Class Counsel Fees, Administration Expenses, and CPF Levy;
- (y) ***“Notice of Approved Settlement”*** means the notice, in a form to be agreed upon by the Parties acting reasonably and to be approved by the Court, to be provided to the Class in the event that this Settlement is approved at the Approval Hearing.
- (z) ***“Notice of Proposed Settlement”*** means the notice of the Approval Hearing to be approved by the Court and provided to the Class that summarizes this Settlement Agreement and the process by which the Parties will seek its approval, in a form to be agreed upon by the Parties acting reasonably, a proposed draft of which is attached as Schedule **“B”** hereto;
- (aa) ***“Parties”*** means the Plaintiff Joseph Fantl and ivari;
- (bb) ***“Policyholder”*** means the owner of an Affected Contract or, where applicable, their beneficiary or estate;
- (cc) ***“Provincial Laws”*** means the statutes and regulations of the provinces or territories where the Affected Contracts were sold which would otherwise apply to the Affected Contracts;
- (dd) ***“Released Claims”*** means any and all manner of claims (including, without limitation all claims for breach of contract, indemnity, negligence, breach of duty of care or any other duty (including fiduciary duty or good faith and fair dealing), fraud, misrepresentation, unjust enrichment, disgorgement, conspiracy, misconduct or any violation of any federal, provincial or other statutes, rules, regulations or common law), demands, actions, suits, causes of action, whether class, individual or otherwise in nature whether personal or subrogated, damages whenever incurred and liabilities of any nature and kind whatsoever, including interest, costs, expenses, Administration Expenses, penalties, taxes, Class Counsel Fees and lawyer’s fees, known or

unknown, in law, under statute or in equity, that had been, have been, could have been, or in the future may be asserted that arise from or in any way relate to the Best Efforts Replication Claim or the administration of this Settlement Agreement;

- (ee) **“Released Persons”** means the Company, its present and past parents, present and past subsidiaries and Affiliates and their respective past and present directors, officers, employees, trustees, servants, representatives, agents, experts, successors, and assigns, and the heirs, executors, administrators, successors, and assigns of each of the foregoing;
- (ff) **“Releasers”** means the Plaintiff Joseph Fantl and every Class Member and their respective heirs, executors, administrators, successors and assigns;
- (gg) **“Settlement”** means the agreement between the Parties referenced in the Recitals above;
- (hh) **“Settlement Administrator”** means Epiq Class Action Services Canada Inc. The duties of the Settlement Administrator are set out at paragraph 6 of the proposed Distribution Protocol;
- (ii) **“Settlement Agreement”** means this Agreement together with its Schedules;
- (jj) **“Settlement Approval Order”** means an order or orders of the Ontario Superior Court of Justice in the form attached hereto as Schedule “C” (or in a form as may be amended upon the written consent of the Parties prior to the issuance of the order): approving this Settlement as fair, reasonable and in the best interests of the Class Members for the purposes of settlement pursuant to the CPA;
- (kk) **“Settlement Fund”** means the seven million dollars (\$7,000,000.00) (CDN) amount to be paid by the Defendant.

## **PARTIES’ EFFORTS**

2. The Parties shall endeavour in good faith to implement the terms and conditions of this Settlement Agreement.

## SETTLEMENT FUND

3. In consideration of the terms and covenants herein, within thirty (30) days of the Effective Date, the Defendant shall pay to Class Counsel the Settlement Fund to be held in trust.
4. The Settlement Fund shall be managed and paid out by Class Counsel and the Settlement Administrator in accordance with the terms of this Settlement Agreement. Class Counsel and the Settlement Administrator shall not pay out all or any part of the monies in the Settlement Fund, except in accordance with the Settlement Agreement or an Order of the Court obtained on notice to the Parties.
5. Within thirty (30) days of receiving the Settlement Fund from the Defendant, Class Counsel shall transfer the Settlement Fund to the trust account of the Settlement Administrator.
6. The Settlement Fund (or any portion thereof) may be held in an interest-bearing trust account subject to the Settlement Administrator and Class Counsel evaluating whether it is economical to do so (including, without limitation, in light of any expenses associated with maintaining, administering, and reporting with respect to any such interest-bearing account relative to the interest to be generated therefrom). Class Counsel and the Settlement Administrator shall have no liability with respect to the use (or not) of an interest-bearing account for the Settlement Fund or any portion thereof. Class Counsel and the Settlement Administrator shall maintain the Settlement Fund as provided for in this Settlement Agreement.
7. The Defendant shall have no reversionary interest in and otherwise no right or claim to reimbursement or reversion from the Settlement Fund or any portion thereof. The Defendant shall bear no responsibility or liability related to the management or investment of the Settlement Fund or the administration of the Settlement Agreement. The Defendant shall not be required to deposit additional funds as a result of investment or other losses to the Settlement Fund or for any other reason.
8. The Defendant shall not be required to make any payments pursuant to this Settlement Agreement other than the payment of the Settlement Fund as described in paragraph 1(kk) above and, without limitation, shall not be required to make any other payment in respect of taxes, interest, costs, Administration Expenses, Class Counsel Fees, or the CPF Levy.

## **THE SETTLEMENT APPROVAL MOTION**

9. Within sixty (60) days of the Execution Date, the Plaintiff shall serve and file materials for a motion for approval of this settlement and issuance of the Settlement Approval Order. The Settlement Approval Order shall be substantially in the form set out in Schedule "C" to this Settlement Agreement.
10. Within thirty (30) days of the Execution Date, the Plaintiff shall provide draft motion materials for the motion to approve this settlement and issue the Settlement Approval Order to counsel for the Defendant to allow counsel to the Defendant to review and comment on such materials.

## **IDENTIFICATION OF CLASS MEMBERS**

11. The Settlement Administrator has access to the list of the last known addresses and contact information (i.e., mailing address telephone number, fax number, email address) for Class Members that was compiled for the purposes of providing Class Members with notice of this Action being certified as a class proceeding.
12. Prior to the distribution of the Notice of Proposed Settlement (as described below), the Settlement Administrator shall take reasonable and proportionate steps (e.g., by using the Canada Post change of address database) to verify and/or update the Class Members' contact information, as described in paragraph 11 above.

## **NOTICE OF THE PROPOSED SETTLEMENT AND FEE APPROVAL HEARING**

13. Within thirty (30) days of the Execution Date, the Plaintiff shall bring a motion to approve the content and distribution of the Notice of Proposed Settlement. Subject to the direction of the Class Action Case Management Judge, this motion may proceed in person, in writing, or by way of virtual case conference.
14. Subject to the approval of the Court, the Settlement Administrator and/or Class Counsel shall provide the Notice of Proposed Settlement to the Class Members by email to the last known email addresses of Class Members and, where no email address is available, regular mail, and by posting the Notice of Proposed Settlement on the website(s) controlled by Class Counsel.
15. Any Notice of Proposed Settlements returned by regular mail to the Settlement Administrator will be subject to a reasonable "bad address resolution process" to be recommended

by the Settlement Administrator, agreed upon by Class Counsel (acting reasonably and cost effectively). The Notice of Proposed Settlement will be re-sent to any new addresses identified through the bad address resolution process if and to the extent possible in the circumstances.

16. If following the publication and distribution of the Notice of Proposed Settlement the Defendant receives inquiries from Class Members about this Action or this Settlement, it shall re-direct such inquiries to the Settlement Administrator or Class Counsel.

#### **NOTICE OF APPROVED SETTLEMENT**

17. If the Settlement is approved, the Class Members shall be notified of the approval by way of the Notice of Approved Settlement in a form to be agreed upon by the Parties and approved by the Court.
18. The cost of the notices referred to in paragraphs 13 and 17 above and related correspondence and communications shall be paid or reimbursed from the Settlement Fund.

#### **DISTRIBUTION OF THE SETTLEMENT FUND**

19. On or after the Effective Date, Class Counsel or the Settlement Administrator shall distribute the Settlement Fund in accordance with the following priorities:
  - (a) to pay, as per paragraphs 26-29 below, Class Counsel Fees as may be awarded by the Court;
  - (b) to pay all of the costs and expenses reasonably incurred in connection with the provision of the Notice of Proposed Settlement and Notice of Approved Settlement;
  - (c) to pay all of the Administration Expenses, and for greater certainty and clarity, the Defendant and the Class or Class Counsel are specifically excluded from being required to pay any such Administration Expenses or costs and expenses associated with the Notice of Proposed Settlement and Notice of Approved Settlement, with all such costs and expenses being paid from the Settlement Fund;
  - (d) to pay any taxes required by law to any governmental authority;

- (e) to pay the CPF Levy as prescribed by Section 10 of the Class Proceedings regulation under the *Law Society Act*, R.S.O. 1990, c. L.8; and
- (f) to pay a share(s) of the Net Settlement Fund to each eligible Class Member in accordance with the Distribution Protocol as approved by the Court.

20. The approval or denial by the Court of the Distribution Protocol proposed by Class Counsel in Schedule "A" is not necessary for the approval of the Settlement set out herein. The Settlement set out herein and its fairness and reasonableness can be considered by the Court separately and may be approved by the Court even if the proposed Distribution Protocol set out Schedule "A" is not approved. If the proposed Distribution Protocol is not approved but the Settlement is otherwise approved by the Court, the Settlement will be binding on the Parties and all Class Members, and a revised or replacement distribution protocol as requested or required by the Court and as agreed to by the Parties acting reasonably will be considered by the Court separately from its consideration of the fairness, reasonableness, and adequacy of the Settlement provided for herein.

#### **RELEASE**

21. Upon the Effective Date, the Releasers shall have, and by operation of the Settlement Approval Order shall be deemed to have, fully, finally, and forever released, relinquished, and discharged the Released Persons from the Released Claims. By entering into this Settlement Agreement, the Plaintiff represents and warrants, and Class Members shall be deemed to have represented and warranted, that they have not assigned, hypothecated, transferred, or otherwise granted any interest in the Released Claims to any other person.
22. Upon the Effective Date, the Releasers shall, and by operation of the Settlement Approval Order shall be deemed to agree to not make any claim or take any proceedings in connection with any of the claims released by virtue of the preceding paragraphs against any other person, firm, corporation, partnership or other legal entity who may claim contribution or indemnity or other relief over, from any of the Released Persons, whether pursuant to the *Negligence Act*, R.S.O 1990, c. N.1 or other legislation or at common law or equity.

23. Upon the Effective Date, the Releasors shall be permanently barred and enjoined from commencing or prosecuting in any jurisdiction or forum any action against the Released Persons related to, or based on, the Released Claims. This Settlement Agreement shall operate conclusively as an estoppel in the event of any claim, action, complaint or proceeding brought by any of the Releasors against the Released Persons in respect of the Released Claims. The Released Persons may file this Settlement Agreement and the Settlement Approval Order in any action or proceeding that may be brought against them in order to support any defence or counterclaim, including without limitation those based on principles of res judicata, collateral estoppel, release, good faith settlement, judgment bar or reduction, or any other theory of claim preclusion or issue preclusion or similar defence or counterclaim. This Settlement Agreement may be pleaded in the event any claim, action, complaint or proceeding is brought, and it may be relied upon for the purpose of an application to dismiss the claim, action, complaint or proceeding on a summary basis, and this Settlement Agreement and the Settlement Approval Order shall be a full defence to any such action. No Releasor may seek to avoid the application of this Settlement Agreement based on a lack of privity or mutuality.
24. In the event that any person asserts against one or more of the Released Persons in any forum any Released Claims, the Releasors hereby expressly waive and disclaim in favour of the Released Persons any right, claim or entitlement to receive any compensation or funds derived from, or otherwise participate in, any recovery or award against the Released Persons in respect of the Released Claims in any such action or proceeding.

#### **COURT APPROVAL OF THE SETTLEMENT AGREEMENT**

25. The Parties shall use their best effort to effectuate the terms of this Settlement Agreement and to seek approval of this Settlement from the Court.

#### **COURT APPROVAL OF CLASS COUNSEL FEES & DISBURSEMENTS**

26. Class Counsel will seek the Court's approval to pay Administration Expenses and Class Counsel Fees, contemporaneous with seeking approval of this Settlement Agreement. The foregoing shall be reimbursed and paid solely out of the Settlement Fund after the Effective Date. Except as provided herein, Administration Expenses may only be paid out of the Settlement Fund after the Effective Date. No other Class Counsel Fees (or any other counsel fees and disbursements) shall be paid from the Settlement Fund prior to the Effective Date.



27. Class Counsel shall request that its fees be approved by the Court and fixed as 30% of the Settlement Fund (following the deduction of Class Counsel's approved disbursements and taxes thereon), plus the costs awards (\$125,000 and \$119,680.41) previously paid to the Plaintiff in this proceeding.
28. The approval, or denial, by the Court of any requests for Class Counsel Fees to be paid out of the Settlement Fund are not part of the Settlement provided for herein, except as expressly provided in paragraph 19 and are to be considered by the Court separately from its consideration of the fairness, reasonableness, and adequacy of the Settlement provided for herein.
29. For greater certainty, the failure of the Court to include in the Class Counsel Fee Approval Order any specific amount requested by Class Counsel for Class Counsel Fees has no impact or effect on the rights and obligations of the Parties to the Settlement Agreement, shall not affect or delay the issuance of the Settlement Approval Order, and shall not be grounds for termination of the Settlement Agreement.

#### **FAILURE TO OBTAIN APPROVALS**

30. In the event this Settlement Agreement is not approved by the Court, or an appeal precludes the consummation of the Settlement provided for herein in accordance with the terms and conditions of this Settlement Agreement, or this Settlement Agreement is terminated or fails to become effective, the Parties shall be restored to their respective positions in the Action as though this Settlement Agreement had never been made. In such event, the terms and provisions of this Settlement Agreement shall have no further force and effect and shall not be used in the Action or in any other proceeding for any purpose, and any judgment or order entered by the Court in accordance with the terms of this Settlement Agreement shall be treated as vacated, *nunc pro tunc*. In the event that the Settlement provided for in this Settlement Agreement is terminated or fails to become effective in accordance with the terms hereof, then any amount remaining in the Settlement Fund shall be immediately refunded to the Defendant.

#### **TERMINATION OF SETTLEMENT AGREEMENT**

31. The Plaintiff or Defendant may terminate this Settlement Agreement in the event that:
  - (a) The Court refuses to grant a Settlement Approval Order in the form attached as Schedule "C" (or in a form as may be amended upon the written consent of the

Parties prior to the issuance of the Settlement Approval Order) and either:

- i. the date on which the ability to appeal, if any appeal lies, from such refusal has expired without any appeal being taken, or
- ii. any appeal taken in respect of such refusal has been finally concluded without issuance of a Settlement Approval Order in the form attached as Schedule "C" (or in a form as may be amended upon the written consent of the Parties prior to the issuance of the Settlement Approval Order); or

(b) the Settlement Approval Order in the form attached as Schedule "C" (or in a form as may be amended upon the written consent of the Parties prior to the issuance of the Settlement Approval Order) is granted, but is subsequently overturned or reversed in whole or in part on appeal and either:

- i. the date on which the ability to further appeal, if any appeals lie, from such appeal decision has expired without any appeal being taken; or
- ii. any further appeals taken in respect of such appeal decision have been finally concluded without issuance of a Settlement Approval Order in the form attached as Schedule "C" (or in a form as may be amended upon the written consent of the Parties).

32. In addition, if the Settlement Fund is not paid in accordance with paragraph 3 above, the Plaintiff shall have the right to terminate this Settlement Agreement, at his sole discretion.
33. To exercise a right of termination under paragraph 31 or 32, the terminating party shall deliver to the other Party hereto a written notice within thirty (30) days following the occurrence of one of the events described in paragraphs 31 and 32 above.

#### **IF SETTLEMENT AGREEMENT TERMINATED**

34. If this Settlement Agreement is terminated in accordance with its terms:

- (a) No motion to approve this Settlement Agreement, which has not been decided, shall proceed;

- (b) The Parties will cooperate in seeking to have any orders made in respect of this Settlement Agreement set aside and declared null and void and of no force or effect;
- (c) All negotiations, statements, proceedings, and other matters relating to the Settlement and the Settlement Agreement shall be deemed to be without prejudice to the rights of the Parties, and the Parties shall be deemed to be restored to their respective positions existing immediately before the Settlement Agreement was executed; and
- (d) Without limiting the generality of subparagraph (c) immediately above, the Defendant shall retain any and all available defences to the Action and the Plaintiff/Class shall retain all of their claims, rights, and interests relating to the Action and the Released Claims.

#### **SURVIVAL OF PROVISIONS AFTER TERMINATION**

- 35. If this Settlement Agreement is terminated in accordance with its terms, the provisions of paragraph 34 and the definitions and Schedules applicable thereto shall survive the termination and continue in full force and effect. The definitions and Schedules shall survive only for the limited purpose of the interpretation of paragraph 34 within the meaning of this Settlement Agreement, but for no other purposes. All other provisions of this Settlement Agreement and all other obligations pursuant to this Settlement Agreement shall cease immediately.

#### **MOTIONS FOR DIRECTIONS AND ONGOING JURISDICTION**

- 36. The Parties may apply to the Court as may be required for directions in respect of the interpretation, implementation, operation and administration of this Settlement Agreement.
- 37. All motions contemplated by this Settlement Agreement shall be on notice to the Parties.
- 38. The Court shall retain and exercise continuing and ongoing jurisdiction with respect to implementation, administration, interpretation and enforcement of the terms of this Settlement Agreement.

#### **NO ADMISSION**

- 39. The Defendant expressly denies any and all allegations of liability and/or wrongdoing by it or any Released Persons in respect of the Released Claims. Neither this Settlement Agreement,

whether or not consummated, nor any negotiations, discussions, or proceedings in connection herewith, shall be:

- (a) offered or received against the Defendant or the Released Persons as evidence, or construed or deemed to be evidence, of any presumption, concession or admission by the Defendant or the Released Persons of the truth of any fact alleged by the Plaintiff, Class Members, or the validity of any claim that has been or could have been asserted in the Action or in any litigation, or the deficiency of any defence that has been or could have been asserted in the Action or in any litigation, or of any liability, negligence, fault, or wrongdoing of the Defendant or the Released Persons;
- (b) offered or received against: the Defendant or the Released Persons as evidence, or as a presumption, concession or admission, of any fault, misrepresentation, or omission with respect to any statement or written document approved or made by the Defendant or the Released Persons; or against the Plaintiff or the Class Members or Class Counsel or their experts and consultants as evidence of any infirmity in the claims of the Plaintiffs or the Class or as evidence otherwise relating to the merit or veracity of those claims;
- (c) offered or received against the Defendant or the Released Persons as evidence, or a presumption, concession, or admission, of any liability negligence, fault, or wrongdoing, or in any way referred to for any other reason as against the Defendant or the Released Persons, their counsel, or their experts and consultants, in any civil, criminal, or administrative action or proceeding, other than such proceeding as may be necessary to give effect to provisions of this Settlement Agreement; provided, however, that if this Settlement Agreement is approved by the Court, the Defendant and the Released Persons may refer to it to effectuate the liability protection granted to them hereunder; or
- (d) construed against the Defendant, the Released Persons, the Plaintiff, Class Members, their respective counsel, or their respective experts and consultants as an admission or concession that the consideration to be given hereunder represents the amount which could be or would have been recovered after trial. The foregoing

does not, for the purposes of obtaining the Settlement Approval Order, prevent or preclude the Plaintiff and/or Class Counsel from adducing evidence as to what compensation they perceive may, would or could have been awarded by a court had this action proceeded to trial.

40. The Plaintiff hereby acknowledges and agrees, and the Class Members are hereby advised and are deemed to have acknowledged and agreed, that the Plaintiff, Class Counsel, the Defendant, and its counsel have no obligation to provide and are in fact not providing any advice about any potential taxes, tax consequences, tax obligations, deductions, financial or tax reporting or filing obligations/requirements, remittance obligations, withholdings, or any other potential consequences or any other payment, remittance, reporting or filing obligations (whether statutory, regulatory or otherwise) relating to any compensation payable to Class Members under the Settlement. The Class Members shall have no claims or remedies as against the Plaintiff, Class Counsel, the Defendant, or its counsel in respect of the foregoing matters. Class Members are advised to seek their own independent tax, financial, accounting, legal or other advice in respect of the foregoing matters.

#### **MISCELLANEOUS PROVISIONS**

41. The Parties acknowledge that they have required and consented that this Settlement Agreement, its Schedules and all related documents, be prepared in English. Nevertheless, this Settlement Agreement, as well as the attached Schedules and any notices to Class Members, shall be made available in French. To the extent there are any discrepancies between the English and the French versions of the Settlement Agreement, the English version shall govern. Les parties aux présentes reconnaissent avoir demandé et convenu que cette Entente de règlement et tous les documents qui s'y rattachent soient rédigés en Anglais. Néanmoins, cette Entente de règlement, de même que ses Annexes et tous les avis aux Membres du Groupe, seront disponibles en français. En cas de divergence entre les versions anglaise et française de l'Entente de règlement, la version anglaise prévaudra.
42. The captions contained in this Settlement Agreement are inserted only as a matter of convenience and in no way define, extend, or describe the scope of this Settlement Agreement or the intent of any provision thereof.

43. In the computation of time in this Settlement Agreement, except where a contrary intention appears,
- (a) where there is a reference to a number of days between two events, they shall be counted by excluding the day on which the first event happens and including the day on which the second event happens, including all calendar days; and
  - (b) only in the case where the time for doing an act expires on a holiday, the act may be done on the next day that is not a holiday.
44. This Settlement Agreement shall be interpreted and enforced in accordance with the laws of the Province of Ontario without regard to choice of law rules.
45. The Court shall, as noted above, retain jurisdiction with respect to implementation and enforcement of the terms of this Settlement Agreement, and the Parties and Class Members submit to the jurisdiction of the Court for purposes of implementing, enforcing, interpreting, administering or otherwise relating to the Settlement provided for in this Settlement Agreement.
46. This Settlement Agreement, and the Recitals herein, the Schedules attached hereto, constitute the entire agreement among the Parties, and no representations, warranties, or inducements have been made to any Party concerning this Settlement Agreement or its Recitals or Schedules other than the representations, warranties, and covenants contained and memorialized in such documents. Any and all prior and contemporaneous agreements, negotiations, discussions, representations, warranties, and inducements concerning the Action, this Settlement Agreement, and the subjects addressed in this Settlement Agreement are merged and integrated into this Settlement Agreement.
47. The Recitals and Schedules to this Settlement Agreement are material and integral parts hereof and are fully incorporated into, and form part of, this Settlement Agreement.
48. The Parties further agree that the language contained in or not contained in any previous drafts of this Settlement Agreement, shall have no bearing upon the proper interpretation of this Settlement Agreement.
49. This Settlement Agreement was negotiated in good faith, at arms length, mutually drafted by all of the Parties, and entered into freely by the Parties with the advice, input, and participation

of their own legal counsel. In the event that an ambiguity exists in any provision of this Settlement Agreement, such ambiguity is not to be construed against any Party as the drafter of the document.

50. This Settlement Agreement shall be binding upon the Parties and the Class Members and their heirs, executors, administrators, successors and assigns, and shall enure to the benefit of the Parties and the Class Members as well as their heirs, executors, administrators, successors and assigns.
51. The waiver by one Party of any breach of this Settlement Agreement by any other Party shall not be deemed a waiver of any other prior or subsequent breach of this Settlement Agreement.
52. Prior to the Approval Hearing, this Settlement Agreement may be amended, modified, waived, or discharged only by a written instrument signed by or on behalf of each of the Parties or their respective successors-in-interest. Prior to the Approval Hearing, amendments and modifications may be made without notice to the Class Members unless otherwise ordered by the Court. Following the Approval Hearing, any such amendment and modification may be made on the consent of the Parties and with the approval of the Court.
53. Any and all notices, requests, directives, or communications required by this Settlement Agreement shall be in writing and shall, unless otherwise expressly provided herein, be given personally, by express courier, by postage prepaid mail, or by email and shall be addressed as follows:

If to: Joseph Fantl  
c/o Roy O'Connor LLP Barristers  
1920 Yonge Street, Suite 300 Toronto, ON  
M4S 3E2

By email, to each of these addressees:

E-mail: [dfo@royoconnor.ca](mailto:dfo@royoconnor.ca)  
Attention: David F. O'Connor

And

E-mail: [plr@royoconnor.ca](mailto:plr@royoconnor.ca)  
Attention: Peter L. Roy

And

E-mail: [jad@royoconnor.ca](mailto:jad@royoconnor.ca)  
Attention: J. Adam Dewar

If to: ivari  
c/o Blake, Cassels & Graydon LLP Barristers &  
Solicitors  
199 Bay Street, Suite 4000 Commerce  
Court West Toronto, ON M5L 1A9

By email, to each of these addressees:

E-mail: [jeff.galway@blakes.com](mailto:jeff.galway@blakes.com)  
Attention: Jeff Galway

And

E-mail: [doug.mcleod@blakes.com](mailto:doug.mcleod@blakes.com)  
Attention: Doug McLeod

And

E-mail: [eric.leinveer@blakes.com](mailto:eric.leinveer@blakes.com)  
Attention: Eric Leinveer

or to any such address as may be designated by notice given by any Party to another.

54. This Settlement Agreement may be signed in counterparts, each of which will be deemed an original and all of which, when taken together, will be deemed to constitute one and the same agreement.



55. This Settlement Agreement may be signed electronically, and an electronic signature shall be deemed an original signature for purposes of executing this Settlement Agreement.

**IN WITNESS WHEREOF**, the Parties have executed this Settlement Agreement as of the 11th day of September, 2023.

JOSEPH FANTL

Per: \_\_\_\_\_

ivari



Per: \_\_\_\_\_

Tamara Steinberg

General Counsel and Corporate Secretary

September 20, 2023

## Schedule A to the Settlement Agreement -- Distribution Protocol

### DISTRIBUTION PROTOCOL – FANTL v ivari SECTION 1 - DEFINITIONS

1. For the purposes of this Distribution Protocol all defined terms have the same meaning as in the Settlement Agreement, unless specified otherwise.
  - a. *“First Stage of the Distribution”* means the initial distribution to Qualifying Class Members of their Relative Share of the Net Settlement Fund as set out in this Settlement Agreement.
  - b. *“Relative Share”* means the proportion of the Net Settlement Fund to which a Qualifying Class Member is entitled in the First Stage of the Distribution.
  - c. *“Residue”* means the funds remaining in the Net Settlement Fund following the First Stage of the Distribution as set out in paragraphs 10 through 14 of this Distribution Protocol.
  - d. *“Distribution Calculation Period”* means June 1, 2000 through July 31, 2019.
  - e. *“Second Stage of the Distribution”* means, if necessary, the proposed distribution of the Residue to those Qualifying Class Members who cashed cheques in the First Stage of the Distribution.
  - f. *“Qualifying Class Member”* or *“QCM”* means each Class Member whose Initial Settlement Allocation (as defined below) is calculated to be \$50 or greater.

### SECTION 2 – GENERAL PRINCIPLES OF THE DISTRIBUTION AND ADMINISTRATION

2. This Distribution Protocol is intended to govern the administration process to distribute the Net Settlement Fund.
3. This Distribution Protocol is intended to distribute the Net Settlement Fund in a fair and efficient manner. To that end, no Class Member shall be required to make a claim or otherwise to furnish evidence probative of their individual entitlement. Instead, each Relative Share payable to a Qualifying Class Member shall be calculated on the basis of that Class Member’s CAF transaction data, as described in further detail herein.

4. In general, this Distribution Protocol is based on a determination of individual Class Member entitlement based on comparing the returns of the CAF to the S&P 500 Total Return Index during the Distribution Calculation Period. The delta between a Class Member's CAF returns and the S&P 500 Total Return Index within the Distribution Calculation Period is used to generate a value specific to that Class Member. Pre-judgement interest of 3.3% is then applied to that value for each Class Member from the time of their divestment from the CAF or July 31, 2019 (whichever is earlier) to May 3, 2023 to calculate their individual distribution weighting ("**IDW**"). The IDW for each Class Member that is only a Misrepresentation Class Member (i.e. not also a Contract Class Member) is then divided in half (reduced by 50%) to account for the greater risks and lower likelihood of recovery on the misrepresentation claims as opposed to the breach of contract claims. The IDW for each Class Member will then be calculated as a percentage of the total IDW of all Class Members to give each Class Member their "**Individual Settlement Entitlement**".

### **SECTION 3 – DUTIES AND RESPONSIBILITIES OF THE CLAIMS ADMINISTRATOR**

5. The Settlement Administrator shall administer this Distribution Protocol in accordance with the provisions of the Orders of the Court, the Settlement Agreement and the ongoing authority and supervision of the Court.
6. In addition to all duties imposed on the Settlement Administrator pursuant to the Settlement Agreement and otherwise as are reasonably required, requested or directed, the Settlement Administrator's duties and responsibilities shall include the following:
  - a. providing notice(s) to the Class Members as may be required;
  - b. receiving information from the Defendant, including the calculated Relative Share, for each individual QCM;
  - c. developing, implementing and operating the administration process including a bilingual administration website;
  - d. arranging payment to QCMs in a timely fashion;
  - e. reporting the results of the administration process to Class Counsel on a periodic basis or on such other basis as the Court may request or require;

- f. maintaining all information relating to the administration process so as to permit Class Counsel to review the administration at the discretion of Class Counsel or if and as ordered by the Court;
- g. dedicating sufficient personnel to respond to Class Member inquiries in English or French;
- h. remitting the CPF Levy to the CPF; and
- i. arranging, if necessary, payment of Class Counsel Fees and Administration Expenses or other amounts, as ordered or approved by the Court.

#### **SECTION 4 – RELATIVE SHARE CALCULATION**

7. The Defendant shall instruct NERA Economic Consulting (“NERA”) to calculate the Relative Share of each QCM as described below, and communicate same to the Settlement Administrator.
  
8. The Relative Shares of QCMs shall be calculated as follows:
  - a. NERA shall use the CAF transaction data for each Class Member that has been provided to it by the Defendant, and the returns of the S&P 500 Total Return Index, to calculate the IDW for each Class Member and the total IDW for the Class during the Distribution Calculation Period.
  - b. Those Class Members who divested from the CAF prior to the start of the Distribution Calculation Period (i.e. June 1, 2000) or who only invested in the CAF after the conclusion of the Distribution Calculation Period (i.e. July 31, 2019) will not be eligible to receive a Relative Share and will have an IDW of \$0.
  - c. For each Class Member who held units of the CAF during the Distribution Calculation Period, NERA shall calculate their IDW by calculating the difference between the returns that each Class Member received from their investment in the CAF during the Distribution Calculation Period and the returns that each Class Member would have received if their investment performed exactly in line with the S&P 500 Total Return Index, and applying pre-judgment interest at the rate of 3.3% to that value from the time the Class Member divested from the CAF or July 31, 2019 (whichever is earlier) to May 3, 2023.

- d. Each IDW shall then be converted to an Individual Settlement Entitlement as follows:
  - i. Every IDW attributable to a Contract Class Member shall be weighted at 100%, whereas every IDW attributable a Class Member who is only a Misrepresentation Class Member shall be weighted at 50%. For example, and solely for illustration purposes: if Contract Class Member "X" has an IDW of \$100 and Misrepresentation Class Member "Y" (who is not also a Contract Class Member) has an IDW of \$100, then X's IDW will be remain \$100 and Y's IDW will be reduced to \$50; and
  - ii. The weighted IDW for each Class Member will then be calculated as a percentage of the total IDW of all Class Members to give each Class Member their Individual Settlement Entitlement.
- e. The Net Settlement Fund will then be allocated to Class Members based on their Individual Settlement Entitlement to give each Class Member their "**Initial Settlement Allocation**".
- f. Those Class Members whose Initial Settlement Allocation is \$50 or greater are QCMs.
- g. Those Class Members whose Initial Settlement Allocation is less than \$50 ("**de minimus Class Members**") shall not receive any Relative Share from the Net Settlement Fund and shall be excluded from further distribution calculations for the Net Settlement Fund.
- h. The Initial Settlement Allocation amounts for all *de minimus* Class Members shall then be distributed among the QCMs in accordance with their Individual Settlement Entitlement.
- i. The Relative Share of each QCM shall be equal to their Initial Settlement Allocation plus their proportionate share of the total Initial Settlement Allocations for all *de minimus* Class Members.

## SECTION 5 - THE ADMINISTRATION PROCESS

9. Generally, the claims administration will be as follows:

### *First Stage of the Distribution*

10. Within 90 days from the Effective Date, the Settlement Administrator shall prepare and deliver notification letters (“**First Stage Notification Letters**”) to each Class Member. For each Class Member with a Relative Share below \$50, the First Stage Notification Letter will advise that their calculated Relative Share falls below the court-approved threshold value for receiving funds under the settlement. For each Class Member with a Relative Share above \$50, the First Stage Notification Letter to a will set out the QCM’s calculated Relative Share and be accompanied by a cheque payable to them in the same amount. The First Stage Notification Letters to QCMs will also advise that they may be entitled to an additional payment from the Residue (if any) and that they should advise the Settlement Administrator of any change of their mailing and contact addresses in the next 18 months.
11. The Settlement Administrator shall deliver the First Stage Payment Notification Letters and cheques via regular mail to Class Members’ last known mailing address based on the list that was compiled and updated for the purpose of providing Class Members with Notice of this Action being certified as a class proceeding, as may be updated.
12. There are no appeals available from the calculation of the Relative Shares, if any, as set out in the First Stage Payment Notification Letters as part of the First Stage of the Distribution.
13. Any First Stage Payment Notification Letters and cheques returned to the Settlement Administrator will, out of an abundance of caution, be subject to a further reasonable and proportionate “bad address resolution process” to be recommended by the Settlement Administrator and agreed upon by Class Counsel (acting reasonably and cost effectively). If such a further bad address resolution process does not result in the QCM in question being located, the Relative Share that would otherwise have been payable to that QCM will remain in trust and form part of the Residue. If such QCM is subsequently located and requests their Relative Share at any point not longer than 11 months following the earliest date of the first mailing of a First Stage Payment Notification Letter to any QCM, then such Relative Share may be paid by replacement cheque to the QCM to be delivered by ordinary mail to the QCM at the updated address that they provide and any such replacement cheque must be cashed by the Class Member within 30 days.

14. Any cheques accompanying the First Stage Payment Notification Letters that are not returned to the Settlement Administrator and are not cashed by a Class Member within 6 months of their issuance may be subject to a “reminder program” (whereby some reasonable step may be taken to re-contact the QCM in writing, by email or otherwise to remind them that a cheque was available and could be re-issued and, if re-issued, must be cashed within 30 days) to be recommended by the Settlement Administrator and agreed upon by Class Counsel (acting reasonably and cost effectively). If such reminder program does not result in the re-issuance of a cheque representing the Relative Share to the QCM in question within 9 months following the earliest date of the first mailing of a First Stage Payment Notification Letter to a Class Member, then such Relative Share shall remain in trust and form part of the Residue.

### *Second Stage of the Distribution*

15. The Residue may be used or reserved to pay any reasonable additional or reasonably anticipated additional Administration Expenses.
16. The process to distribute the Residue (after the payment or reserve for the aforesaid additional Administration Expenses) will commence thirteen (13) months following the earliest date of the first mailing of a First Stage Payment Notification Letter to any Class Member.
17. The Administrator shall distribute a percentage share of the Residue to each QCM who cashed their cheque from the First Stage of the Distribution. The Administrator shall calculate each such percentage share by dividing the value of the QCM’s cashed cheque from the initial distribution by the sum total value of all cashed cheques from the initial distribution. The distribution of the Residue to individual QCMs may, subject to the discretion of Class Counsel with input and advice from the Settlement Administrator, be subject to a reasonable and economically efficient minimum payment amount or threshold.
18. The Residue will be paid by cheques mailed to the most up to date address of the QCMs who cashed cheques representing their Relative Share as part of the First Stage of the Distribution. Cheques from the Second Stage of the Distribution are to be cashed within 60-days after which they shall be cancelled by the Settlement Administrator and QCMs shall be notified of this condition in the covering letter accompanying said cheques.

19. There is no appeal, correction, or challenge relating to this Second Stage of the Distribution.
20. Subject to reasonable discretion of Class Counsel with input from the Settlement Administrator and while considering any additional costs, etc., it is not expected that this Second Stage of Distribution will be subject to any bad address resolution or reminder program.
21. If there are any funds remaining in trust following the foregoing and payment of all Administration Expenses, the Plaintiff will request that the Court approve the payment of that remaining balance to a charity approved by the Parties acting reasonably.
22. Following the completion of the First Stage of the Distribution process and the completion of the Second Stage of the Distribution process (as described above), and otherwise at other times at the reasonable request of either Party or the Court, the Settlement Administrator will provide a report on the results of the distribution of the Net Settlement Fund to Class Counsel, who in turn will update the Defendant.

#### **SECTION 6 - CLASS COUNSEL**

23. Class Counsel shall generally oversee the distribution of the Net Settlement Fund and provide reasonable assistance and directions to the Settlement Administrator regarding this Distribution Protocol.
24. Class Counsel shall have no role in the calculation of Relative Shares.

#### **SECTION 7 - RESIDUAL DISCRETION**

25. Notwithstanding the foregoing, if, during the administration, Class Counsel have reasonable and material concerns that the Distribution Protocol is producing an unjust result on the whole or to any material segment of the Class Members or that a modification is required or recommended, they shall move to the Court for approval of a reasonable modification to this Distribution Protocol or for further directions with respect to the distribution of the Net Settlement Fund.
26. In arriving at a determination that an unjust result is occurring or that a modification is required or recommended, and in considering what modification may be required, Class



Counsel shall seek comments or input from the Defendant and the Settlement Administrator if and as needed.

#### **SECTION 8 – CONFIDENTIALITY**

27. All information received from the Defendant is collected, used, and retained by the Settlement Administrator pursuant to, *inter alia*, the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, and any analogous provincial legislation as may be applicable, for the purposes of administering this Distribution Protocol, and shall be kept confidential.

## Schedule B to the Settlement Agreement – Notice of Proposed Settlement

### NOTICE OF PROPOSED SETTLEMENT

**TO: ALL CLASS MEMBERS IN *FANTL v IVARI* – CAN-AM FUND REPLICATION CLASS ACTION  
COURT FILE NO.: 06-CV-306061-CP**

This Notice is directed to all Class Members in this certified class proceeding who have not opted- out of the class action. The Plaintiff and the Defendant, ivari, formerly Transamerica Life Canada (together, the “Parties”) have agreed to settle this class action for the all-inclusive amount of \$7 million CAD. The settlement was reached following years of litigation and subsequent negotiations between the parties with the assistance of a retired judge (mediator).

This Notice is published by Order of the Ontario Superior Court of Justice and explains the proposed settlement and how Class Members may comment (in support of or, in opposition to) the proposed settlement. The agreement to settle this matter does not imply any liability, wrongdoing, or fault on the part of ivari, none of the allegations against ivari have been proven and ivari expressly denies any liability, wrongdoing, or fault.

#### **History of this Class Proceeding**

The Plaintiff’s Statement of Claim alleges that the Defendant made commitments or representations related to the Can-Am Fund replicating the performance of the S&P 500 Total Return Index on a best efforts basis. The Can-Am fund was available as an investment option through a number of different insurance policies offered by the Defendant. The alleged commitments and representations were either: i) express contractual commitments in the Class Members’ written insurance contracts or (“Contract Class Members”); or ii) representations (not contractual promises) contained in the “summary information folders” that were provided to Class Members in connection with their application for their insurance contract (Class Members with for whom the alleged commitments and representations are found only in the summary information folders are “Misrepresentation Class Members”). The text of the court-ordered class definition is available for review at: [INSERT LINK](#).

Following a series of court decisions and appeals issued between 2013 and 2017 this action was certified (or approved to proceed) as a class action with Joseph Fantl as the representative plaintiff.

The Class was notified of the certification of this class action in 2019 and given the opportunity to exclude themselves (opt-out) from this class action. Anyone remaining in this class action following the close of the opt-out period agreed to be bound by any decision at trial or court- approved settlement in this action.

Following several years of additional litigation, including an extensive discovery process and a mediation before a retired judge, the Parties reached the proposed settlement summarized below.

### **The Proposed Settlement**

Under the proposed Settlement, the Defendant ivari has agreed to make an all-inclusive settlement payment of CAD \$7 million. Compensation to Class Members (the "Net Settlement Fund") will be paid from the net amount of the \$7 million sum remaining after payment of Class Counsel's legal fees and incurred expenses, settlement administration expenses, and payments owing the Class Proceeding Fund (including the Fund's 10% statutory levy).

In exchange for its \$7 million payment, ivari will receive a full release of all claims and any potential claims that the more than 71,000 Class Members may have against it relating to their investments in the Can-Am Fund. The Net Settlement Fund will be distributed among the Class Members pursuant to the Distribution Protocol (defined below). If approved, this settlement will be binding on all Class Members who have not opted out of this class action, regardless of whether or not that Class Member received any share of the Net Settlement Fund pursuant to the Distribution Protocol.

Subject to the Court's approval, the Parties have agreed to the following protocol ("Distribution Protocol") to distribute the Net Settlement Fund. If this settlement is approved:

1. No Class Member shall be required to make a claim or provide evidence regarding their individual allocation. Instead, each relative share of the Net Settlement Fund allocated to a qualifying Class Member shall be calculated on the basis of that Class Member's Can-Am Fund transaction data that is already in the possession of the Defendant;
2. An outside financial services and consulting firm has been retained to calculate each Class Member's individual share of the Net Settlement Fund;
3. Individual Class Member allocations are based on a comparison of the returns of their investments in the Can-Am Fund to the returns of the S&P 500 Total Return Index between June 1, 2000 through July 31, 2019. Individuals who divested from the Can-Am Fund prior to June 1, 2000 or invested after July 31, 2019 will not be entitled to a share of the Net Settlement Fund;
4. The difference between a Class Member's Can-Am Fund returns and the S&P 500 Total Return Index within that time period is used to generate a notional amount specific to that Class Member;
5. The statutory pre-judgment interest of 3.3% is then added to this notional amount for each Class Member from the time of their divestment from the Can-Am Fund or July 31, 2019 (whichever is earlier) to May 3, 2023;
6. Class Members whose insurance contracts did not contain express best efforts language (i.e. Misrepresentation Class Members) will have their notional amount reduced by 50% to account for the greater risks and lower likelihood of recovery on the misrepresentation claims if the case had proceeded forward on the merits. The misrepresentation claims and damages resulting therefrom would arguably have been more difficult to establish than the claims and damages based on the breach of contract claims;

7. Class Members whose insurance contracts contained express best efforts language (i.e. Contract Class Members) will not have their notional amount reduced;
8. The notional amount of each Class Member as calculated and potentially reduced as per above will in turn be expressed as a percentage of the sum of all notional amounts and then multiplied by the Net Settlement Fund to determine the initial allocation of each Class Member.
9. Class Members whose initial allocation amounts to \$50 or less shall not receive any compensation from the Net Settlement Fund, and \$50 or less amounts otherwise allocated to those Class Members shall be distributed to the balance of the Class on the basis of their proportionate share;
10. It is anticipated that approximately 17,000 Class Members will have an initial allocation of more than \$50 and will receive a payment. For those Class Members whose initial allocation pursuant to the Distribution Protocol is greater than \$50, the estimated median payout amount is approximately \$130.
11. The Funds from any uncashed compensation cheques will be pooled and, 13 months following the first distribution of settlement funds, will be paid out in a second distribution to those Class Members who cashed cheques during the first distribution, with each such Class Member receiving a proportionate percentage of the uncashed compensation calculated by dividing the value of their cashed cheque from the initial distribution by the sum total value of all cashed cheques from the initial distribution; and,
12. Any Settlement Funds remaining following the second distribution will not be returned to ivari but will be donated to charity.

The complete text of the proposed Distribution Protocol can be reviewed at: ●

The Representative Plaintiff and Class Counsel strongly recommend the settlement. In their opinion, when viewed against the alternative of continued litigation and the delay and uncertain outcome of same, the Settlement is fair, reasonable and in the best interests of the class. The Plaintiff's full submissions in support of the settlement will be set out in materials to be filed with the Court and made available for your review through a posting or link on [www.royoconnor.ca](http://www.royoconnor.ca) in advance of the settlement approving hearing (as described below). A full copy of the Settlement Agreement is available now for your review through the same posting or link.

#### **Motion for Settlement Approval**

The settlement is subject to the approval of the Court, which will decide whether the settlement is fair, reasonable, and in the best interests of Class Members. The Court will hold a hearing, via Zoom, to decide whether to approve the settlement on November 21, 2023.

The Court will decide whether to approve or reject the Settlement as proposed. It does not have the authority to unilaterally change the material terms of the Settlement. If the Court does not approve the Settlement, the lawsuit will continue. If the lawsuit continues, it may take several more years to complete the pre-trial procedures, trial, and possible appeals. The Class may or may not be successful at trial and, even if successful, the trial of the common issues would not

result in payments of any compensation to Class Members. Any compensation available to Class Members would need to be decided in a subsequent individual issues phase of this proceeding after the common issues trial. Any compensation awarded to Class Members following the individual issues phase would not necessarily be greater than, and might possibly be less than, the compensation available under this proposed Settlement.

### **How to Comment on the Proposed Settlement**

Class Members may, but are not required to, attend the Settlement Approval hearing. Please contact Class Counsel as set out below for instructions on how to access the Zoom hearing.

Class Members are also entitled, but not obligated, to express their opinions about the settlement and whether it should be approved. If you wish to make a submission to the Court supporting or objecting to the proposed Settlement, you must send the submissions in writing (by mail or email) to Class Counsel, at the address below, and ensure that they are received no later than November 7, 2023. Please note that Class Counsel will provide all submissions to the Court and the Defendant in advance of the hearing, and the submissions may be referred to publicly. The written submissions should include:

1. Your name, address, telephone number, and e-mail address;
2. A brief statement of the reasons that you support or oppose the proposed settlement terms; and,
3. Whether you plan to attend the virtual (Zoom) settlement approval hearing.

### **Updating Class Member Contact Information**

In order to communicate with you better and, in the event this Settlement is approved, and to assist in the mail-out of cheques, Class Members are requested to confirm or update their contact information by sending an email to the proposed settlement administrator INSERT NAME at INSERT EMAIL ADDRESS or through the change of address link or portal at INSERT WEBSITE.

### **Class Counsel's Motion for Fee Approval**

The law firm of **Roy O'Connor LLP** is Class Counsel and has represented the members of this Class in this action for the last 11 years of the litigation. Roy O'Connor LLP can be reached as set out below.

Class members will not have to personally pay for the legal work done or for the associated expenses incurred over the years since this case began. The contingency fee agreement with Class Counsel sets out that Class Counsel will ask the Court to approve legal fees of 30% of any settlement funds, plus their disbursements and applicable taxes.

Approval of the Settlement Agreement will not be contingent upon the court approval of legal fees.

For clarity, as explained above, any approved legal fees and disbursements (and related taxes) will be paid out of the \$7 million settlement fund.

In this case, the Plaintiff has received financial support from the Class Proceedings Fund (the "Fund"), which is a body created by statute and designed to allow access to the courts through class actions in Ontario. The Fund agreed to reimburse the Plaintiff for some expenses incurred in pursuing this action. The Fund would also have been responsible for costs that may have been awarded against the Plaintiff in this case. In exchange, the Fund is entitled to recover, from any court award or settlement in favour of the Class Members, the amounts it has reimbursed the Plaintiff for expenses as well as 10% of any amounts payable to Class Members.

### **Interpretation**

This notice only contains a general summary of some of the terms of the Settlement Agreement. As stated above, a full copy of the Settlement Agreement can be found at ●. If there is a conflict between the provisions of this notice and the Settlement Agreement, the terms of the Settlement Agreement shall prevail.

### **More Information**

For more information about the class proceeding lawsuit, you may contact:

#### **ROY O'CONNOR LLP**

Barristers

Attn: TBD

1920 Yonge Street Suite 300

Toronto, Ontario

M4S 3E2

Email TBD

Tel: (416) 362-1989

Web: TBD

**PLEASE DO NOT CALL IVARI, THE COURTHOUSE, OR THE REGISTRAR OF THE COURT ABOUT THIS ACTION. THEY WILL NOT BE ABLE TO ANSWER YOUR QUESTIONS ABOUT THE LAWSUIT OR SETTLEMENT.**

This notice is published pursuant to the Ontario *Class Proceedings Act* and was approved by the Court.

Schedule "C" to the Settlement Agreement – Draft Order

Court File No. 06-CV-306061-CP

ONTARIO

*SUPERIOR COURT OF JUSTICE*

THE HONOURABLE  
JUSTICE PERELL

)  
)  
)

B E T W E E N:

JOSEPH FANTL

Plaintiff

-and-

Defendant

ivari

*Proceeding under the Class Proceedings Act 1992*

**JUDGMENT**

**THIS MOTION**, made by the Plaintiff, on his own behalf and on behalf of the Class, for an Order approving the settlement agreement entered into between the Plaintiff and the Defendant dated • (the "Settlement Agreement") as being fair and reasonable and in the best interests of the Class, was heard this day by videoconference in Toronto, Ontario.

**ON READING** the Certification Order herein dated April 18, 2013 as varied by the Order of the Divisional Court dated March 9, 2015 (which together sets out the common issues and describe the class and the nature of the claims asserted on behalf of the class) attached to this Judgment as Schedule "A" and Schedule "B" respectively, the Notice of Motion and evidence filed by the parties, including the Settlement Agreement attached to this Judgment as Schedule

“C”, and on hearing submissions of counsel for the Plaintiff and the Defendant, and any objectors or reading submissions of any objectors, fair and adequate notice of this hearing having been provided to Class Members in accordance with the Order of this Court dated ●,

1. **THIS COURT ORDERS & DECLARES** that the settlement of this Class Action on the terms set forth in the Settlement Agreement, is fair, reasonable and in the best interests of the Class and is hereby approved pursuant to s. 29 of the *Class Proceedings Act, 1992 S.O. 1992, c.C.6*, (as it then was) and shall be implemented and enforced in accordance with its terms.
2. **THIS COURT ORDERS** that the use of capitalized terms in this Judgment shall have the same meaning as found in the Settlement Agreement except to the extent that the definition of a term in the Settlement Agreement and this Judgment conflict, in which case the definition of the term as set out in this Judgment shall govern.
3. **THIS COURT ORDERS, ADJUGES AND DECLARES** that the Settlement Agreement is expressly incorporated by reference into this Judgment, and this Judgment and the Settlement Agreement are binding upon all Class Members, whether or not such Class Members receive or claim compensation, including persons who are minors or are mentally incapable, and the need for service or notice of this or any further steps in these proceedings on the Public Guardian and Trustee, as well as all other requirements in the *Public Guardian and Trustee Act, R.S.O. 1990, c. P.51*, and any other service or notice required by the *Rules of Civil Procedure, R.S.O. 1990, Reg 194* is hereby dispensed with .
4. **THIS COURT ORDERS, ADJUGES AND DECLARES** that the requirements of Rules 7.04(1) and 7.08(4) are hereby dispensed with.



5. **THIS COURT ORDERS** that Epiq Class Action Services Canada Inc. (the “Settlement Administrator”) shall administer and oversee implementation of the Settlement Agreement, including the Distribution Protocol, in accordance with its terms.
6. **THIS COURT ORDERS** that the costs of the administration of this Settlement, including, but not limited to the reasonable fees and disbursements of the Settlement Administrator and the costs of the notice program described below, shall be paid from the Settlement Fund without further approval of the Court.
7. **THIS COURT ORDERS** that the Notice of Approved Settlement (the “Notice”) attached hereto as Schedule “D” is approved and shall be published or distributed as specified in paragraphs 8a and 8b of this Order, subject to the right of the Parties to make minor, non-material amendments to the form of the Notice by mutual agreement, as may be necessary or desirable.
8. **THIS COURT ORDERS** that within sixty (60) days of the date of this Judgment, the Plaintiff, through Class Counsel and the Settlement Administrator, shall cause the Notice to be distributed to the Class by:
  - a. causing the Notice to be sent to the last known email addresses of the Class Members and, where no email address is available, cause the Notice to be sent by regular mail to the Class Members’ last known mailing addresses; and,
  - b. causing the Notice to be posted on the website(s) controlled by Class Counsel (●).
9. **THIS COURT ORDERS** that for the purposes of the administration and enforcement of the Settlement Agreement and this Order that this Court will retain ongoing jurisdiction and supervisory role.

10. **THIS COURT ORDERS** that pursuant to section 10(1)(b) of the *Law Society Amendment Act (Class Proceedings Fund) 1992*, the Administrator shall deduct 10% from any compensation payable to individual Class Members under the Settlement and hold that money in trust pending the final determination of the quantum of the Class Proceeding Fund's section 10(1)(b) levy.

11. **THIS COURT ORDERS** that, no amounts shall be distributed to any Class Members until the Class Proceedings Committee has had an opportunity to review and confirm the calculation of the levy in paragraph 10. If there is any dispute or question as to the calculation of the levy to the Fund, Class Counsel and counsel for the Fund shall arrange an appearance before the Class Action Case Management Judge to resolve the issues and that, pending any appearance, no amounts shall be distributed to any Class Members.

12. **THIS COURT FURTHER ORDERS, DECLARES AND ADJUGES** that as of the date of this Judgment, each Class Member shall be deemed to have consented to the dismissal of any other action or proceeding they may have commenced asserting Released Claims as against the Releasees, including ivari, without costs and with prejudice.

13. **THIS COURT ORDERS** that the persons who have opted-out from the Class Action are not entitled to any relief or given any rights under the Settlement Agreement.

14. **THIS COURT ORDERS** that the Action is hereby dismissed against the Defendant without costs and with prejudice.

15. **THIS COURT ORDERS** that there be no costs of this motion.



**Schedule D to the Settlement Agreement – Certified Common Issues**

- (1) Was it a term of contracts IMS III revision dates 11/94, 02/95, 09/95 and 11/96 and IMS RRIF revision date 10/95 between Transamerica and Class Members that Transamerica would use Best-Efforts to make the Can-Am Fund replicate the performance of the S&P 500 Total Return Index?
- (2) If the answer to Common Issue 1 is “yes”, did Transamerica breach the “Best- Efforts” term?
- (3) Did Transamerica owe Class Members a duty of care in making statements in the Summary Information Folders?
- (4) Did Transamerica represent to Class Members that (a) it had an objectively reasonable, reliable, considered and sufficient basis for stating that the Can-Am Fund would replicate the S&P 500 on a best efforts basis and an honest and reasonable intent to use best efforts to achieve replication of the S&P 500; and/or (b) replication of the S&P 500 on a best efforts basis was a material term of Class Members’ contracts?
- (5) Were those representations untrue, inaccurate or misleading and, if so, were they negligently made by Transamerica?

## Schedule D to the Judgment – Notice of Approved Settlement

### NOTICE OF APPROVED SETTLEMENT

**TO: ALL CLASS MEMBERS IN *FANTL v IVARI* – CAN-AM FUND REPLICATION CLASS ACTION  
COURT FILE NO.: 06-CV-306061-CP**

In reasons for decision released on December 12, 2023, the \$7 million Settlement of this proceeding was approved by the Ontario Superior Court of Justice as being fair, reasonable, and in the best interests of the Class Members.

The agreement to settle this matter does not imply any liability, wrongdoing or fault on the part of ivari. None of the allegations against ivari have been proven and ivari expressly denies any liability, wrongdoing, or fault.

For more information about this class action and the approved settlement, please visit:  
<https://www.canamfundclassaction.ca/>

#### History of this Class Proceeding

The Plaintiff's Statement of Claim alleged that the Defendant made commitments or representations related to the Can-Am Fund replicating the performance of the S&P 500 Total Return Index on a best efforts basis. The Can-Am Fund was available as an investment option through a number of different insurance policies offered by the Defendant. The alleged commitments and representations were either: i) express contractual commitments in the Class Members' written insurance contracts ("Contract Class Members"); or ii) representations (not contractual promises) contained in the "summary information folders" that were provided to Class Members in connection with their application for their insurance contract (Class Members with for whom the alleged commitments and representations are found only in the summary information folders are "Misrepresentation Class Members"). The text of the court-ordered class definition is available for review at: [www.canamfundclassaction.ca](http://www.canamfundclassaction.ca).

Following a series of court decisions and appeals issued between 2013 and 2017 this action was certified (or approved to proceed) as a class action with Joseph Fantl as the representative plaintiff.

The Class was notified of the certification of this class action in 2019 and given the opportunity to exclude themselves (opt-out) from this class action. Anyone remaining in this class action following the close of the opt-out period agreed to be bound by any decision at trial or court-approved settlement in this action.

Following several years of additional litigation, including an extensive discovery process and a mediation before a retired judge, the Parties reached the settlement summarized below. As set out above, the settlement was approved on December 12, 2023, following a hearing in the Ontario Superior Court of Justice on December 11, 2023.

## The Approved Settlement

Under the Settlement, the Defendant ivari has agreed to make an all-inclusive settlement payment of CAD \$7 million. Compensation to Class Members (the "Net Settlement Fund") will be paid from the net amount of the \$7 million sum remaining after payment of Class Counsel's legal fees and incurred expenses, settlement administration expenses, and payments owing the Class Proceeding Fund (including the Fund's 10% statutory levy).

In exchange for its \$7 million payment, ivari will receive a full release of all claims and any potential claims that the Class Members may have against it relating to the Best Efforts Replication Claim relating to the Can-Am Fund. The Net Settlement Fund will be distributed among the Class Members pursuant to the court-approved Distribution Protocol (defined below).

The Parties have agreed, and the Court has approved, the following Distribution Protocol to distribute the Net Settlement Fund:

1. No Class Member is required to make a claim or provide evidence regarding their individual allocation. Instead, each relative share of the Net Settlement Fund allocated to a qualifying Class Member has been calculated on the basis of that Class Member's Can-Am Fund transaction data that is already in the possession of ivari;
2. An outside financial services and consulting firm has been retained to calculate each Class Member's individual share of the Net Settlement Fund;
3. Individual Class Member allocations are based on a comparison of the returns of their investments in the Can-Am Fund to the returns of the S&P 500 Total Return Index between June 1, 2000 through July 31, 2019. Individuals who divested from the Can-Am Fund prior to June 1, 2000 or invested after July 31, 2019 will not be entitled to a share of the Net Settlement Fund;
4. The difference between a Class Member's Can-Am Fund returns and the S&P 500 Total Return Index within that time period is used to generate a notional amount specific to that Class Member;
5. The statutory pre-judgement interest of 3.3% was then added to this notional amount for each Class Member from the time of their divestment from the Can-Am Fund or July 31, 2019 (whichever is earlier) to May 3, 2023;
6. Due to the difficulties in establishing misrepresentation claims, Class Members whose insurance contracts did not contain express best efforts language (i.e. Misrepresentation Class Members) have had their notional amount reduced by 50% to account for the greater risks and lower likelihood of recovery on the misrepresentation claims if the case had proceeded forward on the merits;
7. Class Members whose insurance contracts contained express best efforts language (i.e. Contract Class Members) did not have their notional amount reduced;
8. The notional entitlement for each Class Member as calculated and potentially reduced as per above will in turn be expressed as a percentage of the sum of all notional amounts and then multiplied by the Net Settlement Fund to determine the initial allocation of each Class Member;
9. Class Members whose initial allocation amounts to \$50 or less shall not receive any compensation from the Net Settlement Fund, and \$50 or less amounts otherwise allocated to those Class Members shall be distributed to the balance of the Class on the

basis of their proportionate share. Please refer to the enclosures with this Notice to determine if you are allocation amounts to \$50 or more;

10. The Funds from any uncashed compensation cheques will be pooled and, 13 months following the first distribution of settlement funds, will be paid out in a second distribution to those Class Members who cashed cheques during the first distribution, with each such Class Member receiving a proportionate percentage of the uncashed compensation calculated by dividing the value of their cashed cheque from the initial distribution by the sum total value of all cashed cheques from the initial distribution; and,
11. Any Settlement Funds remaining following the second distribution will not be returned to ivari but will be donated to charity.

The complete text of the proposed Distribution Protocol can be reviewed at: [www.canamfundclassaction.ca](http://www.canamfundclassaction.ca).

#### Updating Class Member Contact Information

In order to communicate with you better and, in the event this Settlement is approved, and to assist in the mail-out of cheques, Class Members are requested to confirm or update their contact information by sending an email to the proposed settlement administrator Epiq Class Action Services Canada, Inc. at INSERT ADDRESS or through the change of address link or portal at [www.canamfundclassaction.ca](http://www.canamfundclassaction.ca).

#### Class Counsel's Motion for Fee Approval

The law firm of Roy O'Connor LLP is Class Counsel and has represented the members of this Class in this action for the last 11 years of the litigation. Roy O'Connor LLP can be reached as set out below.

As set out above, Class Members do not have to personally pay Class Counsel for the work that they have done or for the disbursements that they have carried over the years since this case began. The Representative Plaintiff entered into a contingency fee agreement with Class Counsel at the outset of the case, providing that Class Counsel are to be paid only in the event of a successful settlement or trial judgment. As provided for in that contingency fee agreement, the Court approved legal fees of 30% of the \$7 million Settlement Fund minus unrecouped disbursements of \$182,893.64 and permitted Class Counsel to retain prior costs awards totalling \$198,249.05 for a total fee, exclusive of taxes, of \$2,243,380.96. HST on legal fees totalling \$265,867.15 shall be paid out of the Settlement Fund as well.

In this case, the Plaintiff has received financial support from the Class Proceedings Fund (the "Fund"), which is a body created by statute and designed to allow access to the courts through class actions in Ontario. The Fund agreed to reimburse the Plaintiff for some disbursements incurred in pursuing this action. The Fund would also have been responsible for costs that may have been awarded against the Plaintiff in this case. In exchange, the Fund is entitled to recover, from any court award or settlement in favour of the Class Members, the amounts it has reimbursed the Plaintiff for disbursements as well as 10% of any amounts payable to Class Members.

#### Interpretation

This notice only contains a general summary of some of the terms of the Settlement Agreement. As stated above, a full copy of the Settlement Agreement can be found at [www.canamfundclassaction.ca](http://www.canamfundclassaction.ca). If there is a conflict between the provisions of this notice and the Settlement Agreement, the terms of the Settlement Agreement shall prevail.

More Information

For more information about the class proceeding lawsuit, you may contact:

**ROY O'CONNOR LLP**

Barristers

Attn: James Katsuras

1920 Yonge Street Suite 300

Toronto, Ontario

M4S 3E2

Email: [info@royoconnor.ca](mailto:info@royoconnor.ca)

Tel: (416) 362-1989

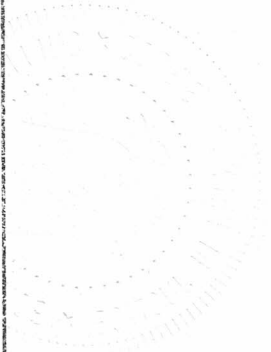
Web: [www.canamfundclassaction.ca](http://www.canamfundclassaction.ca)

PLEASE DO NOT CALL IVARI, THE COURTHOUSE, OR THE REGISTRAR OF THE COURT ABOUT THIS ACTION. THEY WILL NOT BE ABLE TO ANSWER YOUR QUESTIONS ABOUT THE LAWSUIT OR SETTLEMENT.

This notice is published pursuant to the Ontario Class Proceedings Act and was approved by the Court.



**JOSEPH FANTL**  
Plaintiff



- and -

**ivari**  
Defendant

Count File No.: 06-CV-306061-CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act 1992*

**JUDGMENT**

**ROY O'CONNOR LLP**

Barristers

1920 Yonge Street, Suite 300  
Toronto, ON M4S 3E2

**Peter L. Roy (LSO No. 161320)  
David F. O'Connor (LSO No. 33411E)  
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Email: [jad@royoconnor.ca](mailto:jad@royoconnor.ca)

Lawyers for the Plaintiff, Joseph Fantl