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*

AFFIDAVIT OF DEREK MCKAY – SETTLEMENT & FEE APPROVAL
(SWORN NOVEMBER 7, 2023)

I, Derek Mckay, of the City of Toronto, Ontario, **MAKE OATH AND SAY**:

1. I am of Counsel with the firm Roy O'Connor LLP, Class Counsel in this proceeding. I have been closely involved with this matter since January 2007 when I joined the firm's predecessor, Roy Elliott Kim O'Connor LLP, as an associate, and as such I have knowledge of the matters to which I depose in this affidavit. Where information in this affidavit is not based on my direct knowledge, but on information and belief from other sources, I have stated the source of that information and confirm that I believe that information to be true.

2. In Part I of this affidavit, I principally address factors relevant to the Plaintiff's motion for settlement approval. Specifically, in Part I, I discuss the following: (1) the nature of this motion; (2) key background regarding the Can-Am Fund and the Parties; (3) the procedural

history of this action; (4) the key terms of the proposed settlement and rationale for same; and (5) the experience and recommendation of Class Counsel. Part II of this affidavit addresses factors relevant to the Plaintiff's motion for approval or fixing of Class Counsel's fees.

PART I - SETTLEMENT

(1) Nature of Motion

3. The Plaintiff Joseph Fantl moves for court approval of a proposed settlement that he and the Defendant ivari (formerly Transamerica Life Canada) have reached in respect of the claims in this class action. Those claims relate to the Defendant's Can-Am Fund, and in particular whether, in managing the fund, the Defendant made "best efforts" to replicate the return performance of the S&P 500 Total Return Index in Canadian dollars.

4. In essential part, the settlement provides for payment by the Defendant of an all-inclusive and non-reversionary sum of $7 million dollars. A copy of the proposed settlement agreement is attached as **Exhibit "A"**.

5. As I set out further below at Part I, Section (5)(b) "Recommendation of Class Counsel", Class Counsel believe that this settlement is fair, reasonable and in the best of the class in light of the foreseeable challenges and risks of bringing this action to trial.

(2) Key Background

6. Based on information disclosed by the Defendant in this action and my own research and review in this action, I can advise that the Can-Am Fund is both a "segregated" fund and an "index" fund. Segregated funds are investment funds offered under insurance

contracts. Viewed from the outside, segregated funds look and behave similarly to mutual funds. Like mutual funds, they have investment parameters that specify the investments to be held in the fund and can be based on such things as type of investment (e.g., bonds or equities), or industry (e.g., oil and gas funds, mining funds, technology funds), etc.

7. Viewed from the inside, segregated funds differ from mutual funds in a number of ways. Among other differences, unlike a mutual fund investor, a segregated fund investor does not actually purchase and own units in the fund. Instead, in exchange for his or her payment of premiums under the insurance contract, the segregated fund investor is notionally ascribed a certain number of units of the fund and is entitled to be paid a sum defined in terms of the value of those units. The investor does not, however, have an actual ownership interest in the assets of the fund itself – the fund is the property of the insurer, but is kept "segregated" from the insurer's other assets.

8. As noted above, the Can-Am Fund is also an index fund. An index fund is one that is invested and managed so as to replicate or "track" the return performance of a known stock or other financial markets index. The Can-Am Fund was intended to replicate or "track" the return performance of the S&P 500 Total Return Index in Canadian dollars. I am informed by our expert, Gerry Rocchi, and by my review of related financial analysis literature that the deviation of the returns of an index fund from its target index over a period of time is commonly referred to as the index fund's "tracking error".

9. The Can-Am Fund was initially established and offered as an investment option for policyholders by NN Life Insurance Company of Canada on or about October 1, 1992. The Defendant ivari (formerly Transamerica Life Canada) is the ultimate successor corporation

of NN Life.

10. Much of the foregoing factual background is also set out in the decisions from the Divisional Court and Court of Appeal in this matter.[1]

11. The Representative Plaintiff, Joseph Fantl, was a policyholder with the Defendant (or its predecessors) and had invested (or notionally invested as described above) a portion of his funds in the Can-Am Fund. Mr. Fantl is a retired civil litigation lawyer and former member of the Ontario bar.

(3) Procedural History

(a) The Original Millman *Claim*

12. This action was initially styled *Millman v. Transamerica Life Canada*, with Sutts, Strosberg acting as plaintiff's counsel. The claim was issued December 29, 2003. Mr. Millman, an investor in the Defendant's Can-Am Fund, complained (1) that the Defendant charged Can-Am Fund investors management fees that exceeded the contractually stipulated maximum rate, and (2) that the defendant contractually promised that the Can-Am Fund would, but failed to, replicate the returns of the S&P 500 Total Return Index.

(b) The Fantl *Claim*

13. In the Fall of 2005, Roy Elliott Kim O'Connor LLP, a predecessor of present Class Counsel, Roy O'Connor LLP, took carriage of this matter. Around this time, Mr. Millman indicated that he no longer wished to serve as representative plaintiff. Mr. Millman was replaced by the representative plaintiff, Mr. Joseph Fantl, in 2006. Copies of the retainer agreement

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[1] See: *Fantl v. Transamerica Life Canada*, 2015 ONSC 1367 (Div. Ct.) at paras 8-16; and *Fantl v. Transamerica Life Canada*, 2016 ONCA 633 (C.A.) at paras. 4-8

between Mr. Fantl and Roy Elliott Kim O'Connor LLP, and letter agreement confirming same in respect of Roy O'Connor's direct predecessor, Roy Elliott O'Connor are attached as **Exhibits "B"** and **"C"**, respectively. Among other things, the retainer agreement provides that Class Counsel shall be entitled to a 30% contingency fee, plus the fee portion of any costs award in favour of the Plaintiff.

14. The *Fantl* Claim (hereafter, also simply the "Claim") was subsequently amended. In broad terms, the amendments did three main things: (1) various amendments added negligent misrepresentation claims in parallel to the existing claims sounding in breach of contract; (2) the allegations of excess management fee charges, previously limited to the Can-Am Fund, was expanded to include 27 additional segregated funds; and (3) other amendments refocused on an alleged failure of the Defendant to make "best efforts" to achieve replication (as opposed to simply alleging a failure to replicate the S&P 500 TRI). As a result, the Claim then advanced essentially two distinct categories of assertions: (a) that the Defendant breached its insurance contracts in respect of 28 segregated funds by charging class members, more than the contractually stipulated and represented maximum management fees (the "Management Fee Overcharge" claim, which settled years ago); and (b) that the Defendant failed to make "best efforts" to replicate the S&P 500 Total Return Index in its management of the Can-Am Fund, and in so failing breached a contractual obligation to do so and misrepresented to Class Members (via best efforts statements contained in its Summary Information Folders, as described further below) that it was in fact doing so (the "Best Efforts Claim(s)").

15. The Management Fee Overcharge claim settled in 2009.[2] The right and ability of the Plaintiff to pursue the Best Efforts Claims was specifically preserved as part of that settlement.

16. The Plaintiff's amended focus on "best efforts" reflected the fact that the express wording in the policies did not provide for unqualified replication of the S&P 500 Total Return Index, but rather for replication "on a best efforts basis". Specifically, five of the Defendant's policy forms and the great majority of its pre-sale disclosure documents, the "Summary Information Folder" (or "SIF"), contained an express statement essentially similar to the following:

> Can-Am Fund. Investments include Canadian Treasury Bills and Standard and Poor's 500 Stock Index Futures Contracts, (and when necessary, other derivative products), **which together, on a best effort basis, will replicate the performance of the S & P 500 Total Return Index**. The investment objective of this fund is long-term accumulation of capital through appreciation and reinvestment of net income. [**bolding added**]

17. In the Defendant's corresponding French language materials, the above-bolded "best efforts" replication statement is rendered, "afin de reproduire le plus précisément possible la performance de lìndice de rendement global S&P 500," which the Plaintiff argued would translate on a near word-to-word basis to "in order to replicate as precisely as possible the performance of the S&P 500 Total Return Index".

18. The Plaintiff's focus on the "best efforts" replication statement was also informed by caselaw interpreting "best efforts" obligations in various factual scenarios, which we argued was to the effect of the following:

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[2] *Fantl v. Transamerica Life Canada*, 2009 CanLII 42306 (ON SC).

a. "Best efforts" imposes a higher obligation than a "reasonable effort";

b. "Best efforts" means taking, in good faith, all reasonable steps to achieve the objective, carrying the process to its logical conclusion and leaving no stone unturned; and

c. "Best efforts" includes doing everything known to be usual, necessary and proper for ensuring the success of the endeavour.[3]

(c) Pursuit of a Class-wide Contractual Basis of Liability

19. Throughout this litigation, Class Counsel were aware that a claim for damages for negligent misrepresentation is much harder to certify and prosecute successfully than a similar claim for damages for breach of contract since the cause of action in tort often raises inherently individual issues of causation, reliance and damages.

20. The majority of the proposed Class Members did not have a policy containing an express "best efforts" commitment. Only five of the 53 iterations of the Defendant's insurance policy forms at issue included an express "best efforts" replication statement. For the Class Members who did not have one of these five policy forms, the best efforts statement was contained only in their pre-sale disclosure document, the SIF.

21. Although ultimately unsuccessful in this regard, Class Counsel argued that a case could be made that the "best efforts" replication statement contained in the SIFs was contractual in nature. Specifically, as part of the aforesaid amendments to the Claim, the Plaintiff pleaded and advanced the following allegations: (i) the SIF formed part of the insurance contract; (ii) the SIF constituted a collateral contract; and (iii) the "best efforts" replication

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[3] See, for example, *CSRS Ltd. v. Embley*, 2008 BCCA 533 (B.C. C.A.) at para. 84.

statement contained in the SIF constituted an implied contractual term. However, as I set out further below, both this Honourable Court and the Court of Appeal rejected each of these alternative bases of contractual liability.

(d) Initial Efforts to Settle the Best Efforts Claim

22. The Parties engaged in intensive, good-faith efforts to settle the Best Efforts Claim starting in or about September of 2012. Each side retained experts and invested significant time exploring the relevant issues over a series of meetings and exchanges of correspondence. Those efforts proved unsuccessful. While the Plaintiff and his expert were of the opinion that there was a material and statistically significant tracking error in the Can-Am Fund indicative of fund mismanagement, the Defendant, among other things, argued through its experts that there was no potential liability and, in particular, no material and statistically significant tracking error, no mismanagement and no damages.

23. The Parties ceased negotiations in or about March 2013 when it became clear that they could not find any common ground.

(g) Certification of the Best Efforts Claim

24. In the meantime, the Plaintiff pressed forward toward the certification motion and the parties exchanged facta. The motion to certify the Best Efforts Claim was heard in April 2013.

25. Justice Perell certified the breach of contract claim and associated common issues on behalf of Class Members who invested in the Can-Am Fund under one of the five policy iterations that contained express "best efforts" replication language, and whose claims

were not barred by the expiry of absolute limitation periods.[4]

26. Justice Perell declined to certify the remainder of the proposed breach of contract claims based on the "best efforts" replication statements contained in the SIFs, holding that it was plain and obvious that the Folders and the statements therein were non-contractual.

27. Justice Perell also declined to certify the Plaintiff's negligent misrepresentation claims, finding that while the claim raised common issues regarding the accuracy of the alleged representations, it did not satisfy the preferable procedure requirement because of the presence of individual issues of causation, reliance and damages for each affected Class Member.[5]

28. The certification decision resulted in two separate appeal routes. Appeal from the dismissal of the breach of contract claims went directly to the Court of Appeal. That appeal was unsuccessful.[6]

29. The narrowing of the class definition and common issues fell under the jurisdiction of the Divisional Court. The Plaintiff sought and obtained leave to appeal to the Divisional Court from the refusal to certify the negligent misrepresentation claim. The appeal to the Divisional Court was successful.[7] A subsequent effort by the Defendant to restrict the negligent misrepresentation claims to those who received the English version of the SIFs was rejected by the Divisional Court.[8] The Defendant's subsequent appeal to the Court of Appeal regarding the negligent misrepresentation claims was dismissed.[9] The Defendant

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[4] *Fantl v. Transamerica Life Canada*, 2013 ONSC 2298 (S.C.).
[5] *Fantl v. Transamerica Life Canada*, 2013 ONSC 2298 (S.C.).
[6] *Fantl v. Transamerica Life Canada*, 2013 ONCA 580 (C.A.).
[7] *Fantl v. Transamerica Life Canada*, 2015 ONSC 1367 (Div. Ct.).
[8] *Fantl v. Transamerica Life Canada*, 2015 ONSC 4977 (Div. Ct.).
[9] *Fantl v. Transamerica Life Canada*, 2016 ONCA 633 (C.A.).

unsuccessfully sought leave to appeal to the Supreme Court of Canada in 2017.[10]

30. In the end result, the Plaintiff was left with a comparatively straightforward but much-truncated claim for breach of contract on behalf of a minority of the Class, and a larger, but more difficult to successfully prosecute, claim for negligent misrepresentation.

31. The certified class definition and common issues are as follows:

Certified Class Definition

A. in respect of the claim for breach of express terms of contract and related relief as set out herein,

> 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. in respect of the claim for negligent misrepresentation and related relief as set out herein,

> 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).

Certified Common Issues

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

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[10] *Transamerica Life Canada v. Joseph Fantl*, 2017 CanLII 8570 (SCC).

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?

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?

32. A copy of the Order setting out the above is attached as **Exhibit "D".**

(h) Notice of Certification and Class Member Opt-outs

33. Following certification, in 2019, approximately 72,000 Class Members received a notice of certification and 160 individuals elected to opt-out of the proceeding.

(i) Final Amendment of Claim

34. The Plaintiff subsequently prepared and filed a final amended Claim to accord with the scope and terms of the certification order. A copy of the Third Fresh as Amended Statement of Claim as filed in November 2017 is attached as **Exhibit "E"**.

35. The essence of the Plaintiff's claim in contract is set out at paragraphs 1(a) and (b) of the Claim:

> "1. The Representative Plaintiff claims on behalf of himself and the other members of the Class (as defined below):

a. a declaration that it was an express term of the Transamerica Funds Contracts (as defined below), under which the Can-Am Fund was an available investment option, that the defendant would make its "best effort" to ensure that the Can-Am Fund replicated the performance of the S&P 500 Total Return Index in Canadian dollars;

b. a declaration that the defendant breached each Transamerica Funds Contract under which the Can-Am Fund was an available investment option by failing to make its best effort to ensure that the Can-Am Fund replicated the performance of the S&P 500 Total Return Index;"

36. The Plaintiff's pleading of negligent misrepresentation is set out at paragraphs 26-30 of the Claim:

"26. The best efforts replication statements as contained in the Summary Information Folders as referred to above (collectively, the "Statements") constituted or amounted to negligent misrepresentations (express or implied), which included, but are not limited to, the following:

a. a misrepresentation that the defendant had an objectively reasonable, reliable, considered and sufficient basis for the Statements, and an honest and reasonable belief in, and an honest and reasonable intent to achieve or effect, same; and

b. a misrepresentation that the Statements were in fact material terms of the Transamerica Funds Contracts because the Folders purported to disclose or summarize the material facts or terms of the Transamerica Funds Contracts.

27. Fantl and the other Class Members received, read and reasonably relied to their detriment upon the aforesaid representations. They were induced

to enter into the Transamerica Funds Contracts by the aforesaid representations, and maintained their investments in Transamerica Funds in reliance on same.

28. The defendant made the aforesaid representations knowing that the Plaintiff and other Class Members would reasonably rely on such representations and that such representations would induce, or would naturally tend to induce, the Plaintiff and other Class Members to purchase and retain units of the Transamerica Funds.

29. The representations were untrue, inaccurate and misleading.

30. At all relevant times, the defendant possessed special expertise, information and knowledge with respect to the Transamerica Funds including in particular the Can-Am Fund, and the defendant's design, management and efforts in relation to the Transamerica Funds, again including in particular the Can-Am Fund. It was reasonably foreseeable that the Plaintiff and other Class Members would rely on the defendant's expertise, information and knowledge. The defendant owed, and breached, a duty of care to the Plaintiff and other Class Members."

37. A copy of the current Statement of Defence as filed by the Defendant is attached as **Exhibit "F"**. The Defendant advanced many defences to the Claim, including denial of any mismanagement, poor fund performance, reliance, causation and damages. Further, and among other things, the Defendant took the position that, as the Defendant regularly updated Class Members on the performance of the Can-Am Fund, Class Members were always in a position to determine whether they thought the fund was underperforming, and if they did, they had the option to move their monies out of the Fund. Moreover, the Defendant argued that there was no reliance by Class Members on the "best efforts"

replication statements contained in the SIF, and that they chose to invest in the Defendant's policies and funds based on other reasons, including potentially the advice from the more than 15,000 individual insurance agents who were dealing with the Class Members, or as a result of an automatic distribution of investments in funds through participation in the Defendant's "Asset Decision Maker" service[11] that automatically rebalanced and invested Class Members's holdings based on Class Members' generic risk tolerance and investment goals. The Defendant noted in the Defence that the Plaintiff himself had not relied on the statements in the SIF, on the basis that Mr. Fantl could not recall what he reviewed, considered and relied upon in choosing to invest in the Can-Am Fund.

(j) Discovery

38. In the summer and autumn of 2018, the Parties negotiated the scope of the Defendant's search for and production of potentially relevant documents. In important part, on or about October 4, 2018, the Parties reached agreement regarding both (a) the electronic Boolean search strings to be used to search the Defendant's various repositories of electronic documents, and (b) how the resulting documents where to be further sorted to reduce irrelevancies and duplicates.

39. Between March 19, 2019 and September 1, 2022, the Defendant produced more than 80,000 documents in electronic form. Class Counsel reviewed tens of thousands of these documents after applying its own internal set of further electronic Boolean searches and

[11] An example description of the Defendant's "ADM" service excerpted from the Defendant's Summary Information Folder is attached as **Exhibit "G".**

search criteria for relevance. During this review process, we shared hundreds of documents with our expert, Mr. Gerry Rocchi. Mr. Rocchi has extensive experience with the design and operation of index funds similar to the Can-Am Fund. He assisted us in analyzing the documents for evidence of the Defendant's (and its third-party fund manager's) fund management practices. A copy of Mr. Rocchi's curriculum vitae is attached hereto as **Exhibit "H"**.

40. Recognizing, among other things, that much of the relevant period in this case reached back many years, the parties agreed to pursue discovery by written questions. The parties completed two rounds of written examination for discovery questions and answers commencing in November 2020 and concluding in May 2022. The written questions posed by the Plaintiff to the Defendant were extensive and followed our detailed review of thousands of documents and input from our expert. The discovery process was largely complete when the parties agreed to suspend further litigation steps pending another attempt at mediation.

(k) Mediation

41. The Parties' proposed settlement was reached after two days of mediation led by former Associate Chief Justice of Ontario Dennis O'Connor on May 2nd and 3rd, 2023.

42. Both parties exchanged mediation briefs as well as expert reports addressing liability and the quantification of potential (hypothetical) damages.

43. Going into the mediation, we recognized that there were real risks that the Plaintiff might not be successful in establishing liability. These risks were particularly acute with respect to negligent misrepresentation. Even if we were successful in establishing

mismanagement of the Can-Am Fund and material underperformance, as noted above, serious challenges would arise in establishing individual causation, reliance and damages for negligent misrepresentation for tens of thousands of class members. Some of the potential factual challenges associated with the misrepresentation claim were highlighted by this Court in its certification Reasons:

> *[132] In the context of the case at bar, the calculation of damages for misrepresentation would involve hypothesizing based on the evidence of each class member what would have happened had the class member not invested in the Can-Am Fund. Transamerica could raise serious challenges about causation of damage. There are the arguments that the policyholder would have selected the Can-Am Fund regardless of the misrepresentation. Transamerica could argue that had the policyholder gone ahead with a different investment but for the misrepresentation, the alternative investment would not have performed any better than the Can-Am Fund and possibly worse than the Can-Am Fund.*[12]

44. As for damages, Class Counsel believed that, assuming the Plaintiff could clear the liability hurdles at trial, a reasonable estimate or measure of damages could be based on the difference between the Can-Am Fund's returns and the returns of other directly comparable S&P 500 index funds available from other institutions or companies.[13] Accordingly, our mediation material set out an analysis of potential damages based on the difference between the returns of the Can-Am Fund and those of,

    a. the average of its top two performing direct competitor funds[14]; or

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[12] *Fantl v. Transamerica Life Canada*, 2013 ONSC 2298 (S.C.).

[13] On the dual theories that the returns of better performing competitors were (a) in the case of contract, indicative of what "best efforts" ought to have returned; and (b) in the case of tort, indicative of the alternative returns Class Members could have achieved had they not relied on the Defendant's "best efforts" representation and instead invested their Can-Am Fund monies in a different Canadian S&P 500 index fund (including a different S&P 500 segregated fund offered by a different Canadian insurance company).

[14] We believed that the average of the return performances of the top two performing funds was a readily defensible measure of what "best efforts" fund management ought to have achieved.

b. the average of all its direct competitor funds[15],

with all redemptions (disinvestments/withdrawals) from the Can-Am Fund earning interest from the date of redemptions at the applicable *Courts of Justice Act* ("*CJA*") pre-judgment interest rate. By the Plaintiff's estimate, the total maximum potential damages (including interest) under the aforementioned scenarios (a) and (b) would be $13.88 million and $11.81 million, respectively.

45. The Plaintiff also advanced an argument at mediation that he would be requesting an interest rate at trial that was higher than the *CJA* presumptive rate, on the theory that the monies in issue were investment monies and Class Members had demonstrated a desire to invest same to earn S&P 500 returns in Canadian dollars. In lieu of the *CJA* presumptive rate, the Plaintiff proposed that prejudgment interest accumulate at the rate of return of the iShares Core S&P 500 Index Exchange Traded Fund (commonly known by its stock ticker "XSP") for all prejudgment periods after November 2005 when the XSP first become available, and for any prior period at the average rate of return of the Can-Am Fund's direct comparators. Using this alternative basis for calculating prejudgment interest would have dramatically increased the estimate of maximum potential damages to $35.45 million (based on average of the returns of the top two performing competitor funds), or to $29.92 million (based on the average of all competitors). However, we recognized that Ontario courts rarely exercise their discretion to depart from the *CJA* prejudgment interest

[15] We believed that this lower measure based on the average of all direct comparator funds served as an estimated lower limit or "floor" for what "best efforts" ought to have achieved. Alternatively, damages based on the average of the returns of all direct comparators offered a reasonable basis for measuring damages in the event that a trial judge held that the Defendant's use of the "best efforts" statements was not indicative of a promise or representation of anything higher than the more usual "reasonable efforts" standard.

rates, and will only do so on a showing that some other measure of interest is necessary or plainly just in the circumstances. As Class Counsel had no evidence, and no reasonable prospect of securing evidence, as to what Class Members did with the proceeds of their divestments from the Can-Am Fund, a trial judge's use of much higher rates in lieu of *CJA* rate seemed very improbable. The mediator, Dennis O'Connor, indicated that securing such an increased interest rate or rate of return from our courts would require making new law and should be taken off the table.

46. All of the Plaintiff's damages estimates were based on a liability and damages period running from June 1, 2000, when the Defendant took management of the Can-Am Fund "in-house", until August 1, 2019, when the Defendant's current fund manager took responsibility for the Fund. Based on our examination of the evidence, it appeared that the Can-Am Fund performed relatively well both before and after this period.

47. Returning to the Plaintiff's estimates of maximum potential damages using the applicable *CJA* prejudgment interest rate – $13.88 million (average of top two comparators) and $11.81 million (average of all comparators) – it became clear that the Plaintiff's estimates needed downwards revision to account for various factors identified by the Defendant on the basis of information uniquely within the Defendant's possession. First, the Plaintiff's estimates were based on the total assets under management in the Can-Am Fund, while the claims of the defined Class related to a subset (albeit a significant majority) of those assets. Prior to mediation, the Plaintiff did not have information regarding the notional value of the Can-Am Fund holdings of just the Class Members. The Defendant's expert was able to incorporate the assets in question for the Class into its calculations.

48. Second, the Plaintiff's damages estimates needed to be reduced to account for "top ups" made by the Defendant to numerous Class Member unit holdings. As is the case for any investment in a Canadian segregated fund, investments in the Can-Am Fund were subject to a guaranteed return of a certain percentage of principal at policy maturity. The minimum guarantee percentage was 75%, with Class Members having the option to elect a higher 100% guarantee. The Defendant maintained, we believe correctly, that any estimate of base damages needed to be reduced by the amount of contractually required "top-up" payments that the Defendant actually made to certain Class Members. The Defendant had access to the detailed policyholder data relating to these top-ups, which the Plaintiff was not privy prior to mediation. The Defendant's expert incorporated various top-ups into its damage calculations.

49. A third issue related to the comparator funds advanced by the Plaintiff. In particular, the highest performing comparator fund used by the Plaintiff, the Empire Life U.S. Equity Index Fund, was a performance outlier. Its performance returns far outstripped those of the other comparators and even bested the returns of the S&P500 Total Return Index itself. The Empire Life fund's outperformance strongly suggested that it was invested in a manner inconsistent with the investment constraints of the Can-Am Fund and the other comparators, and the Defendant argued, with Dennis O'Connor agreeing, that it was not a true reasonable comparable fund and ought to be excluded from the damage analysis.

50. Taking into account the reduction in the assets in question for the Class, the offsets for top-ups, and a revised set of direct comparators (to exclude the Empire Life Fund), the estimated maximum hypothetical damages based on our damage period and the CJA pre-

judgment interest was reduced to:

- $11 million, if damages were based solely on the next top-performing direct comparator, the Manulife American Equity Index Fund; and
- $8.75 million if the average of the entire set of revised direct comparator was used.

The aforesaid two calculations were specifically put forward and discussed at the mediation. It is important to note that each of these estimates of maximum damages were based on the assumption that all elements of the claims in contract and tort were proven, and that all Class Members with a negligent misrepresentation claim successfully pursued those claims through the individual issues phase.

51. Put differently, the estimates of hypothetical maximum damages set out above were calculated before any discounts to reflect various risks, including the risk of:

    a. failing to establish that the "best efforts" replication statements imposed or referred to any performance standard greater than reasonable efforts;
    b. failing to establish fund mismanagement for all or part of the Class Period;
    c. failing to establish that the "best efforts" replication statement in the SIFs was a representation as to existing fact (rather than simply a statement about anticipated future performance);
    d. failing to establish that the Class interpreted the statement in the SIF as the aforesaid representation as set out in paragraph 36 above;
    e. failing to prove individual reliance, causation and damages for negligent misrepresentation at any subsequent individual issues stage; and
    f. class members failing to come forward for any individual issues phase analysis.

52. In respect of item (e) above and the issues of reliance and causation, while some case law suggests that reliance need not always be difficult to establish in certain circumstances in some class proceedings, Class Counsel was cognizant that an unknown number of Class Members might have decided to invest and stay invested in the Can-Am Fund for reasons unrelated to the Defendant's "best efforts" replication statements. For example, it was conceivable that some or many Class Members invested in the Can-Am Fund and other funds for the purpose of holding a diversified (and thus presumably lower risk) portfolio, or even as an automatic result of participating in the Defendant's Asset Decision Maker service as described above. It was also possible that many Class Members, armed with the Defendant's quarterly or other regular reports about the performance of the Can-Am Fund, and having access to public return data for comparator funds and the S&P 500 itself, simply chose to keep their money invested in the Fund. In the same vein, it was conceivable that a trial judge might conclude that Class Members, armed with these same periodic reports and other return data (and with knowledge of the allegations in this class action through notice from the settled Management Fee Overcharge certification and settlement in 2009 and notice of certification of the Best Efforts Claims in 2019), acquiesced in, or failed to mitigate, their damages by maintaining their investments for the subsequent years.

53. In respect of item (f) above, there were reasons why not more than a relatively modest percentage of Class Members with a negligent misrepresentation claim might come forward to try to establish individual reliance, causation and damages. Their individual claims may be relatively small. They may not be prepared to devote the time or accept

the risk of an adverse individual cost award necessary to see through an individual issues analysis. As I discuss immediately below, a low participation and/or success rate at an individual issues stage to establish reliance, causation and damages would dramatically reduce the total quantum of potentially recoverable damages.

54. Going into the mediation, Class Counsel did not know what proportion of estimated class damages would fall under breach of contract and what proportion under tort. During mediation, the Defendant, who had such detailed information and data, disclosed that based on the Plaintiff's damage period the great majority of Class Members' potential damages, approximately 81%, were attributable to the negligent misrepresentation claim, and only 19% to a contract claim.

55. As noted above, Class Counsel went into the mediation cognizant of the greater risks associated with the negligent misrepresentation claims and recognizing that the Defendant would likely demand, as it did in fact demand, a large discount to estimated hypothetical maximum damages in respect those claims. Similarly, the mediator recognized the greater risks with, and the need for a greater substantial discount for, the negligent misrepresentation claims.

56. Using the highest maximum damage calculation set out above (the $11 million estimate of maximum hypothetical damages based on a comparison with the best truly comparable fund (the Manulife fund)), the 81%/19% split between tort and contract claims suggested that the most reasonably likely maximum recovery at trial for breach of contract would be $2.1 million ($11 million x 0.19 = $2.09 million). In that scenario, total damages potentially available to the negligent misrepresentation Class Members would be $8.9 million.

However, we recognized that, for purposes of any mediation analysis or settlement, these estimates would in turn have to be reduced to reflect the various risks and issues noted above.

57. We applied percentage reductions to each of the claims to address the risks and challenges noted above. Applying an 80% chance that the contract claims would succeed, the quantum attributable to contract was reduced to $1.68 million ($2.1 million x 0.8 = $1.68 million). If the estimated likelihood of success for the much risker tort claims when coupled with the real risk that only a modest number of class members may pursue the case through an individual issues phase was 40%, the total quantum attributable to tort claims reduces to $3.56 million ($8.9 million x 0.40 = $3.56 million). In such a scenario, the total damages recoverable by the class would be $5.24 million (including CJA prejudgment interest compounded on a daily basis). Class Counsel believed that the percentages of success noted above were arguably still quite aggressive and generous to the Class, particularly given the risks and issues noted above. Prior to and during the mediation, we had considered scenarios where the total recovery for the class (leaving aside the risk of losing on the common issues) might reasonably be much lower.

58. At the end of the second day of the mediation, the Parties reached an agreement in principle to settle the dispute for the all-inclusive and non-reversionary sum of $7 million dollars. That amount compared favourably to potential damages of $5.3 million (or less) and seemed quite reasonable and fair to Class Counsel. The mediator indicated that he too thought that it was reasonable and fair in the circumstances.

(l) Notice of Proposed Settlement

59. By order dated September 11, 2023, a copy of which is attached to this affidavit as **Exhibit "I"**, Justice Perell approved the text of the parties' agreed upon Notice of Proposed Settlement and the methods by which that notice is to be distributed to the Class Members. Pursuant to Justice Perell's Order, the Class was notified of this proposed Settlement on October 20, 2023. Any comments from Class Members, either supporting or objecting to the proposed Settlement will be filed with the Court in advance of the hearing of the Settlement Approval Motion.

(4) KEY TERMS OF PROPOSED SETTLEMENT AND RATIONALE FOR SAME

60. On October 11, 2023, after the necessary negotiation of detailed terms, the Parties executed the proposed Settlement Agreement attached as **Exhibit "A"**. As noted, the agreement provides for the Defendant to make an all-inclusive and non-reversionary payment of CAD $7 million in settlement of the outstanding claims against it in this proceeding.

(a) Calculation of Net Settlement Sum to Be Distributed to Class Members

61. From the $7 million sum, the following deductions will be made to yield the net amount available for distribution to class members ("Net Settlement Fund"): Class Counsel's disbursements and fees, as may be approved by this Honourable Court; settlement administration expenses; any payment of taxes required by law; repayment of the Class Proceeding Fund for funded expenses; and the Class Proceedings Fund's 10% statutory levy. In respect of the administration expenses, we have obtained an estimate from the proposed administrator Epiq (which also administered the settlement of the Management

Fee Overcharge claims) inclusive of postage, in the amount of approximately $376,000 plus taxes of approximately $49,000. A redacted copy of Epiq's estimation is attached as **Exhibit "J"**.[16] I note that a significant portion of the estimated administration expenses (more than 50%) relates to mailing and postage costs for the tens of thousands of Class Members. The Plaintiff proposes to reserve from the $7 million that estimated amount ($425,000 including tax) plus a buffer of $100,000 to cover any unanticipated additional administrative costs. Class Counsel will endeavour to keep the administration costs as low as reasonably possible.

62. Were this Honourable Court to approve the above deductions and to award Class Counsel its requested 30% contingency fee, it is estimated that a Net Settlement Fund of approximately $3.36 million would be available for distribution to Class Members.[17]

(b) Key Terms of the Proposed Distribution Protocol

63. The Plaintiff proposes to distribute the Net Settlement Fund in accordance with the Distribution Protocol attached to the Settlement Agreement as Schedule A.

64. Three main premises inform the Protocol. The first premise is that individual Class Members' relative settlement entitlements (their "Individual Distribution Weightings" or "IDWs"), can be reliably calculated as the difference between the returns on their Can-Am Fund investments versus the returns of the S&P 500 Total Return Index, for the period or periods that such investments were held by each Class Member from June 1, 2000 through July 31, 2019, calculated on a daily return basis, and grossed up at the prejudgment

[16] Epiq treats its processes as proprietary and confidential and has redacted its description of same for the purpose of filing in the public court record.

[17] This assumes settlement administration expenses are limited to Epiq's estimate of $425,000, inclusive of taxes.

interests rate of 3.3% to May 3, 2023 from the earlier of their divestment from the Can-Am Fund or July 3, 2019, the end of the Plaintiff's identified damages period. The resulting IDW for each Class Member is then used to calculate each Qualifying Class Member's Relative Share of the Net Settlement Fund, as further explained below.

65. The second premise is that contract claims and negligent misrepresentation claims should be relatively weighted to reflect the greater risks and challenges associated with the tort claims, as discussed further above. The Plaintiff proposes that contract claims be given a 2:1 weighting relative to negligent misrepresentations claims or, stated differently, that the percentage recovery for the tort claims be one-half the percentage for the contract claims.

66. The third and final premise is that payment to any class member should meet or exceed a *de minimus* amount in order to: (a) avoid trivial payment amounts; and (b) maximize the ratio of payment to administrative cost of payment. As I explain below, the Plaintiff proposes to determine which Class Members qualify for payment under the settlement by applying a $50 minimum threshold to the initial calculation of Class Members' relative weighted entitlements.

67. In the Plaintiff's proposed Distribution Protocol, these three premises combine as follows to determine which Class members qualify for payment under the Settlement:

    a. The first step is to calculate the IDW (individual distribution weighting) of each Class Member. As described above, IDWs are calculated as the difference between the returns of each Class Member's Can-Am Fund investments versus the returns of the S&P 500 Total Return Index between June 1, 2000 and July 31, 2019,

and grossed up by 3.3% prejudgment interest to May 3, 2023 from the earlier of (a) the date of their divestment(s) from the Can-Am Fund or (b) July 31, 2019.

b. The second step is to apply the 2:1 weighting of contract to tort claims. To that end, each IDW attributable only to negligent misrepresentation is reduced by 50%, with all IDWs attributable to contract remaining at 100% (without reduction).

c. The third step is to express each resulting weighted IDW (both 50% and 100% weighted) as a percentage of the sum of all weighted IDWs and to multiply each resulting percentage by the quantum of the Net Settlement Fund to yield each Class Member's "Initial Settlement Allocation".

d. The fourth and final step to determine which Class Members qualify for payment under the Settlement ("Qualifying Class Members" or "QCMs") is to apply the $50 *de minimus* threshold. Every Class Member with an Initial Settlement Allocation greater than or equal to $50 is a QCM. Conversely, any Class Member with an Initial Settlement Allocation below $50 is excluded from payment under the settlement.

68. Once the set of QCMs is determined by applying the $50 threshold, each individual QCM's "Relative Share" of the Net Settlement Fund is calculated. The Relative Share is different from (greater than) the Initial Settlement Allocation because the effect of excluding Class Members falling below the $50 threshold is to increase the total settlement sum available to QCMs. The total of all Initial Settlement Allocations attributable to non-qualifying Class Members is to be redistributed to QCMs in proportion to the quantum of each QCM's Initial Settlement Allocation. Thus, the

Relative Share for each QCM equals their Initial Settlement Allocation plus their proportionate share of the redistribution.

69. All of the foregoing calculations are made on the basis of the Defendant's detailed records of the Can-Am Fund and the Class Members investments and withdrawals from that Fund. No additional information will be required from Class Members about their Can-Am Fund investments.

70. The Defendant, through its third-party consultant, NERA, has provided estimates of the total number of QCMs and various breakdown metrics regarding same. Class Counsel are advised that, assuming a $3.4 million Net Settlement Fund, 58,669 Class Members have a non-zero IDW. Of these, 14,985 have an IDW equal or greater than $50 and are QCMs. After applying the $50 threshold and the redistribution of any payments less than $50 (which would total approximately $596,000), the median Class Member payout would be $130.75 and the average payout would be $226.89. Mr Fantl's estimated compensation would be $420.51. The largest estimated compensation would be $12,942.32. The smallest estimated payment would be $60.64.

(c) First Stage Distribution

71. The Settlement Administrator will deliver notification letters ("First Stage Notification Letters") to each Class Member. The letters will be sent 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.

72. 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 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 any Residue remaining after conclusion of the First Distribution.

73. Any First Stage Payment Notification Letters and cheques returned to the Settlement Administrator will 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 the bad address resolution process does not result in the QCM in question being located, the QCM's Relative Share will remain in trust and form part of the Residue. However, if the same 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 the QCM's 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. Any such replacement cheque must be cashed by the Class Member within 30 days.

74. Any First Stage cheques 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 the cheque 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 form part of the Residue.

(d) Second Stage Distribution

75. The Residue remaining after completion of the First Stage Distribution may be used or reserved to pay any unanticipated additional Administration expenses if they unexpectedly exceed the buffer referred to above. As noted above, the amount withheld from the Net Settlement Fund for Administration expenses is based on the Administrator's estimate plus a reasonable buffer, with the hope and expectation that there will accordingly not be any additional Administration expenses. If any portion of the reserved amount for the estimated Administrator expenses plus buffer remains after all administration expenses, that remaining portion will be added to the Residue.

76. The Residue will be distributed starting 13 months following the first mailing of a First Stage Notification letter. The Residue will be distributed amongst all QCMs who chased their First Distribution cheques in proportion to the value of each QCM's cashed First Distribution cheque expressed as a percentage of all cashed First Distribution Cheques.

77. Payments pursuant to the Second Distribution may be subject to a *de minimus* payment threshold at the discretion of Class Counsel with input from the Settlement Administrator.

78. Second Distribution cheques will be mailed to the most up-to-date address of the recipient QCMs and must be cashed within 60 days, failing which the cheques will be cancelled.

Recipient QCMs will be advised of same in the letter that accompanies their Second Distribution cheque.

79. Subject to the reasonable discretion of Class Counsel, with input from the Settlement Administrator, the Parties do not anticipate a reminder program or bad address resolution process forming part of the Second Stage Distribution.

80. If any Residue funds remain after payment to QCMs and payment of all administration expenses, the Plaintiff will request that the Court approve payment of same to a charity selected by the Parties.

(e) Additional Key Terms

81. There are no appeals available from the calculation of the Relative Shares in either the First or Second Distribution.

82. At any point during settlement administration, Class Counsel shall have the discretion to move for Court Approval of any modification of the Distribution Protocol that is deemed reasonably necessary or advisable.

(5) EXPERIENCE AND RECOMMENDATION OF CLASS COUNSEL

(a) Experience of Class Counsel

83. The lawyers at Roy O'Connor with primary responsibility for this action are, in order of year of call, Peter Roy, David O'Connor, Adam Dewar and myself. We have experience prosecuting (and defending) class proceedings. Some of our plaintiff-side class actions include:

    a. *McCarthy et al. v. The Red Cross Society et al.* (Hepatitis C tainted blood

litigation)[18];

b. *Hislop v. Canada* (same-sex survivor Canadian Pension benefits)[19];

c. *Quenneville v. Volkswagen et al.* ("dieselgate" emissions scandal)[20];

d. *Fresco v. CIBC* (unpaid overtime worked by retail bank employees)[21];

e. *Fulawka v. Bank of Nova Scotia* (unpaid overtime worked by retail bank employees)[22];

f. *Bozsik v. Livingston International Inc.* (unpaid overtime worked by customs brokerage employees)[23].

(b) Recommendation of Class Counsel

84. As set out further above, Class Counsel received extensive assistance from its expert, Mr. Gerry Rocchi. Mr. Rocchi is a rare expert in the area of index fund design and management. Amongst other tasks, Mr. Rocchi assisted in analyzing various of the Defendant's productions and various other sources of relevant financial data, and provided insight and opinion regarding both the factual merits of the Claim as well as potential damages. Mr. Rocchi's expert analysis, insight and opinions have greatly assisted Class Counsel in evaluating, prosecuting and settling this case.

85. As set out further above, were the Plaintiff to succeed at trial on the breach of contract claim and secure damages based on the returns of the Manulife fund (the Can-Am Fund's highest performing true direct comparator), then the most likely recovery under contract

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[18] *McCarthy v. Canadian Red Cross Society*, 2007 CanLII 21606 (ON SC).
[19] *Canada (Attorney General) v. Hislop*, 2007 SCC 10 (CanLII).
[20] *Quenneville v. Volkswagen*, 2017 ONSC 2448 (CanLII).
[21] *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 75 (CanLII) and *Fresco v. Canadian Imperial Bank of Commerce*, 2022 ONCA 115 (CanLII)
[22] *Fulawka v. Bank of Nova Scotia*, 2014 ONSC 4743 (CanLII) and *Fulawka v. Bank of Nova Scotia*, 2016 ONSC 1576 (CanLII).
[23] *Bozsik v. Livingston*, 2019 ONSC 5340 (CanLII).

would be approximately $2.1 million, representing approximately 19% of the total $11 million in damages hypothetically available to the Class.

86. Class Members' claims for negligent misrepresentation would not be resolved at a common issues trial because each negligent misrepresentation claimant would need to prove reliance, causation and damages through a subsequent individual issues resolution procedure. As detailed above, two factors suggest that the total recovery from any such individual issues stage would likely be more modest.

87. The first factor is that, given the modest sums at stake, few Class Members would be likely to take any steps to prove reliance, causation and damages. Although Class Counsel does not have specific data about the value distribution of hypothetical damages for the negligent misrepresentation claims, a reasonable approximation can be made on the basis of existing data and related estimations. By our estimates, the maximum hypothetical average payout to Class Members would be approximately $150. The derivation of these calculations are set out in attached **Schedule "I".**

88. As noted above, experience suggests that only a relatively modest percentage of Class Members would take steps to prove individual reliance in the hopes of recovering such relatively modest sums. The disincentive to participate in an individual issue resolution process would be particularly strong if such participation involved exposure to the possibility of an adverse costs award. The Plaintiff's indemnity from the Class Proceedings Fund does not apply to any individual issues stage.

89. The second factor suggesting that the total recovery for negligent misrepresentation would likely be small, is the very real possibility that many Class Members either (a) did

not in fact rely on the Defendant's "best efforts" replication statements or else (b) could not establish damages because they could not prove that they would have acted differently or invested their money with greater returns.

90. In light of all of the issues discussed above, it is Class Counsel's opinion that the proposed settlement is fair, reasonable and in the best interests of the Class.

PART II – CLASS COUNSEL FEES

91. In Part II of my affidavit, I address the factors often considered on a class action fee approval motion.

Complexity of This Case

92. This action was of high factual complexity and moderate legal complexity. The core factual allegation – that the Defendant mismanaged the Can-Am Fund by failing to use "best efforts" – required Class Counsel to absorb technical and somewhat complex information relating to index fund management. To understand and argue the case, Class Counsel was required to develop a working understanding of various fund management operations and the factors that can influence the performance of such funds including, without limitation: the need for time-sensitive daily rebalancing of futures contract holdings in response to foreign exchange movements, fund inflows and fund redemptions, in order to avoid leverage or market under-exposure; coordinating the term-to-maturity of futures contracts and backing assets; quarterly "roll" strategies (also time sensitive) for futures contracts (selling of expiring contracts and purchase of new contracts); maximization of the yield to risk ratio in the choice of backing assets (e.g., choosing high quality, higher yield corporate commercial paper rather than lower yielding government debt

instruments).

93. As noted above, we devoted many hundreds of hours to reviewing the Defendant's productions for evidence relating to the abovementioned operations. The process of building the Plaintiff's case on the evidence was well-advanced by the time the parties engaged in the May 2023 mediation.

94. The Plaintiff's "best efforts" legal theory was moderately nuanced. Although Canadian case law contains some helpful statements to effect that a "best efforts" obligation imposes a high onus, as set out at paragraph 18 above, Class Counsel was not and is not currently aware of any case where a fund manager was found liable for breaching an obligation to use "best efforts" in the management of an investment fund. Based on answers received from the Defendant during discoveries and the position generally staked by the Defendant, Class Counsel believed that the Defendant was likely to argue at trial (a) that the "best efforts" statement was merely intended to convey to policyholders that replication of the S&P 500 was not guaranteed, and (b) that the accepted industry custom or norm is that an investment fund manager need only meet the standard of "reasonable prudence" which grants the manager broad investment discretion. As part of our preparation for litigation on the merits, we were marshalling evidence and preparing arguments to address the possibilities that the Defendant was subject to either a higher best efforts standard or a lower reasonable efforts or prudence standard.

Degree of Risk

95. It is trite but nonetheless true that class proceedings are inherently risky. Our firm and its

predecessor firms have taken on some difficult cases, both large and small, with an uncertain outcome. While we have achieved successes in some class proceedings, we have also experienced some real defeats, like many firms who practice in this area. For example, we were counsel or co-counsel in:

a. *Larcade v. The Province of Ontario* – regarding access to "special needs agreements" for thousands of profoundly disabled children whose parents were allegedly compelled to surrender custody of their disabled child to the Province in order for their child to qualify for and receive the care they needed. Certification was initially denied by Justice Cullity, then was subsequently certified by the Divisional Court, but that certification order was later overturned by the Court of Appeal[24];
b. *Williams v. AGC et al.* – a proposed class action arising from the second wave of the SARS epidemic that resisted a motion to strike before being struck by the Court of Appeal[25];
c. *McCracken v. CNR* – an unpaid overtime class action regarding the alleged misclassification of CNR workers. The action was initially certified by Justice Perell but later overturned by the Court of Appeal. Class Counsel invested millions in unrecovered fees and disbursements[26];
d. *Monckton v. Canadian Business College* – a class action on behalf of dental hygiene students who were allegedly mislead by the Defendant into believing that completion of the Defendant's program would entitle students to sit the provincial licensing examination. We incurred over $512,500 in time and disbursements before a favourable settlement for the class was reached, but requested and received less than $50,000 in fees[27]; and,
e. *Ginther v. Bell Canada et al.*, where we brought an action to the brink of

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[24] *L. (A.) v. Ontario (Minister of Community and Social Services)*, 2006 CanLII 39297 (ON CA).
[25] *Williams v. Canada (Attorney General)*, 2009 ONCA 378 (CanLII).
[26] *McCracken v. Canadian National Railway Company*, 2012 ONCA 797 (CanLII).
[27] *Monckton v. C.B.S. Interactive Multimedia*, 2012 ONSC 5227.

certification only to find, despite having invested hundreds of hours of legal time, that various facts recently disclosed by the Defendant made the case inappropriate for certification. The Court approved a without-costs discontinuance of the proceeding[28].

96. In this case, we undertook a moderately significant degree of risk. Details of the most salient risks taken are summarized here:

    a. *Certification Risk* – We were not successful in having the case fully certified at the initial certification motion. Only a small subset of the intended contract claims were certified, and we were only successful in certifying the misrepresentation claims on appeal. This action and the settlement secured for Class Members would have been significantly reduced had the misrepresentation issues been excluded from this action;

    b. *Risk on the Merits* – There was a real risk that a trial judge might reject the "best efforts" replication premise supporting the Plaintiff's claims in both contract and tort, and reject the argument that there was any poor management of the Can-Am Fund at all even if judged against industry standards. Moreover, as detailed further above, even if successful on the contract claim in its entirety, we believe the resulting damages would likely have been no more than $2.1 million. The total recovery for the negligent misrepresentation claims in an individual issues phase would likely have been modest. As also discussed above, even were the Plaintiff successful in proving the existence and breach of duty of care, there was a very good chance that only a modest number of tort Class Members would come

[28] *Ginther v. Bell Mobility Inc. et al.*, Court File No. CV-19-00631662-00CP.

forward, and for those who came forward, success in proving reliance, causation and damages may have proven quite challenging.

c. *Hours/Work Required to Date* – We carried significant fees for years. Class Counsel has devoted more than 5000 hours to the case to date. Our total unbilled fees to date are $3,348,936.45, before applicable taxes. We expect that approximately $200,000 of additional time will be required to see this settlement (if approved) through to the completion of its administration.

The Monetary Value & Importance of the Matter to the Class

97. The monetary stakes of this action for the Class as a whole were modest but real, and for some Class Members may be in the thousands of dollars. As set out further above, assuming a $3.4 million Net Settlement Fund (which is very close to Class Counsel's estimate of $3.36 million), the average payout to the proposed 14,985 Qualifying Class Members would be $226.89, with payouts ranging from $12,942.32 to $60.64.

Competence of Class Counsel

98. We have experience as Class Counsel, having acted successfully for both class action plaintiffs and defendants in numerous cases.

Results Achieved

99. In our view, this Settlement is a very fair result for the Class. Many Class Members will receive material compensation, and no Class Member need make an individual application or provide support (or risk any time or costs) for any kind of individual assessment. The total compensation obtained under this Settlement may be as much or more compensation than the Class might have seen at the end of a contested common

issues trial and potentially years of individual assessments.

Expectations of the Class as to the Amount of the Fees

100. The retainer agreement provides that Class Counsel shall be entitled to a 30% contingency fee in the event of recovery for the Class, plus the fee portion of any court awarded costs in the proceeding. I have reviewed the affidavit of Mr. Fantl sworn in support of the settlement and fee approval motion and note that he affirms the aforesaid fees terms and supports our fee request.

101. Pursuant to the notice sent when this Best Efforts Claim was certified, the Class was advised that Roy O'Connor will be paid only in the event this action is successful. The notices sent as part of this settlement approval motion indicated that Class Counsel would be seeking a 30% contingency fee plus disbursements, taxes and the CPF's levy. Any responses received from the Class Members regarding Roy O'Connor's requested fee will, of course, be filed with the Court in due course.

Opportunity Cost to Class Counsel

102. Time and resources risked on this case represent time and resources that could not be invested in either conventional paying files or other class proceedings. As set out above, Class Counsel has devoted more than 5000 hours of time amounting to more than $3.3 million in prospective fees to bring this case to settlement. That is a real investment of time and money for any firm and particularly for a smaller litigation boutique like Roy O'Connor.

Fees Requested

103. Pursuant to clauses 12 and 13 of the Retainer Agreement, Class Counsel's disbursements

("case expenses") are to be a first deduction from the gross settlement amount, with Class Counsel's 30% contingency fee then calculated on and deducted from the resulting reduced sum. As set out below, the unrecouped disbursements of counsel total $182,893.64, inclusive of taxes, which when subtracted from $7 million yields the sum of $6,817,106.36.

104. Consistent with the terms of the retainer agreement, Class Counsel request fees equal to 30% of $6,817,106.36, or $2,045,131.91. This 30% fee is in addition to the fee portions of all previous costs awards attributable to the Best Efforts Claim, which total $198,249.05, before taxes.[29] Combined, these two amounts would result in total fees of $2,243,380.96. We believe that this is fair and reasonable compensation in the circumstances, given, amongst other things, the results achieved for the Class and the fact that this sum represents less than Class Counsel's base fees.

Disbursements Incurred to Date

105. As noted above, Class Counsel has incurred unrecouped disbursements, inclusive of taxes, totaling $182,893.64 in this action. This sum is inclusive of $5,456.86 in disbursements incurred by REKO before August 22, 2007 in respect of the Best Efforts Claim (see footnote 31 further below), as well as the unrecouped disbursements attributable to the Best Efforts (replication) Claim of prior counsel – Sutts, Strosberg LLP and Camp Fiorante Matthews LLP – in the amount of $3,899.51, inclusive of taxes, which

[29] A detailed breakdown of the Plaintiff's costs awards in the action is attached as **Exhibit "K"**.

we agreed to protect when we assumed carriage of the action.[30] A summary chart of unrecouped disbursements by firm is attached as **Exhibit "L".** A detailed list of Class Counsel's unrecouped disbursements is attached as **Exhibit "M"**.

106. Class Counsel expect to incur several thousand dollars of additional disbursements through the settlement approval and implementation process.

Straight Time Incurred to Date

107. While our Retainer Agreement with Mr. Fantl provides that we will be paid 30% of the Class Members' recovery, some courts have reviewed the base time incurred on a class proceeding to confirm that the requested percentage fee is reasonable by converting the requested to fee to an implicit multiplier on base fees. As set out above, Class Counsel has unrecouped fees before taxes of $3,348,936.45, which includes $254,015.30 of previously unclaimed REKO time expended up to August 22, 2007 that was attributed to the Best Efforts Claim.[31] To this sum must be added the $44,321.00 in fees, exclusive of taxes, of previous counsel – Sutts, Strosberg LLP and Camp Fiorante Matthews LLP – whose time Class Counsel agreed to protect when we assumed carriage of this action. We intend to pay prior counsel the percentage that their fees represent of the total awarded by the

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[30] The $3,899.51 figure is calculated on 50% of total disbursements incurred by prior counsel before August 22, 2007, and thus represents the 50% of disbursements notionally attributable to the replication claim (with the remaining 50% being notionally attributable to the previously settlement management fee claim).

[31] The prospect of settling of the prior Management Fee Overcharge Claim was raised on or about August 22, 2007. The time incurred in the case thereafter through the formal settlement in 2009 was focused on that Management Fee Overcharge Claim. Prior to August 22, 2007, Class Counsel on both the Fee Overcharge Claim and the Can-Am replication or Best Efforts Claim. When the Management Fee Overcharge Claim in this action settled in 2009, Class Counsel ascribed 50% of the time and disbursements to August 22, 2007 to the fee overcharge claim and its settlement, and ascribed the remaining 50% to the Best Efforts Claim (which Class Counsel accordingly did not claim in costs or otherwise as a basis for fees in the context of the settlement of the fee overcharge claim).

Court.[32] The combined unrecouped fees of Class Counsel and previous counsel total approximately $3.4 million before taxes.

108. The tasks performed by Class Counsel to date include:

a. factual and documentary research;
b. interviewing the Plaintiff and the drafting of his affidavit in support of certification;
c. amending the claim;
d. reviewing the Defendant's certification record;
e. arguing the certification motion;
f. arguing the appeals to the Divisional Court and Court of Appeal (two appeals in the CA);
g. resisting the Defendant's request for leave to appeal to the Supreme Court of Canada;
h. overseeing the certification notice and opt-out process;
i. obtaining information from various industry participants and experts;
j. reviewing the Defendant's extensive productions;
k. conducting the written examinations for discovery of the Defendant;
l. preparing for and attending the mediation and related negotiations;
m. communicating with putative Class Members;
n. drafting the Settlement Agreement and preparing material for settlement approval;
o. drafting the Notice Program for the proposed Settlement;
p. attending various case management meetings; and,
q. retaining and instructing the proposed Settlement Administrator.

109. As noted above, Class Counsel expects to incur additional time to implement the Settlement if it is approved. Based on my experience, I estimate that we will devote an

[32] As we did with all undifferentiated REKO time and disbursements, we notionally divided previous counsel's time and disbursements incurred up to August 22, 2007 equally between the Management Fee Overcharge Claim that settled in 2009 and the Best Efforts Claim now before the Court.

additional $200,000 in time (not accounted for in the fees referred to above) to implement the Settlement.

110. If this estimated future time or fees of $200,000 is added to the actual time incurred to date of approximately $3.4 million, the fees incurred will total $3.6 million. Class Counsel's requested 30% contingency fee of $2,045,131.91 plus the retained fee potion of costs awards in the amount of $198,249.05, yield a total fee of $2,243,380.96. This total fee translates to an effective multiplier of approximately 0.60 (or 60%) on total base fees ($2.3 million ÷ ($3.6 million + approx. $0.2 million in recouped fees) = 0.59).

Payment of the Third-Party Settlement Administrator

111. As set out above, the parties have retained Epiq to act as the third-party administrator of this settlement. Epiq's fees will be paid out of the $7 million settlement fund. Epiq estimates that their fees will be approximately $425,000, inclusive of HST. As set out at paragraph 61 above, Class counsel has proposed to reserve from the $7 million fund the sum of $425,000 plus a buffer of $100,000 to cover any unanticipated additional administrative costs.

Class Proceedings Fund Repayment and Levy

112. The Plaintiff was approved for funding by the CPF. Pursuant to s. 10(1) of O. Reg. 771/92, as this action resulted in a settlement in favour of the Class, the CPF is entitled to the repayment of its funded disbursements and 10% of the amount of the award or settlement funds payable to the Class Members. An extract from the Fund's website

illustrating how its levy is to be calculated is attached to this affidavit as **Exhibit "N"**.[33] The CPF's 10% levy applies to the net settlement sum remaining after all deductions are made for Class counsel's disbursements, counsel fees, repayment of CPF covered expenses and settlement administration expenses.

113. The CPF has covered $349,877.10 of the Plaintiff's litigation expenses, inclusive of HST, the great majority of which comprised expert fees. A breakdown of CPF covered expenses in this case is attached as **Exhibit "O"**.

Expected Net Settlement Value

114. If the Court approves payment of the fees, disbursements and administration expenses set out above, the expected Net Settlement Fund available for distribution to qualifying Class Members will be as follows:

Gross Settlement Amount:	$7,000,000
less	
(Class Counsel Disbursements, incl. of HST)	($182,893.64)
equals:	$6,817,106.36
less	
(Class Counsel's Requested 30% Fee)	($2,045,131.91)
(HST on Fees)	($265,867.15)
(Expected Administration Expenses, incl. of HST):	($425,000)
(Repayment of CPF Funded Expenses):	($349,877.10)
equals:	$3,731,230.20
less	
(CPF 10% Levy):	($373,123.02)

[33] https://lawfoundation.on.ca/for-lawyers-and-paralegals/class-proceedings-fund/the-funds-entitlement-to-a-levy-and-how-it-is-calculated/.

Expected Net Settlement Fund: $3,358,107.18

SWORN BEFORE ME)
at the City of Toronto,)
in the Province of Ontario)
this 7th of November , 2023.)
)
)
)
A Commissioner for Taking Affidavits)

LSO# 75540

DEREK MCKAY

Schedule I

Estimated Maximum Average and 75th Percentile Potential Damages for Negligent Misrepresentation

a. As set out in Part I, section (3) (k) "Mediation" of this affidavit, the likely maximum total damages that might in principle be recovered were all Class Members (both contract and tort claimants) entitled to monetary compensation is an estimated $11 million. If one assumes that approximately 81% of this sum would be attributable to negligent misrepresentation, then the likely maximum possible recovery for same is approximately $8.9 million.

b. A rough estimate can be made of the distribution of hypothetical maximum damages amongst negligent misrepresentation claimants by using the same $8.9 million quantum paired with settlement payment estimates prepared by the Defendant's third-party consulate NERA. NERA's estimates assumed a $3.4 million Net Settlement Fund. Grossing up NERA's estimates by a factor of 2.618 (8.9/3.4 = 2.6176) yields a rough estimate of the maximum potential value of the negligent misrepresentation claims (assuming that the distribution of hypothetical maximum damages for contract claims and for tort claims are similar).

c. Assuming a $3.4 million total payout, NERA estimated the average value of individual potential entitlements to be $57.95, and the 75th percentile potential entitlement to be $51.37. Grossing up those estimates by a factor of 2.6176 yields the following estimates of the maximum hypothetical average and 75 percentile damage award values for negligent misrepresentation: approximately $152 and $134, respectively.

This is Exhibit "A" referred to in
the affidavit of Derek McKay,
sworn before me, this 7th day of
November, 2023

A Commissioner for Taking Affidavits.

LSO# 755440

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) ***"Releasors"*** 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 SETTLMENT 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 Releasors 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 Releasors 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
Attention: David F. O'Connor

And

E-mail: plr@royoconnor.ca
Attention: Peter L. Roy

And

E-mail: 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
Attention: Jeff Galway

And

E-mail: doug.mcleod@blakes.com
Attention: Doug McLeod

And

E-mail: 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 14th day of September, 2023.

JOSEPH FANTL

Per: _____

ivari

Per: _____

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 ___ 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-judgement 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 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-
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 • (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?

This is Exhibit "B" referred to in
the affidavit of Derek McKay,
sworn before me, this 7th day of
November, 2023

A Commissioner for Taking Affidavits.

LSO# 755440

Contingency Fee Retainer Agreement

BETWEEN:

JOSEPH FANTL

ADDRESS:

47 Fairview Blvd
Toronto, Ontario
M4K 1L8
(416) 469-0016

- and -

REKO LLP

ADDRESS:

10 Bay Street
Suite 1400
Toronto, Ontario
M5J 2R8
(416) 362-1989

The parties agree as follows:

Retainer

1. Joseph Fantl (the "Client") hereby retains, authorizes and instructs Roy Elliott Kim O'Connor LLP ("REKO"), 10 Bay Street, Suite 1400, Toronto, Ontario, M5J 2R8, to act as his solicitors, counsel, and agent with respect to an action on behalf of the Client and other members of the relevant class against Transamerica Life Canada ("TLC" or "Defendant") for claims arising out of the defendant's negligent misrepresentations and contractual breaches pertaining to the class members' investments in the Can-Am Fund, a segregated investment fund administered by the defendant, and/or other related events. (the "Class Action").

2. The Client agrees to act as class representative to bring this action on behalf of all of the class members. Subject to instructions from the Client from time to time, REKO shall prosecute the Class Action and take such steps as it may consider necessary and proper.

3. The Client and REKO have discussed options for retaining REKO other than by way of a contingency fee agreement, including retaining REKO by way of an hourly-rate retainer.

4. The Client has been advised that hourly rates may vary among solicitors and that the Client can speak with other solicitors to compare rates.

5. The Client has chosen to retain REKO by way of a contingency fee agreement.

6. The Client understands that all usual protections and controls on retainers between a solicitor and client, as defined by the Law Society of Upper Canada and the common law, apply to this contingency fee agreement.

Terms of Payment of Fees and Disbursements

7. The provisions of this agreement regarding fees and disbursements are subject to court approval as provided in s. 32(2) of the *Class Proceedings Act, 1992*, S.O. 1992, c.6 ("*CPA*"). REKO shall seek court approval as soon as reasonably possible. If the court does not approve such provisions, REKO shall not be obliged to continue to act in the Class Action.

8. REKO shall be paid its fees upon the following contingency:

   In the event the class action is successful in obtaining judgment on the common issues in favour of some or all class members or in obtaining a settlement that benefits one or more class members. The fees shall be paid by a lump sum payment or payments out of the proceeds of any judgment or order awarding damages, interest or costs to the class or any settlement which includes payments in favour of the class or a class member, or otherwise as may be directed by the court.

9. The fees shall be calculated by applying a percentage of:

   a) 30% of the amounts (including damages and interest but excluding party and party costs and disbursements), recovered by the class or class members under any judgment(s), order(s), report(s) on a reference, or settlement(s) plus the fee portion of any party and party costs obtained by REKO prior to the certification of this action as a class proceeding;

   b) 30% of the amounts (including damages and interest but excluding party and party costs and disbursements), recovered by the class or class members under any judgment(s), order(s), report(s) on a reference, or settlement(s) plus the fee portion of any party and party costs obtained by REKO after the certification of this action as a class proceeding but before a trial of this action;

c) 30% of the amounts (including damages and interest but excluding party and party costs and disbursements), recovered by the class or class members under any judgment(s), order(s), report(s) on a reference, or settlement(s) plus the fee portion of any party and party costs obtained by REKO following a trial of this action, but before any appeal; and,

d) 30% of the amounts (including damages and interest but excluding party and party costs and disbursements), recovered by the class or class members under any judgment(s), order(s), report(s) on a reference, or settlement(s) plus the fee portion of any party and party costs obtained by REKO following any appeal(s) of this action.

For the purpose of calculating the fees, the amount of recovery to which the above-referenced percentages apply, excludes any amount awarded or agreed to that is separately specified as being in respect of costs and disbursements.

10. In the event recovery is by way of a structured settlement, the contingency fee shall be calculated based on the funding amount of the structure.

11. REKO and the Client acknowledge it is difficult to estimate what the expected fee will be however the following are estimates:

    a) If the class action results in a quick settlement for the class, within 3 months after the date of this retainer, and the total amount recovered by the settlement (including damages and interest but excluding party and party costs), is $800,000, and a percentage of 30% is applied, the fee would be $240,000 plus the fee portion of any party and party costs obtained by REKO prior the certification of this action as a class proceeding.

    b) If the trial of the common issues occurs within 2 or 3 years and is decided in favour of the class and no appeals are taken, and the total amount recovered at trial (including damages and interest but excluding party and party costs), is $2,000,000, and a percentage of 30% is applied, the fee would be $600,000 plus the fee portion of any party and party costs obtained by REKO following the trial of this action.

    These estimates do not include work for any mini-hearings or other proceedings, which may be necessary for some or all class members to deal with individual issues.

12. The Contingency fee shall be calculated on any settlement or any judgment after all case expenses incurred by REKO have been deducted.

13. Case expenses are those costs incurred by REKO to prosecute the claim. Case expenses include reasonable photocopy charges, couriers, travel expenses, fees paid to agents, experts and other lawyers.

14. The Client authorizes REKO to pay case expenses to prosecute the claim as REKO deems necessary and as the Client so instructs. REKO shall pay all case expenses. The Client agrees that the firm shall be entitled to 100% recovery of these expenses from and only from moneys received from a judgment or settlement as approved by the court.

15. The Client shall not be obliged to fund any disbursements or taxes, including the GST payable on the solicitor's fees. Ultimately, if the action is successful, the disbursements and taxes, including the GST payable on the solicitor's fees, will be paid out of the proceeds of judgment or settlement.

16. The Client agrees and directs that all funds claimed by REKO for legal fees, costs, taxes and disbursements shall be paid to REKO in trust from any judgment or settlement money.

17. REKO shall not recover more in fees than the Client recovers as damages or receives by way of settlement.

Costs

18. The Client has been advised by REKO that successful litigants may be entitled to part (partial indemnity) or substantially all (substantial indemnity) of their reasonable legal fees and disbursements if successful in the litigation, including interlocutory steps, typically being entitled to substantially all of their legal fees and disbursements only in the event of misconduct or egregious conduct of the opposite party, including in the litigation.

19. Unless otherwise ordered by a judge, The Client is entitled to receive any costs contribution or award, on a partial indemnity scale or substantial indemnity scale, if the Client is the party entitled to costs.

20. If during the course of the class action the court awards costs to the Client on a motion or other proceeding and such costs are paid by the Defendant, REKO may apply such costs on account of its fees or may hold such funds in trust and apply them against disbursements.

21. The Client is responsible for paying any costs, contribution or award, on a partial indemnity scale or substantial indemnity scale, if the Client is the party liable to pay costs.

Assessment of Bill

22. The client has the right to ask the Superior Court of Justice to review and approve the solicitor's bill. For purposes of assessment, if a contingency fee agreement is not one

to which subsection 28.1(6) or 28.1(8) of the *Solicitors Act* applies, the client may apply to the Superior Court of Justice for an assessment of the solicitor's bill within 30 days after its delivery or within one year after its payment. If a contingency fee agreement is one to which subsection 28.1(6) or 28.1(8) of the *Solicitors Act* applies, the client or the solicitor may apply to the Superior Court of Justice for an assessment within six months after its delivery.

Negotiations

23. The Client hereby authorizes REKO, in their discretion, to enter into negotiations with the Defendant for the purpose of reaching a settlement. The Client understands that any settlement affecting the class is subject to approval by the court. The Client agrees and acknowledges that any negotiations are for the purpose of reaching a settlement of the claims of the class, not simply the individual claim of the Client.

24. In the event the Client chooses to settle his individual claim without settling the claims of the class, the Client expressly agrees and acknowledges that REKO is permitted to be retained by another representative of the class to continue to assert the claims on behalf of the class. In such event privileged communications between REKO and the Client made for the purpose of advancing the claims of the class and REKO's work product created for the purpose of advancing the claims of the class shall be disclosed to the new class representative and may be used on behalf of the class.

Termination

25. Either the Client or REKO may terminate this Contingency Fee Retainer Agreement at any time. If the Client terminates the solicitor client relationship before any offer to settlement has been made by any party and before a judgment, REKO is entitled to have all case expenses paid by them pursuant to this agreement constitute a charge on the file and to have a charge on the file for services rendered on the basis of services rendered at a rate of $600 per hour.

26. If REKO terminates the solicitor client relationship before any offer of settlement has been made by any party and before a judgment, REKO is entitled to have all case expenses paid by them pursuant to this agreement constitute a charge on the file. In this event, REKO is not entitled to any contingency fee or any fee based on an hourly rate for services.

27. If the Client or REKO terminate the solicitor client relationship after an offer of settlement has been made by a party or after judgment has been obtained, the Client shall pay to the firm the case expenses outstanding and the greater of the contingency fee as set forth in paragraph 9 as applied to any settlement or judgment obtained by the Client after termination, or a legal fee as set out in paragraph 25.

28. Nothing in this agreement shall be taken in any way to prevent the client from terminating this agreement with REKO or changing solicitors.

29. The Client retains the right to make all critical decisions regarding the conduct of the matter.

30. Nothing in this agreement shall be taken in any way to require REKO's consent before a claim may be abandoned, discontinued or settled at the instructions of the client.

Laws of Ontario Apply

31. This Agreement will be governed, construed, interpreted and enforced in accordance with the laws of the Province of Ontario. It is the parties' intention that all requirements of contingency fee retainer agreements be included herein and, for such purpose, the parties agree that this agreement shall be deemed to include any further requirements arising from amendments to the *Solicitors Act*, R.S.O. 1990, c. S.15 and the regulations under that act. Alternatively, the parties to this agreement agree to execute, from time to time, any amendment to this agreement for the purpose of incorporating any such further requirements into this agreement.

Division of Fees

32. The Client consents to the reasonable splitting of fees between lawyers who are not part of REKO, provided that the fees are divided in proportion to the work done and the responsibilities assumed.

Carriage of Lawsuit

33. The Client acknowledges that REKO is incurring a significant financial risk in agreeing to be paid only in the event the action is successful and that REKO is doing so on the basis that they will have carriage of the lawsuit.

Successor of Lawsuit

34. In the event that REKO dissolves or is terminated, this agreement shall apply to successor law firms, as designated by the partners of REKO.

Disagreement regarding Settlement

35. If (a) the Defendant makes an offer to settle the claims of the class, (b) REKO considers the proposed settlement to be in the best interests of the class, (c) REKO recommends

acceptance of such offer to the Client, and (d) the Client does not consider the proposed settlement to be acceptable, then REKO is hereby irrevocably authorized to conditionally accept the Defendant's offer. The condition of acceptance shall be a ruling by the court that the proposed settlement is in the best interests of the class and on the motion for such court approval an affidavit fully disclosing the Client's concerns about the proposed settlement shall be filed with the court.

Confidentiality

36. The Client acknowledges being advised that the communications between REKO and the Client relating to the claims of the class are legally privileged but that such privilege may be lost if the Client was to disclose such information to third persons and that the interests of the class could thereby be adversely affected. The Client agrees to protect the confidentiality of such information and to discuss the matter with REKO prior to disclosing such information to any third person.

Client to Act in Best Interests of the Class

37. The Client acknowledges the obligation to act in the best interests of the Class and that REKO is not obliged to follow instructions from the Client which are not in the best interests of the class.

38. The Client authorizes REKO to bring a motion, or motions, *ex parte* the defendant, to take directions from the court if REKO believes that the Client is not acting in the best interests of the class. The Client consents to any such motion and the release and disclosure by REKO of any potentially privileged information to the Court to aid in any such motion.

Class Representative's Fee

39. In the event the class action is successful, REKO shall request that the court award the Client compensation on a quantum meruit basis for the time spent by the Client as class representative. It is acknowledged that such compensation is not automatic and is entirely within the discretion of the court.

Severability

40. In the event that any particular provision or provisions or a part of one in this agreement is found to be void, voidable, or unenforceable for any reason whatever, then the particular provision or provisions or part of the provision shall be deemed severed from the remainder of this agreement and all other provisions shall remain in force.

Arbitration

41. The Client hereby agrees that any dispute between the parties of this agreement, arising from this agreement, shall be determined by a single arbitrator to be mutually agreed and that the *Arbitration Act, 1991*, S.O. 1991, c. 17 shall apply.

42. In the event it is necessary or prudent to take steps in the lawsuit (e.g. filing a notice of appeal) before the arbitration has resolved the dispute, REKO shall take such steps as it considers being in the best interests of the class.

Entire Agreement

43. It is agreed there is no representation, warranty, collateral agreement, or condition affecting this agreement except as expressed in it.

Execution in Counterpart

44. This agreement may be executed in counterpart.

DATED at Toronto, in the Province of Ontario this 16 day of May, 2006

Witness

JOSEPH FANTL

Witness

REKO LLP

This is Exhibit "C" referred to in
the affidavit of Derek McKay,
sworn before me, this 7th day of
November, 2023

A Commissioner for Taking Affidavits.

LSO# 755440

REO Law
Roy · Elliott · O'Connor LLP
BARRISTERS

Peter L. Roy
Direct line: 416-350-2488
Email: plr@reolaw.ca

July 15, 2009

Mr. Joseph Fantl
561 Avenue Road, Suite 801
Toronto, Ontario
M4V 2J8

RE: Fantl v. Transamerica Life Canada
Court File # 06-CV-306061-CP

Dear Mr. Fantl:

In February, 2006, you retained Roy Elliott Kim O'Connor LLP (REKO) to represent you as the proposed representative plaintiff in a class proceeding against Transamerica Life Canada. A written agreement setting out the terms of your retainer of REKO was executed by yourself and REKO on May 16, 2006.

As you knew, the retainer agreement contained the following provision:

> 34. In the event that REKO dissolves or is terminated, this agreement shall apply to successor law firms, as designated by the partners of REKO.

On December 31, 2007, REKO dissolved. On January 4, 2008, I wrote to you to advise you of the dissolution of REKO and the formation of Roy Elliott O'Connor LLP (REO), and to seek your instructions regarding your representation in the above captioned matter. On January 5, 2008, you wrote to me to indicate that you wished to retain REO to continue to represent you.

Subsequently, and upon your instructions, an amended Statement of Claim in the above captioned matter was prepared and later issued to, *inter alia*, include claims with respect to 27 additional funds, and we engaged in settlement discussions with the Defendant.

I am writing to confirm our mutual understanding and agreement that your retainer of REO was intended to be, and is, on the same terms and conditions as set out in the retainer agreement you entered into with REKO on May 16, 2006 and that these terms and conditions apply to the expanded claim reflected in the amended Statement of Claim. I am also writing to confirm that the reference to recovery by the "Client" in paragraph 17 of the retainer agreement is meant to refer to the total amount recovered by all members of the "Class".

REO *Law*

Kindly sign and return to me a copy of this letter to indicate your agreement with its contents.

Yours truly,

REO LLP

Peter L. Roy

I confirm that the contents of this letter sets out accurately the terms and conditions of my retainer of Roy Elliott O'Connor LLP.

Date: July 15, 2009

Joseph Fantl

Witness

This is Exhibit "D" referred to in
the affidavit of Derek McKay,
sworn before me, this 7th day of
November, 2023

A Commissioner for Taking Affidavits.

LSO # 755440

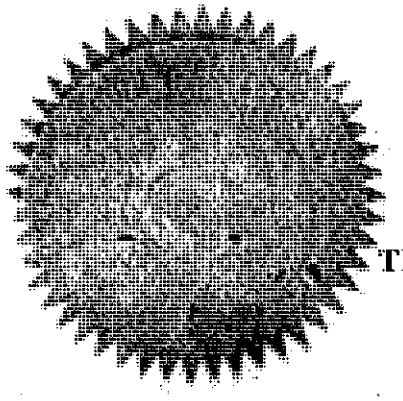
File No.:06-CV-306061CP

ONTARIO

SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	THURSDAY, THE 18TH
	)	
MR. JUSTICE PERELL	)	DAY OF APRIL, 2013

B E T W E E N:



JOSEPH FANTL

Plaintiff /Moving Party

- and -

TRANSAMERICA LIFE CANADA

Defendant /Respondent

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

O R D E R

THIS MOTION by the Plaintiff/Moving Party Joseph Fantl ("Plaintiff") for an Order certifiying 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 3 0 2013

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

Perell, J

JOSEPH FANTL

Plaintiff

- and -

TRANSAMERICA LIFE CANADA

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, 23rd Floor
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David F. O'Connor (LSUC No. 33411E)
J. Adam Dewar (LSUC No. 46591J)

Tel: (416) 362-1989
Fax: (416) 362-6204

Solicitors for the Plaintiff

Divisional Court File No. 395/13

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

THE HONOURABLE JUSTICE SACHS	)	MONDAY, THE 9TH
THE HONOURABLE JUSTICE CORBETT	)	
THE HONOURABLE JUSTICE GILMORE	)	DAY OF MARCH, 2015
	)	
	)	

B E T W E E N:

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.

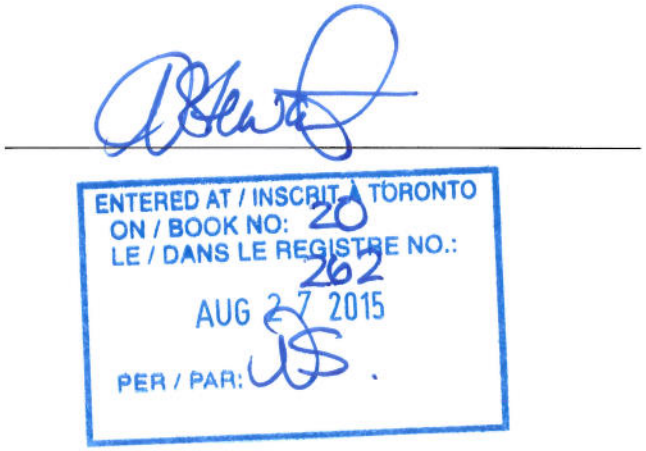
2. THIS COURT ORDERS that paragraph 2 of the Certification Order be varied to read as follows:

> **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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Toronto ON M5H 1T1

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Tel: 416-863-2705
Fax: 416-863-2653
doug.mcleod@blakes.com

Lawyers for the defendant/respondent,
Transamerica Life Canada

This is Exhibit "E" referred to in
the affidavit of Derek McKay,
sworn before me, this 7th day of
November, 2023

A Commissioner for Taking Affidavits.

LSO# 755440

AMENDED THIS NOV 2 7 2017 PURSUANT TO
MODIFIÉ CE CONFORMÉMENT À
☑ RULE/LA RÈGLE 26.02 ("C")
☑ THE ORDER OF Mr. JUSTICE PERELL
L'ORDONNANCE DU
DATED / FAIT LE 27-NOV-2017

Conrad Diamante
REGISTRAR GREFFIER
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

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*

THIRD FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

If you wish to defend this proceeding but are unable to pay legal fees, legal aid may be available to you by contacting a local Legal Aid office.

IF YOU PAY THE PLAINTIFF'S CLAIM and $500.00 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the Plaintiff's claim and $100.00 for costs and have the costs assessed by the court.

Date: December 29, 2003

Issued by: _____
Local Registrar

Ontario Superior Court of Justice
393 University Ave.
10th Floor
Toronto, Ontario
M5G 1E6

TO: **BLAKES, CASSELS & GRAYDON LLP**
Barristers & Solicitors
Box 25, Commerce Court West,
Toronto, ON M5L 1A9

Jeff Galway
Tel: 416-863-3859
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Solicitors for the Defendant

CLAIM

1. The Representative Plaintiff claims on behalf of himself and the other members of the Class (as defined below):

    a. a declaration that it was an express term of the Transamerica Funds Contracts (as defined below), under which the Can-Am Fund was an available investment option, that the defendant would make its "best effort" to ensure that the Can-Am Fund replicated the performance of the S&P 500 Total Return Index in Canadian dollars;

    b. a declaration that the defendant breached each Transamerica Funds Contract under which the Can-Am Fund was an available investment option by failing to make its best effort to ensure that the Can-Am Fund replicated the performance of the S&P 500 Total Return Index;

    c. further, or in the alternative, a declaration that the defendant made negligent misrepresentations about the Transamerica Funds Contracts, including negligent misrepresentations of material terms of the Transamerica Funds Contracts relating to the replication of the S&P Total Return Index by the Can-Am Fund;

    d. a declaration that the doctrine of waiver of tort is available to the Class Members and applies or is satisfied in the circumstances of this case;

    e. general damages in the sum of $500,000,000, or such other sum as this Honourable Court finds appropriate;

f. an accounting of the defendant's revenues or profits and an order directing disgorgement of same in favour of the Class Members;

g. an order directing a reference or giving such other directions as may be necessary to determine issues not determined at the trial of the common issues;

h. pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

i. costs of the action on a substantial indemnity basis including any applicable Goods and Services Tax; and,

j. such further and other relief as to this Honourable court may seem just.

Nature of this Action

2. The defendant, and/or its corporate predecessors, offered a number of contracts under which persons beneficially or notionally invested in units of, or which contracts otherwise provided benefits based upon the value of, a number of segregated funds (collectively, the "Transamerica Funds") including, but not limited to the Can-Am Fund. This class action ~~also~~ concerns the Can-Am Fund, one of the Transamerica Funds, which was designed by the defendant to synthesize or replicate the performance of the S&P 500 Total Return Index. The defendant was variously contractually obligated to make its "best effort" to ensure that the Can-Am Fund replicated the performance of the S&P 500 Total Return Index, and made representations relating to its efforts to ensure such replication. The defendant failed to make its "best effort" to ensure that the Can-Am Fund replicated the performance of the S&P Total Return Index and that the Can-Am Fund in fact failed to replicate the S&P 500 Total Return Index.

3. This Third Fresh as Amended Statement of Claim is being filed so that the content of the Claim accords with, and takes into account:

    a. the prior settlement of the management fee aspects of this case which were settled by Order of the Honourable Justice Perell dated August 10, 2009;

    b. the Order of the Honourable Justice Perell dated April 18, 2013 that certified this action with respect to the claim for breach of contract;

    c. the Order of the Divisional Court for Ontario dated March 9, 2015 that varied the April 18, 2013 Order of Justice Perell, certified the claims for negligent misrepresentation, added common issues and expanded the certified class definition in that regard (the Order of Justice Perell dated April 18, 2013 as varied by the Order of the Divisional Court dated March 9, 2015 is hereinafter referred to as the "Certification Order); and,

    d. the fact that on July 31, 2015 the defendant, Transamerica Life Canada, was acquired by Wilton Re and subsequently changed its name to "ivari".

The Representative Plaintiff & the Certified Class

4. The Plaintiff, Joseph Fantl ("Fantl"), is an individual who resides in Toronto, Ontario. At all relevant times, he was the beneficial owner of units in the Can-Am Fund.

5. The Class as defined in the Certification Order is comprised of :

    a. in respect of the claim for breach of express terms of contract and related relief as set out herein,

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

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).

The Defendant

6. Transamerica Life Canada ("Transamerica" or the "defendant") is an insurance company licensed to do business throughout Canada, which is incorporated under the laws of Canada and has its head office at Toronto, Ontario. On July 31, 2015 Transamerica Life Canada was acquired by Wilton Re and subsequently changed its name to "ivari. " The defendant continues to be referred to herein as "Transamerica" or the "defendant."

7. Transamerica was created on or about December 31, 2000, upon the amalgamation of NN Life Insurance Company of Canada ("NN") and Transamerica Life Insurance Company of Canada ("TLIC"), insurance companies which were licensed to do business throughout Canada at all relevant times and had their head offices located in Don Mills, Ontario and Toronto, Ontario, respectively.

8. Transamerica and its predecessors, for whom Transamerica is at law responsible, marketed, promoted, administered, managed and sold units of the Transamerica Funds throughout Canada.

The Transamerica Funds, the Transamerica Funds Contracts and the Summary Information Folder

9. The Transamerica Funds constituted "segregated funds" in that, in relevant part, the holdings in each fund were kept separate from the defendant's general assets.

10. Transamerica and its predecessors offered the Transamerica Funds as investment options under various contracts including, but not necessarily limited to, variable deferred annuity contracts, universal life contracts and policies referred to by the defendant as the NN Asset Accumulation Plan, or NAAP, and the Equity Linked Annuity Policy, or ELAP (collectively, the "Transamerica Funds Contracts").

11. Each Class Member was required to enter into a Transamerica Funds Contract with the defendant in order to invest in the Transamerica Funds. The Plaintiff and the other Class Members could not negotiate any terms of the Transamerica Funds Contracts.

12. The Plaintiff pleads that each Transamerica Funds Contract was comprised of the following documents:

    a. Policy Form, including endorsements and riders attached thereto at the issue date (collectively, the "Policy Form");

    b. Application; and,

    c. Notice of Confirmation.

13. The Plaintiff pleads that the defendant required that a Summary Information Folder (also referred to as an Information Folder) be delivered to every Class Member as part of, or a precondition to, entering into a Transamerica Funds Contract. Each Class Member did in fact receive a Summary Information Folder. Moreover, the defendant required each Class Member to sign and remit a form acknowledging receipt of the Summary Information Folder before any Transamerica Funds Contract would be entered into. Each

Class Member did sign and remit the acknowledgement form. The Class Members could not negotiate any of the terms of the Summary Information Folders.

14. The Plaintiff further pleads that each Summary Information Folder contains a statement signed by one or more executive representatives of the defendant that, or to the effect that, the Summary Information Folder "provides brief and plain disclosure of all materials facts relating to the contract evidenced by the Policy."

15. The Plaintiff asserts that the Summary Information Folders are fundamental to the Transamerica Funds Contracts and to the overall context and interpretation of the contractual obligations between the Class Members and the defendant.

The Can-Am Fund

16. On or about October 1, 1992, NN established the Can-Am Fund to deliver S&P 500 Index performance in Canadian dollars on a day-to-day basis to interested customers. The S&P 500 Index is an index consisting of 500 U.S.-based common stocks chosen for market size, liquidity and industry group representation, among other factors. The S&P 500 Index is designed to be a leading indicator of U.S. equities.

17. The Can-Am Fund was established as a fund segregated from NN's general assets and invested Canadian dollars, which were to be fully hedged against currency fluctuation. It was established as a synthetic fund designed to replicate the performance of the S&P 500 Total Return Index.

18. Every Summary Information Folder associated with the Can-Am Fund expressly provided that the Can-Am Fund, on a best effort basis by the defendant, would replicate the performance of the S&P 500 Total Return Index. In addition, various Policy Forms

(i.e. Transamerica Funds Contracts) expressly provided that the Can-Am Fund, on a best effort basis, would replicate the performance of the S&P 500 Total Return Index.

19. The Plaintiff pleads that it was an express term of the Transamerica Funds Contracts under which the Can-Am Fund was an available investment option that the defendant would make its best efforts to ensure that the Can-Am Fund replicated the performance of the S&P 500 Total Return Index.

Fantl's Transamerica Funds Purchases

20. On or about July 4, 1996, Fantl invested $90,706.05 under the defendant's Investment Manager Series III Variable Deferred Annuity Policy as follows:

30.000%	Can-Am Fund
30.000%	Balanced Fund (later renamed the Asset Allocation Fund)
20.000%	Dividend Fund
5.000%	Elite Fund
15.000%	Can-Euro Fund

21. On or about March 5, 1999, Fantl redeemed all of his units in the Elite Fund and the Dividend Fund, and portions of his units in the Can-Am Fund and the Can-Euro Fund. He reinvested the proceeds in units of the Can-Daq 100 Fund and the CDN Communication Fund.

22. On or about February 8, 2000, Fantl redeemed all of his units in the Balanced Fund (Asset Allocation Fund) and portions of his units in the Can-Daq 100 Fund and the CDN Communication Fund. He reinvested the proceeds in units of the Can-Am Fund, the Can-Euro Fund and the CDN Resources Fund.

23. On or about August 22, 2001, Fantl redeemed all of his investments with the defendant.

24. Prior to entering into his Transamerica Funds Contract, Fantl received a Summary Information Folder and executed and remitted the acknowledgement form attached to it. Fantl's Summary Information Folder stated, amongst other things, that the Can-Am Fund, "on a best effort basis, will replicate the performance of the S&P 500 Total Return Index".

25. The defendant breached terms of the Transamerica Fund Contracts, by failing to make its best effort to ensure that the Can-Am Fund replicated the S&P 500 Total Return Index and the performance of the Can-Am Fund at all material times consistently fell below the performance of that Index.

Negligent Misrepresentation

26. The best efforts replication statements as contained in the Summary Information Folders as referred to above (collectively, the "Statements") constituted or amounted to negligent misrepresentations (express or implied), which included, but are not limited to, the following:

    a. a misrepresentation that the defendant had an objectively reasonable, reliable, considered and sufficient basis for the Statements, and an honest and reasonable belief in, and an honest and reasonable intent to achieve or effect, same; and

b. a misrepresentation that the Statements were in fact material terms of the Transamerica Funds Contracts because the Folders purported to disclose or summarize the material facts or terms of the Transamerica Funds Contracts.

27. Fantl and the other Class Members received, read and reasonably relied to their detriment upon the aforesaid representations. They were induced to enter into the Transamerica Funds Contracts by the aforesaid representations, and maintained their investments in Transamerica Funds in reliance on same.

28. The defendant made the aforesaid representations knowing that the Plaintiff and other Class Members would reasonably rely on such representations and that such representations would induce, or would naturally tend to induce, the Plaintiff and other Class Members to purchase and retain units of the Transamerica Funds.

29. The representations were untrue, inaccurate and misleading.

30. At all relevant times, the defendant possessed special expertise, information and knowledge with respect to the Transamerica Funds including in particular the Can-Am Fund, and the defendant's design, management and efforts in relation to the Transamerica Funds, again including in particular the Can-Am Fund. It was reasonably foreseeable that the Plaintiff and other Class Members would rely on the defendant's expertise, information and knowledge. The defendant owed, and breached, a duty of care to the Plaintiff and other Class Members.

Waiver of Tort

31. The Plaintiff further pleads and relies on the doctrine of waiver of tort.

32. Without limiting the remedies of the Class Members, the Plaintiff pleads that the Class Members are entitled an accounting by the defendant and disgorgement of the defendant's revenues, profits or returns.

Damages Suffered by Fantl and the Members of the Class

33. Fantl and each Class Member have suffered damages and loss as a result of Transamerica's conduct, breaches of contract and misrepresentations, all as aforesaid.

34. Fantl and the other Class Members also claim, as damages or costs, the costs of distributing the recovery in this action.

Statutes

35. The Plaintiff pleads and relies upon the *Class Proceedings Act, 1992*, S.O. 1992, c.6, and the *Courts of Justice Act*, R.S.O. 1990, c.C-43.

The Plaintiff proposes that this action be tried at the City of Toronto, in the Province of Ontario.

December 29, 2003

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JOSEPH FANTL

Plaintiff

- and -

ivari

Defendant

Court File No. 06-CV-306061-CP

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at Toronto

THIRD FRESH AS AMENDED STATEMENT OF CLAIM

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Solicitors for the Plaintiff

This is Exhibit "F" referred to in
the affidavit of Derek McKay,
sworn before me, this 7th day of
November, 2023

A Commissioner for Taking Affidavits.

LSO# 755440

Court File No. 06-CV-306061-CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

JOSEPH FANTL

Plaintiff

- and –

ivari

Defendant

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF DEFENCE

1. Except as hereinafter expressly pleaded to the contrary, the defendant ivari (referred to herein as "Transamerica") admits the allegations contained in paragraphs 5, 6, 7, and 20 to 23 of the Third Fresh as Amended Statement of Claim.

2. Transamerica has no knowledge in respect of the allegations contained in paragraphs 3 and 4 of the Third Fresh as Amended Statement of Claim.

3. Except as hereinafter expressly admitted, Transamerica denies the balance of the allegations in the Third Fresh as Amended Statement of Claim. Transamerica expressly denies that the representative plaintiff or any class members are entitled to the relief claimed in paragraph 1 of the Third Fresh as Amended Statement of Claim.

The Defendant

4. Transamerica is a Canadian life insurance company and a successor of NN Life Insurance Company of Canada ("NN Life"), which carries on the business of the sale of life insurance, segregated funds and other investment products across Canada. On April 13, 2000, TA Financial Inc., a member of the Aegon N.V. group of companies, purchased the shares of NN Life from ING Canada Inc. NN Life was subsequently amalgamated on December 31, 2000 with Transamerica Life Insurance Company of Canada to become Transamerica Life Canada. On July 31, 2015, Wilton Re Ltd. purchased the shares of Transamerica Life Canada. On October 26, 2015, Transamerica Life Canada changed its name to ivari, in English and French.

The Representative Plaintiff

5. Joseph Fantl, the representative plaintiff, is a retired litigation lawyer who was a policyholder of Transamerica. In June 1996, Mr. Fantl applied to NN Life for a type of variable deferred annuity policy known as an Investment Manager Series III ("IMS III") policy. Mr. Fantl's IMS III policy was issued to him on July 4, 1996. One of several investments selected by Mr. Fantl in his application for an IMS IIII policy was a segregated fund known as the Can-Am Fund. Mr. Fantl eventually surrendered his IMS III policy in August 2001. This action concerns the Can-Am Fund.

The Can-Am Fund

6. The Can-Am Fund is a segregated fund investment option. It was initially offered for sale in or about October 1992. During the period it was open to new investment, the

Can-Am Fund was made available under various insurance products developed and sold by NN Life and later Transamerica, as outlined below.

7. Commencing in March 2001, the Can-Am Fund was no longer offered for sale under new variable deferred annuity policies and was closed to new investment except for policyholders who had pre-authorized payment plans who were permitted to continue to invest in the fund. The fund was fully closed to investment by IMS II and III policyholders in November 2013, at which time existing policyholders were transferred out of the Can-Am Fund altogether.

8. The Can-Am Fund remains in existence, but the remaining Can-Am Fund holdings are now restricted to the variable investment option of certain legacy life insurance policies (discussed further below).

Structure of the Can-Am Fund

9. The investments of the Can-Am Fund consist primarily of short-term Canadian treasury bills ("T-bills") and Standard & Poor's 500 Index futures contracts ("S&P 500 futures contracts"). Funds which use T-bills and derivatives to replicate an underlying index are known as synthetic funds.

10. The Can-Am Fund's U.S. dollar-denominated S&P 500 futures contracts are bought on margin, continuously "rolled forward" and replaced with new contracts prior to their expiry. The interest income earned on the T-bills and, where applicable, money market instruments, together with the gains or losses experienced by the S&P 500 futures contracts, determines the Can-Am Fund's gross returns. The consistently stated

investment objective or goal of the Can-Am Fund since its inception is the long term accumulation of capital through appreciation and investment of net income.

11. The Can-Am Fund was RRSP eligible. While it provided exposure to U.S. equity markets through its S&P 500 futures contracts, the predominant asset of the Can-Am Fund, the Canadian T-bills, earned interest in Canadian dollars. The S&P 500 futures contracts were marked to market daily and any gains or losses were settled with the broker and converted to Canadian dollars daily. Because the Can-Am Fund held Canadian T-bills and at times money market instruments, earned interest in Canadian dollars and converted any settlements of gains or losses on the futures contracts daily to Canadian dollars, it had limited currency exposure. Investment funds with this characteristic are referred to as currency neutral and the Can-Am Fund was marketed as such.

12. The Can-Am Fund was subject to several risk factors. The policy forms, summary information folders and information folders contained specific statements regarding these risk factors and their potential effect on the value of the investment. In particular, the policy forms, summary information folders and information folders contained statements warning investors that the annuity payments and values provided by the policies, where based on the investment experience of the segregated funds supporting the policies, were not guaranteed as to dollar amount.

Performance of the Can-Am Fund

13. Transamerica denies that the Can-Am Fund did not perform in accordance with its stated investment objectives. To the extent that the returns of the Can-Am Fund varied

from the S&P 500 Total Return Index, which Transamerica expressly denies, Transamerica states that such variance (or tracking error, as it is sometimes called) was due to a number of factors which were part of the investment risk assumed by any policyholder who selected the Can-Am Fund as an investment under their policy. These factors included, without limitation:

(a) The Can-Am Fund was designed to be currency neutral;

(b) The Can-Am Fund held derivatives, such as futures contracts, and factors such as the pricing mechanism and the provisions of the futures contracts and index volatility could cause returns on futures contracts to differ from the returns of the underlying index;

(c) The Can-Am Fund held Canadian T-bills whose interest rates varied relative to US interest rates on similar instruments;

(d) Shifts and variations between Canadian and US currency rates;

(e) Low interest rates on T-bills and money market funds;

(f) Volatility in equity and derivatives markets, including but not limited to severe volatility arising out of the financial crisis of the mid-2000s;

(g) Revenue differentials, such as dividends and other distributions, which differed between the fund and the underlying benchmark;

(h) Daily deduction of contractually permitted management fees and other expenses ("MER") from the gross return of the fund;

(i) The inability of the fund to remain fully invested, particularly during periods of net withdrawals from the fund;

(j) Changes in the minimum denomination of futures contracts resulting in a larger amount of residual non-invested cash holdings or cash drag; and

(k) Non-synchronous transactions in the benchmark stocks and synthetic fund holdings.

Investment Management of the Can-Am Fund

14. Transamerica states that the Can-Am Fund was initially developed by Newcastle Capital Management Inc. ("Newcastle", later known as Northwater Capital Management Inc.) and utilized an investment composition intended originally to make the fund eligible as an RRSP investment under the then-existing foreign content restrictions. Newcastle was the investment manager of the Can-Am Fund from its initial launch in or about October 1992 until January 1, 1999. Thereafter, the Can-Am Fund was managed over time by other investment managers, including ING Investment Management Inc., Transamerica's Canadian investment management team, AEGON Capital Management Inc., and the current manager Foresters Capital Management Inc.

15. Transamerica states that at all material times it retained competent, experienced and responsible investment managers who managed the fund in accordance with accepted industry standards and the fund's stated investment objectives.

Variable Life Insurance Contracts and the CLHIA Guidelines

16. A contract of life insurance issued by an insurance company licensed under the *Insurance Act*, R.S.O. 1990, c. I. 8 (the "*Insurance Act*") is an exempt security under the Ontario *Securities Act*, R.S.O. 1990, c. S.5 and comparable legislation in other Canadian jurisdictions. Contracts of life insurance and segregated funds, including the Can-Am Fund, are regulated in Ontario under the *Insurance Act*. Section 110 of the *Insurance Act* deals with variable life insurance contracts and the disclosure requirements applicable to such contracts. A "variable insurance contract" is defined in subsection 110(1) as:

> ...an annuity or life insurance contract for which the reserves or a part thereof vary in amount with the market value of a specified group of assets held in a separate and distinct fund and includes a provision in a life insurance contract under which policy dividends or policy proceeds may be retained for investment in such a fund.

17. In Ontario, insurers are required to file with the Superintendent of Insurance a specimen form of a variable insurance contract, an information folder pertaining thereto and other material prescribed under the regulations and to obtain a receipt from the Superintendent before an insurer may issue a variable insurance contract. Subsection 110(4) of the *Insurance Act* states that the information folder:

> ...shall provide brief and plain disclosure of all material facts relating to the variable insurance contract and shall contain a certificate to that effect signed by the chief executive officer and the chief financial officer of the insurer or such other persons as the regulations may prescribe.

18. The contents of an information folder are prescribed in guidelines issued by the Canadian Life and Health Insurance Association ("CLHIA") which have been adopted by regulation in Ontario and other jurisdictions. The CLHIA guidelines, which have evolved over the years, require that a prospective policyholder receive a pre-contractual disclosure document now known as an information folder before signing an application for an individual variable insurance contract. Prior to 1997, the CLHIA guidelines required that an insurer provide to a prospective purchaser of a variable insurance contract a document called a "summary information folder". Commencing in October 1997, prospective policyholders were provided with a document known as an "information folder" which contained the pre-contractual disclosure mandated by the *CLHIA Guidelines on Individual Variable Insurance Contracts Relating to Segregated Funds*, O. Reg. 132/97, as am. O. Reg. 481/01 (the "1997 CLHIA Guidelines").

19. The 1997 CLHIA Guidelines remained in effect until January 1, 2002, when they were amended, and are the relevant guidelines applicable to the information folders received by class members.

Insurance Products Offering the Can-Am Fund

20. A segregated fund is a separate and distinct fund maintained by an insurer in respect of which the non-guaranteed benefits of an individual variable insurance contract are provided. Because it was a segregated fund, the Can-Am Fund was not a free standing investment and could not be purchased directly like a security or mutual fund.

The Can-Am Fund[1] was only available as an investment option under a variable deferred annuity policy or under the variable investment option, if any, of a universal life insurance policy.

21. The relevant insurance contracts offering the Can-Am Fund were complex and had unique features that differentiated them from direct investments in mutual funds, including guarantees of the policyholder's invested principal at death and maturity (net of withdrawals). The guarantees were a material consideration for policyholders in selecting an insurance contract as opposed to purchasing a mutual fund, particularly for those policyholders who elected to pay an additional fee for the 100% guarantee offered in conjunction with certain of the insurance contracts. These and many other unique features of the insurance contracts made them complex instruments that typically had to be explained to potential investors by the life licensed independent advisors selling the contracts of insurance.

Can-Am Fund Description and Investment Objectives

22. The Can-Am Fund was offered as an investment option under three main types of insurance products: (1) the Investment Manager Series ("IMS") Variable Deferred Annuity Policy ("IMS II" and "IMS III"), (2) the NN Registered Retirement Income Fund ("IMS RRIF") variable deferred annuity contracts, and (3) as a variable investment option

[1] The Can-Am Fund was one of a larger group of segregated funds originally offered by NN Life which also included the American Asset Allocation Fund, American Equity Index Fund, Asset Allocation Fund (also known as the Balanced Fund), Bond Fund, Canadian 35 Index Fund, Canadian Communications Fund, Canadian Financial Services Fund, Canadian Growth Fund, Canadian Resources Fund, Canadian Small Cap Fund, Can-Asian Fund, Can-Daq 100 Fund (also known as the Can-Daq Fund), Can-Emerge Fund, Can-Euro Fund, Can-Global Bond Fund, Dividend Fund, Equity Fund, European Equity Index Fund, 5 Year Pooled Fund, Global Fund, Information Technology Fund, International Bond Index Fund, International Brands Fund, Mid Term Bond Fund, Money Market Fund, NN Elite Fund (also known as the Elite Fund and Global Market Neutral Fund) and T-Bill Fund (the foregoing funds and the Can-Am Fund are collectively referred to herein as the "NN Life Funds").

under specific life insurance products known as Challenger, Achiever Plus, Endeavour, Discovery 2000, Omnilife and the NN Asset Accumulation Plan ("NAAP").

23. As outlined below, during the time period in question, the contracts of insurance offering the Can-Am Fund included variations in the wording found under the heading "Fund Descriptions and Investment Objectives" in connection with the Can-Am Fund.

(a) IMS II

24. The Can-Am Fund was offered in conjunction with the IMS II policy between October 1992 and November 1994. There is no reference to replication whatsoever in the IMS II policy forms or its related summary information folders and IMS II policyholders are therefore not part of the class.

(b) IMS III

(i) Policy Forms

25. The replication language in the IMS III policy forms only appears in the policies issued during the period of November 1994 to October 1997. The IMS III policy forms issued during the period November 1994 to October 1996 (with revision dates 11/94, 02/95 and 09/95) stated the following concerning the Can-Am Fund:

> Investments include Canadian Treasury Bills and Standard and Poor's 500 Stock Index Futures Contracts, (and, when necessary, other derivative products), which together, on a best effort basis, will replicate the performance of the S&P 500 Total Return Index. The investment objective of this fund is long-term accumulation of capital through appreciation and reinvestment of net income.

26. The IMS III policy forms issued during the period November 1996 to October 1997 (with revision date 11/96) stated the following concerning the Can-Am Fund:

> Investments include Canadian Treasury Bills, high quality short term money market instruments and Standard and Poor's 500 Stock Index Futures Contracts, (and, when necessary, other derivative products), which together, on a best effort basis, will replicate the performance of the S&P 500 Total Return Index. The investment objective of this fund is long-term accumulation of capital through appreciation and reinvestment of net income.

27. Commencing with the 10/97 IMS III policy form and in all subsequent IMS III policy forms up to early March 2001 when the Can-Am Fund was closed to new investment, there was no statement made whatsoever concerning replication in the contracts of insurance.

(ii) Pre-Contractual Disclosure

28. The versions of the summary information folders provided to prospective policyholders regarding the IMS III contracts of insurance issued between November 1994 and October 1997 contained the same statement regarding the description and investment objectives of the Can-Am Fund as contained in the corresponding policy form, except that in the 11/94 version of the summary information folder the word "effort" was pluralized (to read "efforts").

29. In the 10/97 revision of the IMS III information folder, the fund description of the Can-Am Fund read as follows:

> Investments include Canadian Treasury Bills, high quality short term money market instruments and S&P 500 Stock Index futures contracts (and, when necessary, other derivative products), which together, on a best effort basis, will replicate the performance of the S&P 500 Total Return Index.

> The principal investment objective of the Can-Am Fund will be long term accumulation of capital through appreciation and reinvestment of net income.
>
> All returns are hedged into Canadian dollars thus minimizing foreign currency risk.
>
> The Can-Am Fund is subjected to the following risk factors: market risk, inflation risk and derivative risk.

30. The 10/97 IMS III information folder also contained a detailed section entitled "The Potential Risks of Investing" which identified under the category of derivative risk, a specific Index Futures Risk. It stated:

> If a derivative such as a futures contract tracks the performance of a stock market index and trading is halted on a number of stocks in that index or if the composition of stocks in the index is changed, it could adversely affect the price of the futures contract.

31. The 10/97 version of the IMS III Information Folder also provided Derivatives Disclosure and stated that the Can-Am Fund and certain other synthetic index funds offered under the IMS III contract of insurance "hold exchange traded index futures and options contracts in amounts equivalent to the market value of the Funds in order to create international market exposure".

32. In addition to the above description of the Can-Am Fund, the 10/97 revision of the IMS III information folder enumerated the investment policy of the segregated funds and stated:

> Notwithstanding any of the above, NN Life is empowered to invest the assets of the funds in any way which it judges to be

> the most effective for the attainment of the objectives for each fund under the circumstance prevailing at the time.

33. In the 11/98 version of the IMS III information folder, the fund description and investment objectives of the Can-Am Fund were modified to include foreign/international market risk to the risk factors. All subsequent versions of the IMS III information folder up to March 2001 (the date Transamerica discontinued offering the IMS series) contained the same fund description and investment objectives for the Can-Am Fund as the 11/98 revision.

(c) IMS RRIF

(i) Policy Forms

34. The IMS RRIF contracts of insurance have a drafting history similar to the IMS II and III policies. The IMS RRIF contract first offered the Can-Am Fund in October 1995. The only version of the IMS RRIF policy form which made any reference to replication is the 10/95 revision which had the following replication language:

> Investments include Canadian Treasury Bills and Standard and Poor's 500 Stock Index Futures Contracts, (and when necessary, other derivative products), which together, on a best effort basis, will replicate the performance of the S & P 500 Total Return Index. The investment objective of this fund is long term accumulation of capital through appreciation and reinvestment of net income.

35. Subsequent versions of the IMS RRIF contract of insurance did not contain any reference to replication.

(ii) Pre-Contractual Disclosure

36. From October 1995 to March 2001 when Transamerica discontinued sales of the IMS RRIF, the summary information folders and information folders that relate to the IMS RRIF contracts of insurance contained fund descriptions and investment objectives, statements concerning replication and summaries of investment risk factors that mirrored the summary information folders and information folders for the IMS III contracts of insurance for the same periods described above.

(d) Variable Investment Option – Universal Life and Other Policies

37. The Can-Am Fund was available as a variable investment option under certain universal life contracts of insurance offered by Transamerica known as Challenger, Achiever Plus, Discovery 2000, Omnilife, Endeavour and the NN Asset Accumulation Plan ("NAAP") Variable Deferred Annuity Policy.

38. The insurance regulations applicable to segregated funds also applied to the variable investment option requiring Transamerica to provide a summary information folder and, later, an information folder to prospective purchasers of a variable investment option in a universal life policy.

(i) Challenger

39. Challenger was offered by NN Life beginning in the 1980's until sales were discontinued in November 2001. Challenger offered policyholders both life insurance and the opportunity to earn investment returns which could be withdrawn in cash or left in the contract to contribute to the death benefit or to defray the policyholder's monthly premium deductions.

40. None of the Challenger contracts of insurance contain any reference to replication in their description of the Can-Am Fund investments. The summary information folders that were provided in respect of the Challenger policies for the 04/93 to 01/95 period did not contain any reference to replication either.

41. Commencing with the 02/95 variable investment option summary information folder, the evolution of the variable investment option summary information folders and information folders for the Challenger contracts followed a similar pattern as the IMS III summary information folders and information folders in terms of their description of the Can-Am Fund, the replication language, the Can-Am Fund's investment objectives and investment risks.

42. In the 02/95 revision of the summary information folder for Challenger the Can-Am Fund description read as follows:

> The investment objective of this Fund is long term accumulation of capital through appreciation and re-investment of net income. Investments in this Fund include Canadian Treasury Bills and Standard and Poor's 500 Stock Index Futures Contracts, (and when necessary, other derivative products), which together, on a best effort basis, will replicate the performance of the S&P 500 Total Return Index.

43. In the 06/96 revision of the summary information folder for Challenger, language was added to the Can-Am Fund description regarding the Fund's exposure to derivatives:

> The investment objective of this Fund is long term accumulation of capital through appreciation and re-investment of net income. Investments in this Fund include Canadian Treasury Bills and Standard and Poor's 500 Stock Index Futures Contracts, (and when necessary, other

> derivative products), which together, on a best effort basis, will replicate the performance of the S&P 500 Total Return Index. Exposure to derivatives will be limited to no more than 10% of the fund's value at any one time.

44. In the 11/96 revision of the summary information folder for Challenger, language was added to the Can-Am Fund description regarding the Fund's holding of high quality, short term money market instruments:

> The investment objective of this Fund is long term accumulation of capital through appreciation and re-investment of net income. Investments in this Fund include Canadian Treasury Bills, high quality, short term money market instruments and Standard and Poor's 500 Stock Index Futures Contracts, (and when necessary, other derivative products), which together, on a best effort basis, will replicate the performance of the S&P 500 Total Return Index. Exposure to derivatives will be limited to no more than 10% of the fund's value at any one time.

45. In the 07/97 version of the Challenger information folder, language was added to the Can-Am Fund description regarding risk factors:

> The investment objective of this Fund is long term accumulation of capital through appreciation and re-investment of net income. Investments in this Fund include Canadian Treasury Bills, high quality, short term money market instruments and Standard and Poor's 500 Stock Index Futures Contracts, (and when necessary, other derivative products), which together, on a best effort basis, will replicate the performance of the S&P 500 Total Return Index. Exposure to derivatives will be limited to no more than 10% of the fund's value at any one time.
>
> The Can-Am Fund is subjected to the following risk factors: market risk and inflation risk.

46. In the 02/98 revision of the Challenger information folder, language was modified in the Can-Am Fund description regarding currency hedging and further risk factors:

> The investment objective of this Fund is long term accumulation of capital through appreciation and re-investment of net income. Investments in this Fund include Canadian Treasury Bills, high quality, short term money market instruments and Standard and Poor's 500 Stock Index Futures Contracts, (and when necessary, other derivative products), which together, on a best effort basis, will replicate the performance of the S&P 500 Total Return Index.
>
> All returns are hedged into Canadian dollars thus minimizing foreign currency risk.
>
> The Can-Am Fund is subjected to the following risk factors: market risk, inflation risk and derivative risk.

47. The Can-Am Fund description was also modified in the 12/99 revision of the Challenger information folder. It stated:

> Investments include Canadian Treasury Bills, high quality short term money market instruments and Standard and Poor's 500 Stock Index futures contracts, (and when necessary, other derivative products), which together, on a best effort basis, will replicate the performance of the S&P 500 Total Return Index.
>
> The principal investment objective of the Can-Am Fund will be long term accumulation of capital through appreciation and reinvestment of net income.
>
> All returns are hedged into Canadian dollars thus minimizing foreign currency risk.
>
> The Can-Am Fund is subjected to the following risk factors: market risk, inflation risk, foreign/international market risk and derivative risk.

48. From December 1999 to November 2001 when Transamerica discontinued sales of Challenger, the information folders relating to Challenger contracts of insurance contained fund descriptions and investment objectives that mirror the 12/99 version of the Challenger information folder.

(ii) Achiever Plus

49. Achiever Plus was a universal life contract sold by Transamerica from the mid-1980's until December 1999, which like Challenger, offered life insurance combined with a variable investment option. During the time period when the Can-Am fund was available as an investment option under the Achiever Plus contract, the product was sold as insurance on the lives of people under the age of 18, with the investment options used as a means to education savings.

50. At no time was there any reference to replication in the description of the Can-Am Fund investments in the Achiever Plus contract of insurance.

51. As in the case of the Challenger contracts of insurance, a prospective Achiever Plus policyholder who wished to select a variable investment option was provided with a summary information folder or an information folder. For a number of years, the pre-contractual disclosure for the Achiever Plus variable investment option was contained in the same documents as the Challenger pre-contractual disclosure documents discussed above.

52. Beginning in February 1988, there was separate pre-contractual disclosure for Achiever Plus. This information folder contained the same fund description and investment objective language for the Can-Am Fund as the 02/98 version of the Challenger information folder. The same description also appeared in the 12/98 version of the Achiever Plus information folder.

(iii) Discovery 2000

53. The Can-Am Fund was introduced as a variable investment option in April 1993 for the Discovery 2000 contract of insurance. At no time was there any reference to replication in the description of the Can-Am Fund investments in the Discovery 2000 contract of insurance.

54. The pre-contractual disclosure for the Discovery 2000 variable investment option was contained in the same documents as the Challenger and Achiever Plus summary information folder disclosure documents discussed above. The only summary information folders for Discovery 2000 containing replication language are the 02/95 and 05/95 revisions.

(iv) Omnilife

55. The Can-Am Fund was introduced as a variable investment option in February 1995 for the Omnilife contract of insurance. At no time was there any reference to replication in the description of the Can-Am Fund investments in the Omnilife contract of insurance.

56. The pre-contractual disclosure for the Omnilife variable investment option was contained in the same documents as the Challenger, Achiever Plus and Discovery 2000 summary information folder disclosure documents discussed above. The only summary information folder for Omnilife containing replication language is the 02/95 version.

(v) Endeavour

57. Another type of life insurance contract which offered the Can-Am Fund as a variable investment option was Endeavour, a whole life insurance contract. The Can-Am

Fund was offered in conjunction with Endeavour between November 1993 and May 1995. There is no reference to replication whatsoever in either the Endeavour policy form or its related summary information folder and Endeavour policyholders are therefore not part of the class.

(vi) NAAP Variable Deferred Annuity Policy

58. The final type of life insurance contract which offered the Can-Am Fund was the NAAP Variable Deferred Annuity Policy which was offered briefly in 1992 - 1993. Neither the NAAP policy form nor its associated summary information folder contained any reference to replication and NAAP policyholders are not part of the class.

The Replication Language

59. Transamerica denies that it was a term of any contract that Transamerica would make its best effort to ensure that the Can-Am Fund replicated the performance of the S&P 500 Total Return Index. Transamerica further denies that the summary information folders or information folders contained material *terms* of the variable insurance contract, as alleged by Mr. Fantl. As noted above, the information folders were required to state material *facts* relating to such contract.

60. The statement concerning replication, on a best effort basis, of an underlying index was merely a description of the Can-Am Fund's investments and constituted a specific disclaimer or qualification that there was no guarantee that the Can-Am Fund would synthesize or track the performance of the S&P 500 Total Return Index or any promise that Transamerica would embark upon a particular course of action, whatever the cost, to ensure that exact replication occurred.

61. Transamerica denies that the investment objective of the Can-Am Fund was the best effort replication of the S&P 500 Total Return Index. The investment objective of the Can-Am Fund has consistently been "long-term accumulation of capital through appreciation and reinvestment of net income" as repeatedly stated in the contracts of insurance and in the pre-contractual summary information folders, information folders and summary fact statements provided to policyholders.

62. In the alternative, Transamerica pleads that, in any event, it met all applicable standards in regard to the replication of the Can-Am Fund.

The French Version of the Replication Language

63. The insurance contracts at issue in this action were published in English and French. The above description of the policy forms and pre-contractual disclosure documents has been restricted to the English language documents. While the French versions of the policy forms, summary information folders, information folders and summary fact statements essentially mirrored the English, in instances where the French documents contained language concerning replication the language does not have the "best effort" concept.

64. Instead, the Can-Am Fund is described in the French language documents in the following two ways:

> Le fonds investit dans les bons du Trésor du Canada, des instruments du marché monétaire à court terme de premier ordre et des contrats à terme sur l'ìndice boursier Standard and Poor`s 500 (et dans d'àutres titres dérivés au besoin) afin de reproduire le plus précisément possible la performance de l'ìndice de rendement global S&P 500.

In the second version, the description reads:

> Le fonds investit dans les bons du Trésor du Canada, des instruments du marché monétaire à court terme de premier ordre et des contrats à terme sur l'ìndice boursier Standard and Poor`s 500 (et dans d'àutres titres dérivés au besoin) afin d'afficher globalement, le plus précisément possible la performance de l'ìndice de rendement global S&P 500.

The Involvement of Intermediaries in the Insurance Sale Transaction

65. With the exception of sales by three individuals (General Managers employed at branch offices in Vancouver, Edmonton and Toronto), Transamerica did not sell any of its insurance contracts offering the Can-Am Fund as an investment option directly to the public. All other sales of the contracts of insurance in issue were made through independent advisors who were not employed by Transamerica, were required to be licensed to sell the particular class of contract of insurance in the province in which the contract was sold, and were free to sell products offered by numerous other insurers.

66. In most cases, Transamerica contracted with companies and/or individuals who acted as managing general agents ("MGA Offices"). MGA Offices contracted with independent advisors. MGA Offices assumed administrative responsibility for vetting and submitting insurance applications from those advisors. During the period between 1992 and 2001, there were a total of 16,405 servicing independent advisors for policyholders holding the Can-Am Fund.

67. At all material times, the role of the individual independent advisor was to provide specific advice to their client about the various products and investments that were offered by Transamerica and other companies whose products they sold. In particular, it

was the responsibility of the independent advisor to determine, for each client, the client's particular levels of sophistication, risk tolerance and financial objectives in order to provide tailored advice, product explanations and recommendations in terms which would make sense to the individual client and suit the individual client's objectives.

68. Independent advisors were required to employ their own learning and skill to assist policyholders to determine the nature and mix of an appropriate investment portfolio, to understand their investment options (including Transamerica's insurance products), to understand what types of risks various options entailed, and what types of returns they could reasonably expect. Independent advisors customarily reviewed summary information folders or information folders and annual financial statements with their clients and highlighted for them aspects of the investment such as investment goals, the types of risks that a policyholder was assuming and what was and was not guaranteed in terms of performance and returns. Advisors worked with their clients both prior to the sale of insurance contracts and thereafter to explain the complex product features to them, and to select contracts, riders and investments which suited the clients' needs as they evolved over time. As a result, the specific product and fund explanation given to any particular policyholder was inherently individual to the advisor and the policyholder.

69. Transamerica denies that any policyholder relied on the description of the Can-Am Fund in the summary information folders and information folders in making their investment decisions. Transamerica pleads that policyholders in fact relied on their individual interactions with their respective advisors in making fund selections and other decisions.

70. In the case of Mr. Fantl in particular, Mr. Fantl did not rely on any statements made in the information folders received when he selected the Can-Am Fund. He only selected the Can-Am fund after being informed about its existence by his independent advisor early in the summer of 1996. Mr. Fantl has no cause of action for negligent misrepresentation and his claim for negligent misrepresentation should accordingly be dismissed.

Information Provided to Policyholders after Issuance of Contract Insurance

71. At all material times, Transamerica regularly communicated with policyholders regarding the performance of their investments in the Can-Am Fund. After the issuance of their respective insurance contracts, policyholders including Mr. Fantl received regular statements from Transamerica confirming their transactions and providing periodic account values and details of the compound rates of return of the segregated funds. Individual policyholders were kept apprised of the changes in value of their investments and were therefore able to determine during the term of their investment whether the Can-Am Fund rates of return in fact replicated or tracked the relevant underlying index. Moreover, policyholders were able to discuss their statements with their independent advisors at any time.

72. For the reasons detailed above, class members were, or ought to have been, aware at all times of the performance of the Can-Am Fund relative to the S&P 500, and freely chose to make and maintain their investments in the fund in light of this knowledge.

73. By continuing to hold or purchase additional Can-Am Fund investments after receipt of this performance-related information, class members accepted the

performance of the Can-Am Fund and did not rely and could no longer reasonably rely on any of the impugned statements in their information folders.

74. If there was any breach of contract or misrepresentation on the part of Transamerica, both of which are specifically denied, the amount claimed is excessive, remote and not reasonably foreseeable.

75. If any class member has experienced damages, which is denied, those class members had the opportunity to close their respective positions before the damages occurred, but they elected not to do so. Class members ratified all investment decisions relating to the Can-Am Fund, including any decisions to remain invested in the fund, and at no time repudiated their investment decisions. Transamerica pleads and relies upon the doctrines of waiver, ratification, acquiescence, mitigation and estoppel.

76. To the extent that any class member suffered any of the damages alleged, the damages are the responsibility of that class member or other third parties. Transamerica pleads and relies upon the provisions of the *Negligence Act*, R.S.O. 1990, c.N.1.

Fantl Purchase and Sale of Can-Am Fund Units

77. Once a policy of insurance was issued, the policyholder had the right under his or her insurance contract to invest additional monies in the contract and could sell or transfer between NN Life Funds depending on changes in the market or investment objectives of the policyholder. In the case of Mr. Fantl, he initially designated 30% of his $90,000 IMS III policy investment to the Can-Am Fund. In March 1999, Mr. Fantl redeemed 25% of the Can-Am Fund units after meeting with his advisor and considering his advice. In March

2000, Mr. Fantl sold 100% of his units in the Balanced Fund and purchased a further $12,759.36 worth of units in the Can-Am Fund.

78. All such purchases and sales occurred after Mr. Fantl received statements showing the performance of the Can-Am Fund and after relying on recommendations of his advisor.

Asset Decision Maker

79. In November 1998, Transamerica introduced a new Asset Decision Maker ("ADM") service which allowed a policyholder to complete a questionnaire and, rather than making his or her own investment decisions with respect to purchasing, selling or transferring units between funds, to rely on automatic rebalancing software to automatically rebalance his or her investments to reflect a "Maximum Growth", "Aggressive Growth", "Conservative Growth", "Growth and Income", "Income and Capital Preservation" or "Capital Preservation" portfolio. The Can-Am Fund was included in varying proportions in these portfolios and there are many class members who held units of the Can-Am Fund by virtue of having elected the ADM service. Transamerica denies that such policyholders have any claim by virtue of having made such an election.

Payments Subsequently Received by Class Members

80. Because the Can-Am fund was no longer offered for sale after 2001, all contracts of insurance potentially involved in this litigation have reached the stage where any applicable 75% and 100% guarantees payable to continuing policyholders have matured and all related top-up payments have been made by Transamerica. Any such payments

must be deducted from any damages allegedly sustained by such policyholders by reason of the matters pleaded in this current litigation.

81. In addition, the Can-Am Fund was one of the NN Life Funds that was subject to restitution pursuant to the management fee overcharge settlement in this action in 2009. Any payments received by class members or adjustments to the value of their Can-Am Fund in their respective policies received by virtue of this settlement must also be deducted from any damages allegedly sustained by such policyholders.

Limitation Defences

82. Transamerica pleads that the claims of any class member relating to policies issued in Quebec which were fully surrendered between December 30, 1997 and December 29, 2000 are statute-barred pursuant to the *Civil Code of Quebec*, L.R.Q., c. C-1991, art. 2925.

83. Transamerica pleads that the claims of any class member relating to policies issued in Newfoundland and Labrador which were fully surrendered between December 30, 1997 and December 29, 2001 are statute-barred pursuant to Newfoundland and Labrador's *Limitations Act,* R.S.N.L. 1995, c. L-16.1.

Waiver of Tort

84. Transamerica denies that the doctrine of waiver of tort applies in the circumstances of this case

85. Transamerica asks that this action be dismissed with costs.

November 16, 2017

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Lawyers for the Plaintiff

JOSEPH FANTL -and- TRANSAMERICA LIFE CANADA Court File No.: 06-CV-306061-CP

Plaintiff Defendant

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Windsor

STATEMENT OF DEFENCE

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Lawyers for the Defendant
Transamerica Life Canada

This is Exhibit "G" referred to in
the affidavit of Derek McKay,
sworn before me, this 7th day of
November, 2023

A Commissioner for Taking Affidavits.

LSO# 755440

000566/1

IMS III Summary Information Folder
– Rev. 12/99

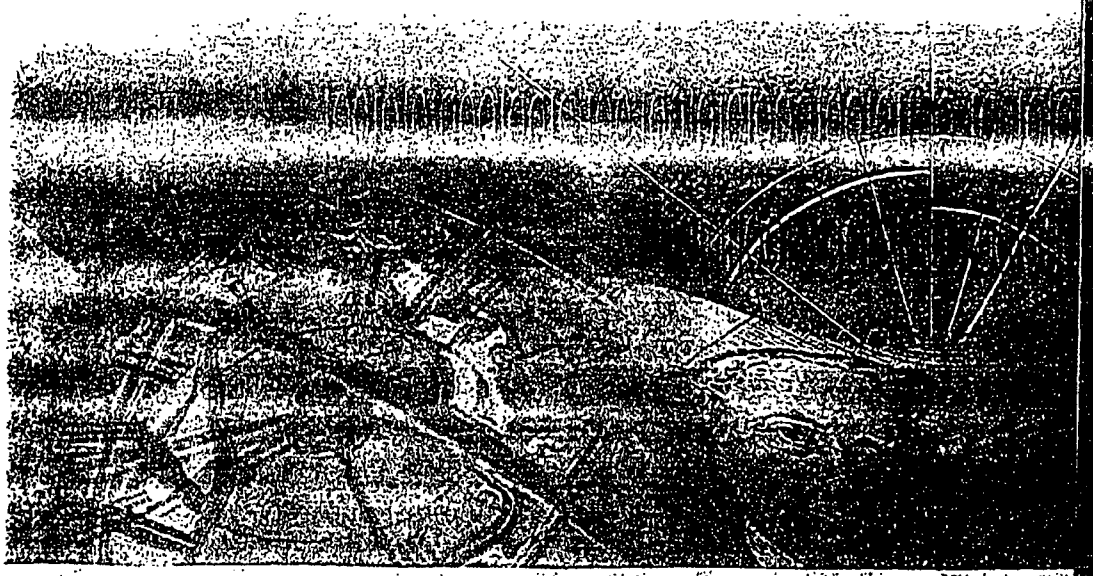
NN Life Insurance Company of Canada
(sometimes designated by its trade name ING Life)

Investment Manager Series III

Information Folder

Variable Deferred Annuity Policy

(This folder is not an insurance contract)



ING LIFE™

ASSET DECISION MAKER (ADM)

The Asset Decision Maker (ADM) is a service offered by us which constructs six optimal investment portfolios (Maximum Growth, Aggressive Growth, Conservative Growth, Growth and Income, Income and Capital Preservation, and Capital Preservation) out of our IMS III funds using Modern Portfolio Theory. Modern Portfolio Theory is a mathematical process which uses statistical measures to produce a set of portfolios which are optimized in terms of risk and return.

There is no active portfolio management in the ADM investment process.

The Owner participates in the ADM service by completing the ADM section of the appropriate application.

Once a policyowner participates in the IMS III ADM service any future premiums credited to the policy must be credited to the ADM service.

The ADM Process

A policyowner credits premiums to one of the above six portfolios after completing a questionnaire which determines a policyowner's particular risk tolerance, requirement for current income, investment goals and investment time horizon.

Once constructed, the ADM service monitors the fund holdings on a quarterly basis to ensure that the capital weightings of each fund remain within a strict range (a variance of 10% of the recommended portfolio allocation). For example, if the recommended allocation for a fund in a portfolio is 20%, the allowable range for that fund is 18% to 22% (a movement of 10% up or down).

Each year we will test the recommended fund portfolio allocations using Modern Portfolio Theory. If any of the six portfolios need rebalancing they shall be altered at calendar year-end. Subsequent automatic quarterly portfolio rebalancing will be compared against the new year-end optimum portfolio.

ADM Facts

On a lump sum basis, the minimum initial premium is $10,000. Subsequent lump sum premiums credited to the policy must be a minimum of $500.00. Under a Pre-authorized Payment Service (PPS), the minimum monthly premium payment is $250.00 (plus an initial premium of $10,000).

The minimum Policy Value is $10,000. If a policy value falls below $10,000, we will notify the policyowner in writing and allow he or she a period of 30 days in which to deposit sufficient monies in order to bring the Policy Value above $10,000. If after a period of 30 days an additional premium has not been credited to the policy, the ADM service will terminate and the annual fee will be charged. All existing funds which were part of the ADM portfolio will remain in the IMS III policy but will no longer participate in the ADM service.

This is Exhibit "H" referred to in
the affidavit of Derek McKay,
sworn before me, this 7th day of
November, 2023

A Commissioner for Taking Affidavits.

LSO# 755440

GERRY ROCCHI, ICD.D

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A seasoned board director and advisor with senior executive experience in a broad array of disciplines – board governance, investment management, pension investment/finance, wealth management, environmental finance, strategy, investment product innovation, market structure and trading, business development, organizational development, communications, operations, risk controls, public policy, corporate finance, financial accounting, audit, and client servicing.

CAREER OVERVIEW

HEALTHCARE OF ONTARIO PENSION PLAN BOARD OF TRUSTEES Toronto **2017 – present**

Chair, 2023 – present
Lead Trustee, Ontario Hospital Association Board Caucus, 2022 – present (rotating Chair and Vice-Chair)
Chair, Human Resources & Compensation Committee 2022 - present,
Chair, Governance Committee 2022
Member, Asset-Liability Committee 2017 - 2021

ECHOWORX CORPORATION Toronto **2015 – present**

Non-executive director and Chair of Echoworx, a Toronto-based international provider of email and document transfer encryption services to internet security providers and corporations.

MEMBER, INVESTMENT COMMITTEE, UNDISCLOSED FAMILY OFFICE Toronto **2008 – present**

MEMBER, CEO ADVISORY COUNCIL, ONTARIO SECURITIES COMMISSION Toronto **2022 – present**

ABERDEEN STANDARD Edinburgh **2014 – 2018**

Member, Global Advisory Panel, 2017-18. Non-executive director, Standard Life Investment, the asset management arm of Standard Life PLC (UK), 2014-2016. Chair of Audit, Risk and Compliance Committee.

STANDARD LIFE ASSURANCE COMPANY OF CANADA Montreal **2013 – 2015**

Non-executive director of Standard Life Assurance Company of Canada and Standard Life Investments Canada until 2015 sale to Manulife. Member of all board committees.

GREEN POWER ACTION GROUP Toronto **2008 - 2015**

Co-founder and CEO. GPA managed the innovative Greening Canada Fund, a carbon offset credit fund, designed for corporations seeking community-based Canadian offset credits for voluntary carbon neutrality usage. The fund distributed 1.25 million tonnes of offsets before its 2015 wind-up.

INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA Toronto **2004 - 2012**

Self-regulatory organization which regulates investment dealers and equity marketplace trading. It was formed in 2008 from the merger of the Investment Dealers Association and Market Regulation Services.

- 2011 –2012. Chair of Board of Directors. First non-dealer chair since founding in 1916. Member, Corporate Governance Committee.
- 2008–2011. Director. Member of Finance & Audit, Governance Committees. Vice-Chair 2010–11.
- 2004-2008. Director, Market Regulation Services. Chair, Finance & Audit Committee. Member, Corporate Governance Committee (2006-2008), and Special Steering Committee for merger.
- 2002-2004. Member, Rules Advisory Committee, Market Regulation Services

BARCLAYS GLOBAL INVESTORS **1997 - 2005**

Formerly a unit of Barclays PLC before its acquisition by Blackrock Global Investors, it is one of the world's largest institutional investment managers, and the largest global manager of exchange-traded mutual funds.

CEO, Barclays Global Investors Canada, Toronto (1997 - 2004)

Reported to Global CEO, responsible for all aspects of Barclays Global Investors' business in Canada, including sales, marketing, public relations, portfolio management, operations, succession planning, and all staff groups. Assets under management increased six-fold and revenues twenty-fold, by:

- Establishing iShares Canada exchange-traded funds (ETFs) as a successful retail franchise, including designing and launching the world's first ETFs that respectively used bonds, futures contracts and other ETFs. The iShares Canada franchise became self-sustaining and dominant.
- Transforming the institutional asset management business, including a strategic repositioning towards client solutions, and strategic relationships with 18 of the top 25 pension funds in Canada.
- Influencing public policy in areas that affected exchange-traded funds, institutional funds and equity trading, through proactive involvement with regulatory and government entities.
- Participated in numerous global activities, including strategic management of the global iShares business in its early years. Led a strategic review of U.S. Defined-Contribution business in 2004.

Special Assignment – Director of Americas iShares Ventures, San Francisco and Toronto (2005)

Reported to CEO, Global Intermediary Investor Business, while also managing transition out of Canada CEO role and continuing to be responsible for iShares Canada. Led strategic reviews of three major unexploited markets for iShares exchange-traded funds (U.S. 401k, U.S. IRA, Latin America).

CONSULTANT **2006 - present**

Consulting on pension plan funding and investment management, investment firm business strategy, and carbon market design. Advisor to OMERS Sponsors Corporation Board from 2012 to 2015.

MEMBER, FINANCE COMMITTEE, L'ARCHE CANADA FOUNDATION Toronto **2016 - 2020**

EXTERNAL ADVISOR, Asset-Liability Committee, Healthcare Of Ontario Pension Plan **2009 - 2011**

MEMBER, Fund Governance Committee, Burgundy Asset Management Toronto **2007 – 2013**

INSTRUCTOR, Rotman School Of Management At University Of Toronto **2007 - 2010**

Co-developed and co-taught a case study course on pension and endowment fund management for Rotman Master of Finance Program.

Director, Portfolio Management Association Of Canada Toronto **2001 - 2004**
Chair, Task Force on Market Integration for Canadian Securities Administrators **2002 - 2003**
Member, Investment Funds Advisory Panel, Ontario Securities Commission **2001 - 2003**
Member, Industry Regulation Committee, Investment Funds Institute **2000 - 2001**
Member, S&P/TSX Index Advisory Panel **1998 - 2005**

IMPERIAL OIL AND EXXON **1981 – 1997**

Assistant Comptroller for Financial and Tax Reporting, Imperial Oil, Toronto (1997)
Production Accounting Manager, Imperial Oil, Calgary (1995 - 1997)
Internal Audit Manager, Eastern Region, Imperial Oil, Toronto (1994 - 1995)
Manager, Employee and Investment Funds, Imperial Oil, Toronto (1992 - 1994)
Treasurer, Esso Caribbean and Central America, Miami (1990 - 1992)
Manager of Financial Planning, Treasurer's Department, Exxon Corporation, New York (1989 - 1990)
Senior Capital Markets Analyst, Treasurer's Department, Exxon Corporation, New York (1988 - 1989)
Investor Relations Advisor, Imperial Oil, Toronto (1987 - 1988)
Secretary of Management Committee, Imperial Oil, Toronto (1987 - 1988)
Corporate Finance Analyst, Imperial Oil, Toronto (1984 - 1987)
Cash and Banking Analyst, Imperial Oil, Toronto (1981 - 1984)

EDUCATION AND PROFESSIONAL DEVELOPMENT

Institute of Corporate Directors, Board Governance of Climate Change, 2021
Institute of Corporate Directors, Directors Education Program, 2020
University of Toronto, Centre for Environment, Certificate of Achievement in Carbon Finance, 2009
University of Toronto, M.B.A. with finance specialty**,** 1981
University of Toronto, B.A. (Honours), Economics**,** 1979
CANADIAN SECURITIES INSTITUTE: Partners, Directors and Officers Course, 2001

RECENT PUBLISHING

Investors Need More Than "Green-Wishing" From Companies to Make Informed Decisions. Globe & Mail Opinion Article, April 25, 2021. Co-written with Ed Waitzer**.**
A Boardroom View of how to Approach Climate Change Governance. Top1000Funds. September 5, 2023**.**

This is Exhibit "I" referred to in
the affidavit of Derek McKay,
sworn before me, this 7th day of
November, 2023

A Commissioner for Taking Affidavits.

LSO# 755440

Court File No. 06-CV-306061-CP

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE JUSTICE PERELL	)	**MONDAY, THE 11th DAY OF SEPTEMBER, 2023**

BETWEEN:

JOSEPH FANTL

Plaintiff

- and -

ivari

Defendant

Proceeding under the *Class Proceedings Act, 1992*

ORDER
(NOTICE OF PROPOSED SETTLEMENT)

THIS MOTION, made by the Representative Plaintiff, for an Order approving the Notice of Proposed Settlement attached hereto as Schedule "1" ("**Notice**") and the program for distributing the Notice to the Class Members was read this day at the Court House at 361 University Avenue, Toronto, Ontario, M5G 1T3.

ON READING the consents of the parties filed,

AND ON READING that the Parties have entered into a settlement agreement attached hereto as Schedule "2" (the "**Settlement Agreement**"), which is subject to the approval of this Court:

ENTERED SEP 1 1 2023 at Toronto SCJ - mg

1. **THIS COURT DECLARES** that the definitions in the Settlement Agreement apply and are incorporated into this Order.

2. **THIS COURT ORDERS** that Epiq Class Action Services Canada, Inc. (the "Administrator") is appointed as the administrator to distribute the Notice as per paragraphs 3 through 5 of this Order.

3. **THIS COURT ORDERS** that the Notice is approved and shall be published or distributed as specified in paragraphs 4 and 5 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.

4. **THIS COURT ORDERS** that within 30 days of the date of this Order, the Plaintiff, through Class Counsel and the Administrator shall, at his own expense, cause the Notice to be sent by email and/or by regular mail, after taking reasonable and proportionate steps to update said addresses as set out at paragraph 12 of the Settlement Agreement, to the last known mailing addresses and/or email addresses of the Class Members.

5. **THIS COURT ORDERS** that within 30 days of the date of this Order, the Plaintiff, through Class Counsel and the Administrator, at his own expense, cause the Notice to be posted on www.royconnor.ca and on a dedicated website to be established regarding the proposed Settlement.

6. **THIS COURT ORDERS THAT** any Class Member who wishes to make a submission to the Court supporting or objecting to the proposed Settlement, must send a written submission, which includes the information required by paragraph 7 below, by email or by mail to Class Counsel at the coordinates below, so that it is received no later than November 7, 2023:

ROY O'CONNOR LLP
Barristers
Attn: James Katsuras
1920 Yonge Street, Suite 300
Toronto, Ontario
M4S 3E2

Email: info@royoconnor.ca

7. **THIS COURT ORDERS** that all written comments regarding the proposed Settlement shall include the following:

    a. The Class Member's name, mailing address, telephone number, and e-mail address (if available);

    b. A brief statement of the reasons the Class Member supports or opposes the proposed Settlement;

    c. Whether the Class Member intends to appear at the virtual (Zoom) Settlement Approval Hearing.

8. **THIS COURT ORDERS** that, in the event the Settlement is approved, the costs of delivering the Notice shall be reimbursed from the Settlement Fund.

9. **THIS COURT ORDERS** that pursuant to section 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, (as amended) and any related or other privacy requirements, including any provincial personal information or privacy legislation, disclosure and use of the aforesaid personal information (i.e. the names, last known contact information, and ivari policy numbers of the Class Members) is hereby allowed, approved, permitted and directed for the purpose of providing Notice to the Class and may be provided by the parties to the Administrator or other non-parties for the purpose of providing the Notice to the Class Members.

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

Perell, J.

Schedule 1 to Notice Order – 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-judgement 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 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: James Katsuras
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 2 to Notice Order – Settlement Agreement

Court File No. 06-CV-306061-CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

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) ***"Releasors"*** 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 SETTLMENT 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 Releasors 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 Releasors 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
Attention: David F. O'Connor

And

E-mail: plr@royoconnor.ca
Attention: Peter L. Roy

And

E-mail: 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
Attention: Jeff Galway

And

E-mail: doug.mcleod@blakes.com
Attention: Doug McLeod

And

E-mail: 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 ___ day of September, 2023.

JOSEPH FANTL

Per: TO BE SIGNED

ivari

Per: TO BE SIGNED

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-judgement 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 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-
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 • (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?

JOSEPH FANTL

Plaintiff

- and -

ivari

Defendant

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

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act 1992*

ORDER
(NOTICE OF PROPOSED SETTLEMENT)

ROY O'CONNOR LLP
Barristers
1920 Yonge Street, Suite 300
Toronto, ON M4S 3E2

Peter L. Roy (LSO No. 16132O)
David F. O'Connor (LSO No. 33411E)
J. Adam Dewar (LSO No. 46591J)
Derek McKay (LSO No. 52907I)

Tel: 416-362-1989
Fax: 416- 362-6204
Email: plr@royoconnor.ca
Email: dfo@royoconnor.ca
Email: jad@royoconnor.ca
Email: dm@royoconnor.ca

Lawyers for the Plaintiff, Joseph Fantl

This is Exhibit "J" referred to in
the affidavit of Derek McKay,
sworn before me, this 7th day of
November, 2023

A Commissioner for Taking Affidavits.

LSO# 755440

Joseph Fantl v. ivari

Project Requirements and Estimated Volumes

Total Direct Notice Population	66,338
Mail Notice of Proposed Settlement Population	66338
Percentage of Undeliverable mail	30%
Mail First Stage Payment Notification Letter Population	17,000
Percentage of Undeliverable mail	50%
Bilingual Toll-Free Phone with IVR	Yes
Bilingual Contact Center Agent Support	Yes
Bilingual Informational Website	Yes
Case Duration (Months)	24
Mailing Packet Content	11-image Summary Notice (each Eng/Fr)
Mailing Packet Format	Inserted into an Envelope

Summary Estimate

Updated Data Standardization and Class First Stage Payme	$	106,838
Project Management	$	25,625
Bilingual Website and Reporting	$	31,354
Bilingual Toll-Free Contact Center	$	44,521
Reminder Notice and Second Stage of Distribution	$	24,592
Distribution and Fund Management First and Second Distri	$	28,505
Postage and Expenses	$	114,474
Total Estimate	$	375,910

Detailed Estimate

Joseph Fantl v. ivari

Activity	[redacted]	Amount
Updated Data Standardization and Class First Stage Payment Notification		
Import and Standardize Updated Data*		$ 1,320
Data Analyst		$ 2,218
Forms Set-up and Mailing Coordination		$ 5,280
Canada Post Address Update ($850 minimum)		$ 850
Print/Fold Notice of Proposed Settlement		$ 34,496
Record Undeliverable Mail (assumes 30% undeliverable)		$ 19,901
Notice of Proposed Settlement Reissue fulfilment and remails		$ 3,582
Print 1-image Cheque with First Stage Payment Notification Letter (Eng/Fr)		$ 21,250
Record Undeliverable Mail (assumes 50% undeliverable)		$ 8,500
Canada Post Address Update ($850 minimum)		$ 850
AllFind Address Locator (assumes 15% Undeliverable addresses not updated through Canada Post)		$ 842
First Stage Payment Cheque Reissue request Fulfillment & Remails		$ 7,750
*Data provided must meet Epiq data standards. Epiq can standardize data at additional cost of $185/hr.		**$ 106,838**
Project Management		
Project Manager		$ 5,950
Project Director		$ 2,970
Project Coordinator		$ 12,000
Data Analyst and Reporting		$ 4,435
Translation Review		$ 270
		$ 25,625
Bilingual Website and Reporting		
Static Website Deployment and Testing		$ 7,000
Website Hosting		$ 7,128
Dashboard Updates		$ 2,970
Dashboard Monthly Support and Storage		$ 14,256
		$ 31,354

Joseph Fantl v. ivari

Activity	[redacted]	Amount
Bilingual Toll-Free Contact Center		
IVR Configuration and Recording		$ 6,000
IVR Maintenance Fee		$ 7,128
IVR Minutes of Use		$ 1,154
Activation Fee for Dedicated Email Address & Inbox		$ 250
Dedicated Monthly Email Infrastructure & Retention Fee		$ 720
Outgoing Email Response		$ 26,093
Cheque Reissue Request Transcription		$ 66
Contact Center Agent - Training		$ 1,000
Bilingual Email & Phone Agents - Shared		$ 2,110
		$ 44,521
Reminder Notice and Second Stage of Distribution		
Print Reminder Notice Second Stage of Distribution (assumes 50% Class Members have not cashed cheque in 6 months from issue)		$ 2,040
Record Undeliverable Notice (assumes 15% UD)		$ 1,275
Print 1-image Cheque with Second Stage Payment Notification Letter (Eng/Fr) Assumes 70% cheques from First Distribution cashed		$ 17,850
Record Undeliverable Mail (assumes 5%)		$ 595
Address Update Correspondence Review and Response		$ 2,832
		$ 24,592
Distribution and Fund Management First and Second Distributions		
Escrow Management		$ 9,240
First Distribution		
Programming Distribution Calculation First Distribution		$ 4,435
Cheque Run Coordination First Distribution		$ 3,750
Account Management and Reconciliation		$ 3,000
Second Distribution		
Programming Distribution Calculation Second Distribution		$ 3,330
Cheque Run Coordination Second Distribution		$ 2,500
Account Management and Reconciliation		$ 2,250
		$ 28,505

Total Estimated Administration Fee $ 261,436

Joseph Fantl v. ivari

Activity	[redacted]	Amount
Postage and Expenses		
Post Office Box - Dedicated		$ 2,112
Postage* Notice of Proposed Settlement (English/French)		$ 61,031
Postage* - First Stage Payment Notification (English/French)		$ 20,393
Postage* - Cheque Cashing Reminder Notice		$ 7,820
Postage* - Second Stage of Distribution		$ 10,948
Photocopies, Delivery and Box Storage		$ 250
Translation		TBD
Bank Fees - Account		$ 7,920
Settlement Fund Income Tax Filing		$ 4,000
*Discounted rates as applicable		**$ 114,474**

Total Estimated Costs **$ 114,474**

Estimate does not include sales tax where applicable.

Total Estimate **$ 375,910**

Standard Rates

	[redacted]
Clerical and Data Entry	
Contact Center (Dedicated)	
Contact Center (Shared Per Minute)	
Claims Analyst	
Claims Specialist and Account Reconciliation/Check Run	
Call Center Supervisor	
Project Coordinator	
Data Analyst and Reporting	
Project Manager	
Sr. Project Manager	
Software Engineer	
Project Director	
Client Services Managers	
Executive Management and Testimony	
Photocopy or Image	
Box Storage (Per Box/Per Month)	
Long Distance, Per Minute	

Estimate Valid Until: 1/15/2024

This is Exhibit "K" referred to in
the affidavit of Derek McKay,
sworn before me, this 7th day of
November, 2023

A Commissioner for Taking Affidavits.

LSO# 755440

Fantl Breakdown of Costs Awarded

Firm	Award	Disbursements	HST/GST on Disbursements	Total Disbursements & HST/GST	Fees	HST/GST on Fees	Total Fees & HST/GST	Total Disbursements, Fees & HST/GST
Roy Elliott Kim O'Connor LLP	Certification	$9,732.61	$486.63	$10,219.24	$37,329.84	$1,866.50	$39,196.34	$49,415.58
Roy Elliott O'Connor LLP	Certification	$0.00	$0.00	$0.00	$68,133.20	$8,387.31	$76,520.51	$76,520.51
Roy Elliott O'Connor LLP	Div & Court of Appeal	$0.00	$0.00	$0.00	$3,783.19	$491.81	$4,275.00	$4,275.00
Roy O'Connor LLP	Div & Court of Appeal	$10,206.88	$1,303.36	$11,510.24	$87,800.67	$11,414.09	$99,214.76	$110,725.00
Roy O'Connor LLP	Div & Court of Appeal & SCC disbursement costs	$2,111.41	$274.48	$2,385.89	$1,202.15	$156.28	$1,358.43	$3,744.32
Totals		**$22,050.90**	**$2,064.47**	**$24,115.37**	**$198,249.05**	**$22,315.99**	**$220,565.04**	**$244,680.41**

This is Exhibit "L" referred to in
the affidavit of Derek McKay,
sworn before me, this 7th day of
November, 2023

A Commissioner for Taking Affidavits.

LSO# 755440

All Firms Unrecouped Disbursements

Firm	Unbilled Amount	GST/HST on Unbilled Disbursement Amount	Amount Unbilled (inclusive of taxes)
Roy Elliott Kim O'Connor LLP	$5,197.01	$259.85	$5,456.86
Camp Fiorante Matthews LLP	$3,074.31	$153.72	$3,228.03
Sutts Strosberg	$639.50	$31.98	$671.48
Roy Elliott O'Connor LLP	$1,858.74	$241.64	$2,100.38
Roy O'Connor LLP	$159,703.33	$11,733.57	$171,436.90
Totals	**$170,472.89**	**$12,420.75**	**$182,893.64**

This is Exhibit "M" referred to in
the affidavit of Derek McKay,
sworn before me, this 7th day of
November, 2023

A Commissioner for Taking Affidavits.

LSO# 755440

Detailed List of Class Counsel Disbursements Unbilled

Firm	Photocopies and printing	Long distance phone calls and conference calls	Postage	Fax	Process Server	Courier	Experts	Travel	Research services	Commonwealth Legal	Redi Web	Website/Communication	Court and Administrative filing fees	Court Reporting Services	Corporate Searches	Epiq	Mediation Fees	Meals	FIRM TOTALS	GST/HST on Disbursements	Total Disbursements & HST
Roy Elliott Kim O'Connor LLP (48000) @ 50%	$ 4,032.29	$ -	$ -	$ 3.85	$ 341.50	$ 11.67	$ -	$ 11.28	$ 501.77	$ -	$ -	$ -	$ 184.50	$ -	$ -	$ -	$ -	$ 32.55	$ 5,119.41	$ 255.97	$ 5,375.38
Roy Elliott Kim O'Connor LLP (48002) @ 50%	$ 61.83	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ 15.77	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ 77.60	$ 3.88	$ 81.48
Roy Elliott O'Connor LLP (48020)	$ 73.50	$ 0.24	$ 2.61	$ -	$ 420.00	$ 33.25	$ -	$ 34.01	$ 528.66	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ 766.47	$ 1,858.74	$ 241.64	$ 2,100.38
Roy O'Connor LLP (48020)	$ 3,616.08	$ 154.90	$ 35.98	$ 10.55	$ 196.00	$ 45.44	$ -	$ 9.25	$ 1,073.75	$ 65,532.20	$ 900.00	$ -	$ 570.00	$ -	$ -	$ 69,576.73	$ 2,889.38	$ 655.85	$ 145,266.11	$ 9,877.53	$ 155,143.64
Roy O'Connor LLP (48050)	$ 9,998.00	$ -	$ 0.80	$ 19.85	$ 2,289.00	$ 369.05	$ -	$ 35.00	$ 554.93	$ -	$ -	$ 290.23	$ 615.00	$ -	$ 146.56	$ -	$ -	$ 118.80	$ 14,437.22	$ 1,856.04	$ 16,293.26
Totals	**$ 17,781.70**	**$ 155.14**	**$ 39.39**	**$ 34.25**	**$ 3,246.50**	**$ 459.41**	**$ -**	**$ 89.54**	**$ 2,674.88**	**$ 65,532.20**	**$ 900.00**	**$ 290.23**	**$ 1,369.50**	**$ -**	**$ 146.56**	**$ 69,576.73**	**$ 2,889.38**	**$ 1,573.67**	**$ 166,759.08**	**$ 12,235.06**	**$ 178,994.14**

This is Exhibit "N" referred to in
the affidavit of Derek McKay,
sworn before me, this 7th day of
November, 2023

A Commissioner for Taking Affidavits.

LSO# 755440

The Law Foundation of Ontario

We're hiring!

The Fund's entitlement to a levy and how it is calculated

If a case is awarded funding, a levy in favour of the Class Proceedings Fund (the "Fund") is payable after the case is either settled or adjudicated in favour of the class.

Regulation 771/92 sets out the way in which the Fund's levy is calculated.

10.

(1) This section applies in a proceeding in respect of which a party receives financial support from the Class Proceedings Fund. O. Reg. 771/92, s. 10 (1).

(2) A levy is payable in favour of the Fund:

> (a) when a monetary award is made in favour of one or more persons in a class that includes a plaintiff who received financial support under section 59.3 of the Act; or
>
> (b) when the proceeding is settled and one or more persons in such a class is entitled to receive settlement funds. O. Reg. 771/92, s. 10 (2).

(3) The amount of the levy is the sum of,

(a) the amount of any financial support paid under section 59.3 of the Act, excluding any amount repaid by a plaintiff; and

(b) 10 per cent of the amount of the award or settlement funds, if any, to which one or more persons in a class that includes a plaintiff who received financial support under section 59.3 of the Act is entitled.
O. Reg. 771/92, s. 10 (3).

In summary, the levy is composed of repayment of the disbursement funding provided by the Fund and 10 % of the "amount of the award or settlement funds, if any, to which one or more persons in a class" is entitled.

The courts have interpreted various aspects the formula for the 10% levy.

In *Martin v. Barrett*, [2008] O.J. No. 3813, the court concluded that the Fund's 10 per cent levy is calculated on the Net recovery, after the deduction of counsel fees and any other costs incurred to administer the settlement.

At paragraph 42, the Court stated:

> [42] ...The success of a class action can be measured by the amount distributable to, or applicable for the benefit of, the class. It is, in my opinion, both reasonable and logical for the quid pro quo to be received by the Foundation for its financial assistance in achieving such success to depend on the extent of the success, without regard to counsel fees or other expenditures made for the same purpose.

At paragraph 48, the Court further stated:

> [48] The levy payable to the Fund pursuant to the Regulation is to be calculated by applying 10 percent of the net amount of any monetary award or settlement amount remaining after the deduction therefrom of all sums which the court directs to be paid to those other than class members. These deductions may include, among other items, the full amount approved by the court as fee for class counsel, amounts expended or to be expended for notice, administration, distribution, or for any other expense that the Court approves as payable from a monetary award or settlement fund.

In *Houle v. St. Jude*, 2017 ONSC 5129, the Court followed this approach when calculating hypothetical scenarios as to how the Fund's levy compared to a third party funder's levy. See paragraphs 40 to 41.

In *Smith v Money Mart*, 2010 ONSC 1334 approved at 2011 ONCA 233, the Court approved a settlement that provided for the payment of the levy by the defendant Money Mart to the Fund directly, and pursuant to which the levy applied to the cash portion of the settlement as well as vouchers given to class members.

In *Jeffery Rudd v. London Life Insurance Co*, 2016 ONSC 5506, affirmed 2018 ONCA 716, the Court concluded that the levy was applicable to a Judgement whereby no monies were directly paid to the class members, but were rather paid into an account held by the Defendant for the benefit of class members. It also held that the levy was payable directly by the defendant to the Fund. See paragraphs 110 to 116 of the Superior Court decision and paragraphs 58 to 67 of the Court of Appeal decision.

Example:

Settlement Amount: $10,000,000

To calculate levy, deduct all of:

Counsel fees: $2,000,000
Funded disbursements returned to the fund: $200,000
Administration costs: $50,000

Total amount subject to the levy
$7,750,000

Levy = $7,750,000 X .10 = $775,000

For any questions about the calculation of the levy in particular cases, please contact Remissa Hirji.

Class Proceedings Fund webpages

Class Proceedings Fund

The Class Proceedings Fund provides financial support to approved class action plaintiffs for legal disbursements and indemnifies plaintiffs for costs that may be awarded against them in funded proceedings.

Read more

Application process

Details on the process and documents needed to apply to the Class Proceedings Fund.

Read more

The Fund's entitlement to a levy and how it is calculated

If a case is awarded funding, a levy in favour of the Class Proceedings Fund (the "Fund") is payable after the case is either settled or adjudicated in favour of the class. Regulation 771/92 sets out the way in which the Fund's levy is calculated.

Read more

Meeting dates

The Class Proceedings Committee's list of scheduled meeting dates. Application hearings are scheduled after a full application has been received.

Read more

Reports & resources

The Class Proceedings Fund reports financial information and activities annually within the Foundation's annual report. Find these reports, as well as other resources, here.

Read more

Committee

The Class Proceedings Committee is responsible for making decisions about whether applicants will receive support from the fund. Meet its members.

Read more

This is Exhibit "O" referred to in
the affidavit of Derek McKay,
sworn before me, this 7th day of
November, 2023

A Commissioner for Taking Affidavits.

LSO # 55440

Fantl Breakdown of CPF Funding by Category

Expert Fees (inclusive of HST)	Notice to Class (inclusive of HST)	Binding & Copying (inclusive of HST)	Mediator Fees (inclusive of HST)	Total Amount (inclusive of HST)
$19,903.90				$19,903.90
$3,250.00				$3,250.00
$36,541.38				$36,541.38
$86,744.45	$43,180.11			$129,924.56
$145,439.06		$489.80	$14,328.40	$160,257.26
$291,878.79	**$43,180.11**	**$489.80**	**$14,328.40**	**$349,877.10**

JOSEPH FANTL
Plaintiff

- and -

ivari

Defendant

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

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act 1992*

AFFIDAVIT OF DEREK MCKAY – SETTLEMENT & FEE APPROVAL
(SWORN NOVEMBER 7, 2023)

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