

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JOSEPH FANTL

Plaintiff

and -

TRANSAMERICA LIFE CANADA

Defendant

Proceeding under the Class Proceedings Act, 1992

Affidavit of Joseph Fantl – Settlement & Fee Approval

I, **Joseph Fantl**, of the City of Toronto, in the Province of Ontario, hereby make oath and say:

1. I am the Representative Plaintiff in this action. I have direct knowledge of the matters to which I depose of in this affidavit. The defined terms in this affidavit have the same meaning in this affidavit as they do in the affidavit of Derek McKay sworn November 7, 2023 and the Settlement Agreement dated September 11, 2023.

2. I am submitting this affidavit to seek approval of the Settlement Agreement and Class Counsel's fees, disbursements and taxes. A copy of the Settlement Agreement is attached to the affidavit of Derek McKay at Exhibit "A".

Background & My Investment in the Can-Am Fund

3. I have sworn a number of affidavits in this proceeding. My role in this litigation is set out, among other things, at paragraphs 25 through 33 of Justice Perell's April 18, 2013 certification decision *Fantl v. Transamerica Life Canada*, 2013 ONSC 2298 (CanLII).

My Role as Representative Plaintiff

4. As the Representative Plaintiff, I was consulted by RO (and its predecessor firms) throughout this litigation. My contact about the case, status and general strategy in the last many years was generally most often with Peter Roy and David O'Connor but I also spoke with Adam Dewar and Derek McKay at various times.
5. I should note that Peter is a good friend of mine as was made clear years ago in the context of this case. That relationship with Mr. Roy however is not the basis for my comments below about the settlement, fees or my view of the legal work by my team.
6. Over the course of this action, I received numerous updates on the status of the action, considered RO's advice and provided input or instructions on every major decision as required. Without limiting the generality of the foregoing, I took the following steps to advance this action:
 - a. provided information, input and instructions to RO;

- b. reviewed and assisted in the preparation of amendments to the statement of claim;
- c. instructed RO to seek financial support from the Class Proceedings Fund;
- d. provided affidavit evidence in support of the certification motion;
- e. attended for a cross-examination in advance of certification;
- f. provided documents for use in the discovery process;
- g. discussed the questions and my written examination of discovery and a follow-up examination for discovery, and provided information for various areas of questioning within my knowledge or recollection;
- h. consulted with RO on several occasions before and then attended the recent mediation session before the Honourable Dennis O'Connor;
- i. approved the settlement at \$7 million; and,
- j. reviewed and approved the settlement terms and structure as well as the Settlement Agreement in this case.

My Views of the Proposed Settlement

7. I have reviewed and considered the terms of the Settlement Agreement. I have also reviewed the affidavit of Mr. McKay regarding the Settlement. I agree with and adopt Mr. McKay's factual summary of this litigation as well as his statements regarding the benefits of this settlement compared to the future risk of litigation. As noted above, I attended the two-day mediation with counsel and provided input on the quantum of the proposed settlement in real time. As a retired civil litigator, I also understood and understand the risks associated with this case quite well.

8. I understand that the key features of the Settlement include the following:
- a. Under the proposed Settlement, ivari has agreed to make an all-inclusive payment of \$7 million in exchange for a full release of all claims and any potential claims that the approximately 72,000 Class Members may have against it relating to their investments in the Can-Am Fund;
 - b. Class Members will be paid from the net amount of the \$7 million sum remaining after payment of Class Counsel's legal fees and expenses, settlement administration expenses, and payments owing the Class Proceeding Fund (including the Fund's 10% statutory levy);
 - c. The Net Settlement Fund will be distributed to Class Members pursuant to the agreed upon Distribution Protocol if that Protocol is approved by the Court.
 - d. Under the proposed Distribution Protocol:
 - i. Class Members shall not be required to make a claim for their individual allocation share of the Settlement Fund. Instead, each relative share of the Net Settlement shall be calculated on the basis of data that is already in the possession of the Defendant;
 - ii. An outside financial services and consulting firm has been retained to calculate each Class Member's individual share of the Net Settlement Fund;
 - iii. Individual Class Member payments 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, depending on the date of their investment in the Can-Am Fund during that period (and, as noted below, further adjusted for interest as of the date that they withdrew or redeemed their investment in the Can-Am Fund over the years);
 - iv. The difference between a Class Member's Can-Am Fund returns and the S&P 500 Total Return Index while the Class Member was invested in the

Fund within that time period is used to generate a notional amount specific to that Class Member;

- v. 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;
- vi. "Misrepresentation Class Members" whose insurance contracts did not contain express best efforts language will have their notional amount reduced by 50% to account for, among other things, the greater risks and lower likelihood of recovery on the misrepresentation claims if the case had proceeded forward on the merits. I understood that a reduction was appropriate for the misrepresentation claims while the mediation was underway and agreed with the specific 50% reduction;
- vii. "Contract Class Members" whose insurance contracts contained express best efforts language will not have their notional amount reduced;
- viii. 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 total class-wide notional amounts and then multiplied by the Net Settlement Fund to determine the initial allocation of each Class Member;
- ix. 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;
- x. 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,

- xi. Any Settlement Funds remaining following the second distribution will not be returned to ivari but will be donated to charity.
9. In the circumstances, I believe that the Settlement is a very good result and is a fair deal for my fellow Class Members. I have weighed the benefits that would be available to Class Members under the Settlement against the costs, risks and delay if we continued the case through a trial and the likely appeal process.
10. I certainly agree with the opinion of RO that this Settlement is fair, reasonable and in the best interests of the class. I am proud of the results achieved in this Settlement. I am proud that I was able to assist and be part of this action.

My Views on Class Counsel's Requested Fee

11. I spoke to RO at length about my Retainer Agreement before I signed it in 2006. I carefully read and understood the terms my Retainer Agreement at the time I signed it. RO answered and responded satisfactorily to all of the questions and requests that I had about the Retainer Agreement and its terms. I agreed with the terms of the Retainer Agreement when I signed it as noted above, and I agree with the terms now.
12. I understand, and understood at the time of signing, that my Retainer Agreement with RO is a contingency fee agreement. I understood that to mean that the Class Members would not be required to pay any fees or disbursements to advance the litigation and that class counsel would only get paid from amounts that they were able to secure from a successful trial or settlement of the case. I understood that, if the case was successful, RO's fees would be 30% of money recovered, plus the fee portion of any prior costs

awards as well as disbursements and taxes. I thought the arrangement was a fair for counsel and the Class.

13. I note that RO took on this relatively complex case and pursued it for many years. Without the efforts and perseverance of RO, I believe that this case would not have been brought to this successful resolution. Indeed, this case did not appear to have been advanced much when the predecessor of RO was approached to take over many years ago. I have been impressed with the work of the team of lawyers and have thanked them for their efforts, time and success.
14. As a former litigator, I am well aware of the high cost of litigation and the difficulty most people have finding a lawyer that they can afford to hire to pursue a civil matter. It is very important for access to justice that counsel that take on risky cases like this and achieve solid results are well rewarded for their efforts.
15. I believe that without the pursuit of this class proceeding, it would have been impossible for the Class Members to have access to justice against the Defendant. I understand that most individual claims were too small for any lawyer to take them on individually a contingency basis (or a fee basis) and pursue them without the advantages of a class proceeding.
16. By pursuing this matter on contingency basis and as a class proceeding, I believe that RO's efforts have allowed the Class Members (including me) to receive fair compensation and that the Class Members would almost certainly not have pursued such compensation without this class action.

17. I can also add that the issues in this case relate, obviously, to money that I invested more than 30 years ago. Having said that, and without retreating from my view of the value of the work provided and results achieved by my counsel, I suspect that many (if most) Class Members have long forgotten about their Can Am Fund investments and any payments that they receive under the Settlement (if approved) may be greeted as a welcome surprise.

Honourarium

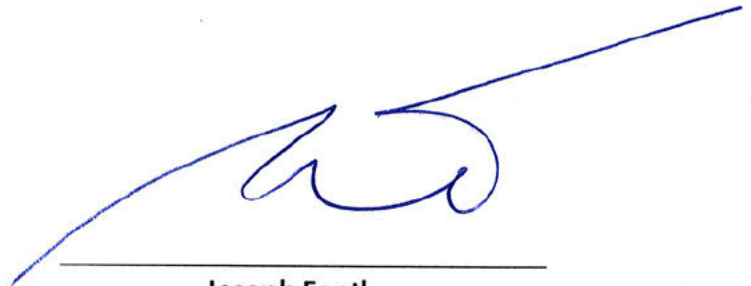
18. While I understand that Courts may, in some cases, award a representative plaintiff an honourarium to acknowledge their role and particular contributions as plaintiff, I have considered that fact but decided on my own that I do not wish to seek an honourarium.

SWORN BEFORE ME
in the City of Toronto,
in the Province of
Ontario, this 7th day of
November, 2023

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A Commissioner for Taking Affidavits, etc.



Joseph Fantl

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 JOSEPH FANTL – SETTLEMENT & FEE APPROVAL

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