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*

FACTUM – SETTLEMENT APPROVAL

December 4, 2023

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PART I: OVERVIEW

1. The Plaintiff moves for court approval of the Parties' proposed settlement of this certified class action for the all-inclusive and non-reversionary sum of $7 million. The breach of contract and negligent misrepresentation claims in question concern whether the Defendant, in managing its "Can Am" investment fund (the **"Can Am Fund**"), made "best efforts" to replicate the return performance of the S&P 500 Total Return Index (hereinafter the "**S&P 500**"). Given the challenges and risks of seeking to resolve these claims through a common issues trial and individual issues resolution process, the Plaintiff and Class Counsel submit that this settlement is fair, reasonable and in the best interests of the class.

2. The proposed settlement is the culmination of many years of litigation including a certification motion and appeals therefrom, an extensive discovery process, a thorough,

expert-assisted analysis of the merits and potential damages as well a two-day mediation led by former Associate Chief Justice of Ontario Dennis O'Connor. At this stage, the Plaintiff and Class Counsel are able to make a well-informed assessment of the potential strengths and weaknesses of the Plaintiff's theories of liability and of the scope of potentially recoverable damages.

3. A significant factor informing the Plaintiff's and Class Counsel's assessment is the distribution of potential damages between what are referred to in Notice of Settlement Approval as the Contract Class Members and - the Misrepresentation Class Members. More than 80% of potential damages are attributable to Misrepresentation Class Members. Because the essential elements of reliance, causation and damages are not certified issues, to secure damages for negligent misrepresentation, some manner of individual issues resolution process to address those issues for each Misrepresentation Class Member would be necessary following any common issues trial (assuming that the misrepresentation common issues were otherwise resolved in favour of the Class). The Plaintiff and Class Counsel have estimated that the maximum average potential quantum of individual damages for misrepresentation likely would not exceed $150. Given, among other things, the relatively modest potential damages at stake for the average Misrepresentation Class Member and the time and potential costs of such an individual issues process, experience suggests that only a relatively small percentage of the Misrepresentation Class Members would participate in an individual claims resolution process at the individual issues stage and that a smaller percentage would ultimately be successful in recovering damages.

4. Using reasonable but still Class friendly assumptions, total recoverable damages for the Class as a whole following a common issues trial and an individual issues phase are estimated in the range of $4.2 to $5.25 million (as discussed further below), inclusive of prejudgment interest. The $7 million settlement compares well to that range.

5. Some of the other features and benefits of the proposed settlement are as follows:

   (a) *Automatic Settlement Entitlement Determination and Payment* – No Class Member is required to make an individual application or provide evidence (or risk any time or costs) to establish their entitlement to a portion of the settlement fund. Instead, settlement entitlements are determined and cheques cut on the basis of the Defendant's detailed, individualized data regarding each Class Member's investments in the Can-Am Fund.

   (b) *$50 De Minimus Threshold* – To minimize the administration-expense to payout ratio, the proposed distribution protocol limits the subset of Class Members ("**Qualifying Class Members**" or "**QCMs**") who qualify for payment under the settlement to those with a calculated initial entitlement of $50 or more. As discussed further below, the total net payout to the Qualifying Class Members is estimated at approximately $3.4 million after deduction of disbursements, Class Counsel Fees, expenses covered by the Class Proceedings Fund, the Fund's 10% levy and administrative expenses (which are relatively high in this case given the number of Class Members (approximately 72,000, of which 58,669 have a non-zero initial entitlement calculation before application of a $50 threshold). Based on such a total available for distribution, 14,985 Class Members will be entitled to $50 or more, with the average payout to those

Qualifying Class Members will be approximately $227. The number of Class Members whose entitlement would fall below the $50 threshold is 43,684. If the $50 threshold was not applied, these 43,684 Class Members would receive an average payout of $13.64.

(c) *A Two-Stage Distribution* – As part of the first stage distribution, a letter will be sent to each Class Member at their last known address advising whether the Class Member does or does not qualify for payment under the settlement, and the basis for that determination. Letters to QCMs will be accompanied by a cheque. Any returned cheques will be subject to a "bad address resolution process". In the event that any QCM cannot be located within a specified time or where a cheque remains uncashed by a QCM within the specified time limit for doing so, the payments attributable these QCMs shall form part of the "Residue" from which second stage payments may be made on a proportionate basis to the QCMs who cashed their first stage cheques. If any Residue monies remain after the second stage distribution, the Plaintiff will seek court approval to donate the remaining balance to a charity chosen by the Parties. In no event will any settlement monies revert to the Defendant.

6. In all of the circumstances, the Plaintiff and Class Counsel view the proposed $7 million all-inclusive, non-reversionary settlement as quite fair and believe its benefits outweigh the risks of continuing this case through a trial, a likely appeal process, and (if the common issues are answered in favour of the Class) the uncertain outcome of any individual assessments that may be pursued.

PART II: THE FACTS

7. The Can-Am Fund is both a "segregated" fund and an "index" fund. Segregated funds are investment funds offered under insurance contracts. While somewhat similar to mutual funds, segregated funds differ from mutual funds in a number of ways. Unlike a mutual fund investor, a segregated fund investor does not actually purchase and own units in the fund but 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[1].

8. The Can-Am Fund is also an "index fund" in that it is intended 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 in Canadian dollars. The deviation of the returns of an index fund from its target index over a period of time is commonly referred to as the "tracking error" of the fund[2].

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[3].

(a) The Claim

10. The claim was issued December 29, 2003 and initially styled *Millman v. Transamerica Life*

[1] McKay Affidavit at para. 6-7
[2] McKay Affidavit at para. 8
[3] McKay Affidavit at para. 9

Canada, with Sutts, Strosberg acting as plaintiff's counsel. The Millman claim was based solely on breach of contract[4].

11. 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. Mr. Millman was replaced by the representative plaintiff, Mr. Joseph Fantl, in 2006. Mr. Fantl is a retired civil litigation lawyer and former member of the Ontario bar[5].

12. The *Fantl* Claim ("Claim") was subsequently amended to, among other things:

    a. add negligent misrepresentation claims in parallel to the existing claims sounding in breach of contract;
    b. expand the allegations of excess management fee charges, previously limited to the Can-Am Fund, to include 27 additional segregated funds; and,
    c. focus 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)[6].

13. As a result, the Claim then advanced essentially two distinct categories of assertions:

    a. 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); and,
    b. 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 the best efforts statements contained in its Summary Information Folders, as described

[4] McKay Affidavit at para. 12
[5] McKay Affidavit at para. 13
[6] McKay Affidavit at para. 14

further below) that it was in fact doing so (the "Best Efforts Claim(s)")[7].

14. The Management Fee Overcharge claim settled in 2009.[8] The right and ability of the Plaintiff to pursue the Best Efforts Claims was specifically preserved as part of that settlement.

15. 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 the following statement (or something effectively similar):

> 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**[9]]

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

    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

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[7] McKay Affidavit at para. 14
[8] McKay Affidavit at para. 15
Fantl v. Transamerica Life Canada, 2009 CanLII 42306 (ON SC).
[9] McKay Affidavit at para.

proper for ensuring the success of the endeavour.[10]

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

17. Throughout this litigation, Class Counsel were aware that a claim for damages for negligent misrepresentation would be much harder to certify and prosecute successfully than a similar claim for damages for breach of contract since such a tort claim generally raises inherently individual issues of causation, reliance and damages[11].

18. The majority of the proposed Class Members did not have a policy containing an express "best efforts" commitment. Only five of the 53 versions 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[12].

19. 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 that: (i) the SIF formed part of the insurance contract; (ii) the SIF constituted a collateral contract; and (iii) the "best efforts" replication statement contained in the SIF constituted an implied contractual term. As set out further below, both this Honourable Court and the Court of Appeal rejected each of these alternative bases of contractual liability[13].

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[10] See, for example, *CSRS Ltd. v. Embley*, 2008 BCCA 533 (CanLII) at para. 84.
[11] McKay Affidavit at para. 19
[12] McKay Affidavit at para. 20
[13] McKay Affidavit at para. 21
Fantl v. Transamerica Life Canada, 2013 ONSC 2298 (CanLII); *Fantl v. Transamerica Life Canada*, 2013 ONCA 507.

(c) Initial Efforts to Settle the Best Efforts Claim

20. 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 (i.e. not best efforts), 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[14].

21. The Parties ceased negotiations in or about March 2013 when it became clear that they could not find any common ground[15].

(d) Certification of the Best Efforts Claim

22. In the meantime, the Plaintiff pressed forward toward certification. The motion to certify the Best Efforts Claim was heard over two days in April 2013[16].

23. This Honourable Court certified the breach of contract claim and associated common issues on behalf of Class Members who had 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.[17]

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[14] McKay Affidavit at para. 22
[15] McKay Affidavit at para. 23
[16] McKay Affidavit at para. 24
[17] McKay Affidavit at para. 25
Fantl v. Transamerica Life Canada, 2013 ONSC 2298 (CanLII).

24. This Court declined to certify the remainder of the proposed 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.[18]

25. This Court 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.[19]

26. The certification decision resulted in two separate appeal routes. An appeal from the dismissal of the contract claims based on the content of the SIFs went directly to the Court of Appeal. That appeal was unsuccessful.[20]

27. 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. 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. The Defendant's subsequent appeal to the Court of Appeal regarding the negligent misrepresentation claims was dismissed. The Defendant

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[18] McKay Affidavit at para. 26
Fantl v. Transamerica Life Canada, 2013 ONSC 2298 (CanLII).

[19] McKay Affidavit at para. 27

[20] McKay Affidavit at para. 28
Fantl v. Transamerica Life Canada, 2015 ONSC 1367 (Div. Ct.).
Fantl v. Transamerica Life Canada, 2013 ONCA 580 (C.A.).

unsuccessfully sought leave to appeal to the Supreme Court of Canada in 2017.[21]

28. In the end result, the Plaintiff was left with a comparatively straightforward but 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[22].

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

29. Approximately 72,000 Class Members received a notice of certification and 160 individuals elected to opt-out of the proceeding[23].

(f) Final Amendment of Claim

30. The Plaintiff subsequently prepared and filed a final amended Claim to accord with the scope and terms of the certification order.[24]

31. 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

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Fantl v. Transamerica Life Canada, 2016 ONCA 633 (C.A.).
Transamerica Life Canada v. Joseph Fantl, 2017 CanLII 8570 (SCC).

[22] McKay Affidavit at para. 30
[23] McKay Affidavit at para. 35
[24] McKay Affidavit at para. 34

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;"

32. 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."

33. The Defendant advanced many defences to the Claim, including denying any mismanagement, poor fund performance, reliance, causation or 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 SIFs. The Defendant argued, among other things, that Class Members chose to invest in the Defendant's policies and funds based on other reasons, including 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[25] (that service automatically rebalanced and invested Class Members's holdings based on Class Members' generic risk tolerance and investment goals). The Defendant noted in its 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[26].

(g) Discovery

34. In the summer and autumn of 2018, the Parties negotiated the scope of the Defendant's search for and production of potentially relevant paper records and, more significantly, electronic documents. The Defendant ultimately produced more than 80,000 documents in electronic form[27].

35. Class Counsel reviewed tens of thousands of these documents after applying its own internal set of further electronic Boolean search terms and criteria for relevance. During this review process, Class Counsel shared tranches of documents with their 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 Class Counsel in analyzing the documents for evidence of the Defendant's (and its third-party fund manager's) fund management practices[28].

36. Recognizing, among other things, that much of the relevant period in this case reached back many years and that many questions would be technical or detailed, the parties

[25] **Exhibit "G"** to McKay Affidavit
[26] McKay Affidavit at para. 37
[27] McKay Affidavit at paras. 38-39
[28] McKay Affidavit at para. 39

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 the detailed review of thousands of documents and input from the Plaintiff's expert. The discovery process was largely complete when the parties agreed in the latter half of 2022 to suspend further litigation steps pending another attempt at mediation[29].

(h) Mediation

37. 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.[30]

38. Both parties exchanged mediation briefs as well as expert reports addressing liability and the quantification of potential (hypothetical) damages.[31]

39. Going into the mediation, the Plaintiff and Class Counsel 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 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 damages aspects of the misrepresentation claim were highlighted by this Court in its certification Reasons:

[29] McKay Affidavit at para. 40
[30] McKay Affidavit at para. 41.
[31] McKay Affidavit at para. 42.

> *[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.*[32]

40. Regarding 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.[33] Accordingly, the Plaintiff's 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[34]; or

    b. the average of all its direct competitor funds[35],

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-

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[32] McKay Affidavit at para. 43; *Fantl v. Transamerica Life Canada*, 2013 ONSC 2298 (S.C.).

[33] 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).

[34] 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.

[35] 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.

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.[36]

41. 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 became 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, Class Counsel recognized that Ontario courts rarely exercise their discretion to depart from the *CJA* prejudgment interest 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,

[36] McKay Affidavit at para. 44.

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.[37]

42. 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 the Plaintiff and Class Counsel's examination of the evidence, it appeared that the Can-Am Fund performed relatively well both before and after this period.[38]

43. 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, two of which were 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.[39]

44. Second, the Plaintiff's damages estimates needed to be reduced to account for "top ups"

[37] McKay Affidavit at para. 45.
[38] McKay Affidavit at para. 46.
[39] McKay Affidavit at para. 47.

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, the Plaintiff believes 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.[40]

45. Another important 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 stated investment constraints of the Can-Am Fund and the other comparators. 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.[41]

46. Taking into account the reduction in the assets in question for the Class, the offsets for

[40] McKay Affidavit at para. 48.
[41] McKay Affidavit at para. 49.

top-ups, and a revised set of direct comparators (to exclude the Empire Life Fund), the estimated maximum hypothetical damages based on the damage period and the CJA pre-judgment interest was reduced to:

a. $11 million, if damages were based solely on the next top-performing direct comparator, the Manulife American Equity Index Fund; and
b. $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.[42]

47. 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 Plaintiff alleged;
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

[42] McKay Affidavit at para. 50.

analysis.[43]

48. 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, among other things, knowledge of the allegations in this class action through notice from the settled Management Fee Overcharge certification and settlement in 2009), acquiesced in, or failed to mitigate, their damages by maintaining their Can-Am investments for the subsequent years.[44]

49. 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

[43] McKay Affidavit at para. 51.
[44] McKay Affidavit at para. 52.

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 discussed 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.[45]

50. 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.[46]

51. Class Counsel went into the mediation cognizant of the greater risks associated with the negligent misrepresentation claims and recognizing that the Defendant would likely assert, as it did in fact assert, that a large discount to estimated hypothetical maximum damages in respect those claims must be recognized. Similarly, the mediator recognized the greater risks with, and the need for a greater substantial discount for, the negligent misrepresentation claims.[47]

52. 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

[45] McKay Affidavit at para. 53.
[46] McKay Affidavit at para. 54.
[47] McKay Affidavit at para. 55.

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, the Plaintiff 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.[48]

53. The Plaintiff 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 under the $11 million estimate (the damages based solely on the top comparable fund) 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 under the $11 million estimates 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

[48] McKay Affidavit at para. 56.

lower.[49] Among many other things, and just as one example, if the damages were calculated based on the average of all of the comparator funds (the $8.75 million estimate instead of the $11 million top performer estimate), the application of the 81/19% split plus the 80% and 40% referred to above would result in the total damages recoverable by the Class being reduced to $4.165 million.

54. 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 recoverable damages of $5.24 million or $4.165 million (or less) noted above, 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.[50]

(i) Notice of Proposed Settlement

55. By order dated September 11, 2023, this Court approved the text of the parties' agreed upon Notice of Proposed Settlement and the methods by which that notice was to be distributed to the Class Members. Pursuant to that Order, the Class was notified of this proposed Settlement on October 20, 2023.[51]

(j) Key Terms of Proposed Settlement

56. 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. The key terms of the agreement are as follows:

[49] McKay Affidavit at para. 57.
[50] McKay Affidavit at para. 58.
[51] McKay Affidavit at para. 59.

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

57. 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 taxes thereon), as may be approved by this Honourable Court;
- Class Counsel's fees (and taxes thereon), again as may be approved;
- settlement administration expenses;
- any payment of taxes required by law;
- repayment of the Class Proceeding Fund for funded expenses;
- the Class Proceedings Fund's 10% statutory levy.

58. In respect of the settlement administration expenses, the Plaintiff has 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.[52] It should be noted 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. From the $7 million total funds, the Plaintiff proposes to reserve the Epiq estimate ($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.[53]

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[52] See Exhibit J" to the Mckay Affidavit for a redacted copy of Epiq's estimate. 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.

[53] McKay Affidavit at para. 61.

59. 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.[54]

(ii) Key Terms of the Proposed Distribution Protocol

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

61. 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 by reference to:

- the difference between the returns on their Can-Am Fund investments versus the returns of the S&P 500, 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 CJA prejudgment interest 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.[55]

62. 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

[54] McKay Affidavit at para. 62. Note, this estimate assumes settlement administration expenses are limited to Epiq's estimate of $425,000, inclusive of taxes.
[55] McKay Affidavit at para. 64.

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.[56]

63. The third and final premise is that payment to any class member should meet or exceed a *de minimus* amount, as noted above, in order to: (a) avoid trivial payment amounts; and (b) maximize the ratio of payment to administrative cost of payment. As explained 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.[57]

64. 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 noted above.
    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

[56] McKay Affidavit at para. 65.
[57] McKay Affidavit at para. 66.

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.[58]

65. 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.[59]

66. 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.[60]

67. 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 (of the total number of Class Members of XXX) have a non-zero IDW. Of these, 14,985 have an IDW equal or greater than $50 and are thus QCMs. After applying the $50 threshold and

[58] McKay Affidavit at para. 67.
[59] McKay Affidavit at para. 68.
[60] McKay Affidavit at para. 69.

the redistribution of any payments less than $50 (which redistribution 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.[61]

(iii) First Stage Distribution

68. 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.[62]

69. 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 the conclusion of the First Distribution.[63]

70. Any First Stage Payment Notification Letters and cheques returned to the Settlement

[61] McKay Affidavit at para. 70.
[62] McKay Affidavit at para. 71.
[63] McKay Affidavit at para. 72.

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 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.[64]

71. 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.[65]

[64] McKay Affidavit at para. 73.
[65] McKay Affidavit at para. 74.

(iv) Second Stage Distribution

72. 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.[66]

73. 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 cashed their First Distribution cheques in proportion to the value of such QCM's (cashed) First Distribution cheque expressed as a percentage of all cashed First Distribution Cheques.[67]

74. 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.[68]

75. 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

[66] McKay Affidavit at para. 75.
[67] McKay Affidavit at para. 76.
[68] McKay Affidavit at para. 77.

Distribution cheque.[69]

76. 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.[70]

77. 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.[71]

(v) Additional Key Terms

78. There are no appeals available from the calculation of the Relative Shares in either the First or Second Distribution.[72]

79. 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.[73]

(k) Responses from Class Members

80. Pursuant to this Honourable Court's Order of September 11, 2023, notice of this proposed Settlement was delivered to the Class by regular mail, in English and French, and posted to: www.canamfundlcassaction.ca. Class Members were invited to provide their comments regarding the Settlement by November 30, 2023. As of the date of this factum,

[69] McKay Affidavit at para. 78.
[70] McKay Affidavit at para. 79.
[71] McKay Affidavit at para. 80.
[72] McKay Affidavit at para. 81.
[73] McKay Affidavit at para. 82.

Class Counsel received 18 submissions regarding the proposed settlement. Each submission supported the settlement and none opposed it[74].

PART III: ISSUES & THE LAW

81. The issue on this motion is whether the Settlement should be approved.

(a) General Principles

82. A settlement of a class proceeding is not binding unless approved by the court.[75] To secure court approval, the settlement must be fair, reasonable, and in the best interests of the class.[76]

83. The factors and principles that inform whether a proposed settlement is fair, reasonable and in the best interests of the class are well-settled. This Honourable Court summarized the relevant factors and principles in *Des-Rosiers v. Takata Corporation*, 2020 ONSC 8043 (S.C.) at paras. 26-29 as follows:

> [26] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of

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[74] Affidavit of James Katsuras, sworn December 4, 2023, at para. 2.

[75] *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 29(2), as it read before the coming into force of section 35 of Schedule 4 to the *Smarter and Stronger Justice Act*, *2020*. Pursuant to the transition provisions of s. 39(1) of the newly amended Act, former s. 29(2) continues to apply to this action.

[76] *Fantl v. Transamerica Life Canada*, 2009 CanLII 42306 (ON SC) at para. 57, *Farkas v. Sunnybrook and Women's College Health Sciences Centre*, 2009 CanLII 44271 (ON SC) at para. 43, *Kidd v. The Canada Life Assurance Company*, 2013 ONSC 1868 (CanLII), *Mancinelli v. Royal Bank of Canada*, 2016 ONSC 6953 at para. 29.

communications by counsel and the representative plaintiff with Class Members during the litigation.[77]

[27] In determining whether to approve a settlement, the court, without making findings of fact on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement.[78] An objective and rational assessment of the pros and cons of the settlement is required.[79]

[28] The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation.[80] A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally.[81]

[29] Generally speaking, the exercise of determining the fairness and reasonableness of a proposed settlement involves two analytical exercises. The first exercise is to use the factors and compare and contrast the settlement with what would likely be achieved at trial. The court obviously cannot make findings about the actual merits of the Class Members' claims. Rather, the court makes an analysis of the desirability of the certainty and immediate availability of a settlement over the probabilities of failure or of a whole or partial success later at a trial. The court undertakes a risk analysis of the advantages and disadvantages of the settlement over a determination of the merits. The second exercise, which depends on the structure of the settlement, is to use the various factors to examine the fairness and reasonableness of the terms and the scheme of distribution under the proposed settlement.[82]

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[77] Citing: *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 45 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 59 (S.C.J.); *Corless v. KPMG LLP*, [2008] O.J. No. 3092 at para. 38 (S.C.J.); *Jeffery v. Nortel Networks Corp.*, 2007 BCSC 69; *Fakhri v. Alfalfa's Canada, Inc.*, 2005 BCSC 1123.

[78] Citing: *Baxter v. Canada (Attorney General)* (2006), 2006 CanLII 41673 (ON SC), 83 O.R. (3d) 481 at para. 10 (S.C.J.).

[79] Citing: *Al-Harazi v. Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191 at para. 23 (Ont. S.C.J.).

[80] Citing: *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 70 (S.C.J.); *Dabbs v. Sun Life Assurance Company of Canada* (1998), 1998 CanLII 14855 (ON SC), 40 O.R. (3d) 429 (Gen. Div.).

[81] *Quenneville*Citing *McCarthy v. Volkswagen Group Canada, Inc.*, 2018 ONSC 2516 (CanLII) at para. 57 *Good v. Toronto Police Services Board*, 2020 ONSC 6332 (CanLII) at para. 31, *Parsons v. Canadian Red Cross Society,* [1999 (2007), 158 ACWS (3d) 12 at para. 17 (Ont. S.C.J.); *Fraser v. Falconbridge Ltd.*, [2002] O.J. No. 3572 (S.C.J.) at para. 70, *Mancinelli v. Royal Bank of Canada*, supra at para. 32, *Rothman v. Kaba Ilco Corp.*, 2018 ONSC 4761 (CanLII) at para. 32.2383 at para. 13 (S.C.J.).

[82] Citing: *Welsh v. Ontario*, 2018 ONSC 3217.

(b) <u>The Likelihood of Recovery or Success at Trial</u>

84. The Plaintiff's core theory of liability in this case turns on a robust interpretation of what it means in law to make "best efforts". The Plaintiff claims that the Defendant both (a) owed and breached a contractual obligation to a smaller subset of Class Members to use "best efforts" to replicate the return performance of the S& 500 in Canadian dollars, and (b) mispresented to the larger subset of Class Members that it was in fact making such "best efforts" when it knew or should have known that it was not in fact doing so. Although Canadian case law contains some helpful statements to effect that a "best efforts" obligation imposes a high onus, as set out at paragraph 16 above, Class Counsel is not 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.[83] It is conceivable that the court might have found such a position convincing.

85. Thus, despite the existence of helpful case law drawn from cases involving different factual contexts, there is a real risk that a trial judge might reject the "best efforts"

[83] McKay Affidavit at para. 94.

replication premise supporting the Plaintiff's claims in both contract and tort. Further, if the Defendant's fund management efforts were to be judged against a lower industry standard or norm of "reasonable prudence", there is a real risk that a trial judge might reject the argument that there was any poor management of the Can-Am Fund at all.[84]

86. 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 based on a comparison to the top performer or $1.66 million based on a comparison to the average of all other S&P 500 comparator index funds.

87. 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.[85]

88. The first factor is that, given the modest sums at stake, few Class Members would be likely to take steps to prove their individual 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. Class Counsel estimates, the maximum hypothetical average payout to Misrepresentation Class Members would be approximately $150.[86]

[84] McKay Affidavit at para. 96(b).
[85] McKay Affidavit at para. 86.
[86] McKay Affidavit at para. 87.

89. 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 process.[87]

90. 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 in a manner that would have secured greater returns.[88]

91. In short, even were the Plaintiff successful in proving the existence and breach of duty of care, there is a very good chance that only a modest number of tort Class Members would come forward, and for those who came forward, success in proving reliance, causation and damages might prove quite challenging.[89]

92. Class Counsel's analysis of the amounts or damages likely to have been recovered is set out in the Facts section further above. As detailed therein, the likely recovery (with interest) would have been in the $4.166 to $5.24 million range.

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[87] McKay Affidavit at para. 88.
[88] McKay Affidavit at para. 89.
[89] McKay Affidavit at para. 96(b).

(c) Amount and Nature of Discovery, Evidence and Investigation

93. As described further above, the proposed settlement was reached after, and informed by the results of, a years long discovery process, the Plaintiff's review of tens of thousands of productions, and extensive expert-assisted analysis of the evidence. At the May 2023 mediation, both Parties put forward detailed expert reports respecting the factual elements of liability and potential damages.

94. Starting in 2011, before the first failed attempt at a mediated resolution, through the second and successful May 2023 mediation, the Plaintiff received and relied upon the indispensable assistance of 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. [90]

95. To date, Mr. Rocchi has devoted 680 hours to this case in return for total professional fees of $258,415, exclusive of HST, for an average (and very reasonable) hourly rate of $380. Mr. Rocchi's professional fees are by far the Plaintiff's largest disbursement on this file, and were monies very well spent.[91]

96. The core factual allegation in this action – 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. Thus, Class Counsel

[90] McKay Affidavit at para. 84.
[91] [Supplement Aff]

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).[92] Mr. Rocchi's expertise was indispensable with regard to the all of the foregoing.

97. Prior to Mr. Rocchi preparing an expert report on factual liability and estimated damages for the May 2023 mediation, preparation of Mr. Rocchi's expert report for trial was well under way.[93]

98. In sum, the Plaintiff's decision to accept proposed settlement of the outstanding claims for the all-inclusive sum of $7 million was informed by a robust appreciation of available evidence and potential arguments both for and against liability and damages.

(d) <u>The Future Expense and Likely Duration of the Litigation</u>

99. Were the Parties to continue to litigate, a final resolution would likely be years in the future and would come at the additional expense of many hundreds of thousands of

[92] McKay Affidavit at para. 92.
[93] [Supplement Aff]

dollars in additional counsel and expert time. An appeal from the common issues trial judgment would be inevitable, irrespective of which Party "won" or in the event of divided success. And were the Plaintiff ultimately successful in establishing that the Defendant made negligent misrepresentations, individualized determinations of the issues of reliance, causation and damages for negligent misrepresentation would further delay the resolution of the majority of Class Members' claims which sound only in tort.

(e) Number of Objectors & Nature of Objections

100. As set out above, as of the date of this factum, Class Counsel received no objections to the proposed settlement but did received 18 submissions in support of the proposed settlement.

(f) Good Faith, Arms-length Bargaining and Absence of Collusion

101. At all times throughout this litigation, including settlement negotiations, the Parties through their Counsel have maintained a professionally civil but steadfastly adversarial relationship.

(g) Communications with the Plaintiff and the Class

102. The Representative Plaintiff was consulted by Class Counsel throughout this litigation. Mr. Fantl (a retired litigator as noted above) received numerous updates on the status of the action, considered RO's advice and provided input or instructions on every major decision as required[94]. Most recently, Mr. Fantl attended the mediation before the

[94] Affidavit of Joseph Fantl sworn November 7, 2023 (**"Fantl Affidavit"**) at paras. 4 & 6.

Honourable Dennis O'Connor and has confirmed his agreement to the Settlement.[95]

(h) Recommendation of Class Counsel

103. For all the foregoing reasons, Class Counsel respectfully recommends that this Honourable Court approve the Parties proposed settlement.

PART IV: ORDER SOUGHT

104. The Plaintiff respectfully requests an Order approving the Settlement Agreement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of December, 2023.

Peter L. Roy, LSO No. 16132O

David F. O'Connor, LSO No. 33411E

J. Adam Dewar, LSO No. 46591J

[95] Fantl Affidavit at paras. 7-10.

Schedule 1 – Certified Class Definition & Common Issues

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 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?

JOSEPH FANTL
Plaintiff

- and -

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Defendant

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

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act 1992*

FACTUM – SETTLEMENT APPROVAL

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