

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

KATHRYN ROBINSON and RICK ROBINSON

Plaintiffs

and

**ROCHESTER FINANCIAL LIMITED, PROMITTERE CAPITAL GROUP
INC., PROMITTERE ASSET MANAGEMENT LTD., BANYAN TREE
FOUNDATION and FRASER MILNER CASGRAIN LLP**

Defendants

Proceeding under the Class Proceedings Act, 1992

**FACTUM
RE: SETTLEMENT AND CLASS COUNSEL FEE APPROVAL
RETURNABLE JANUARY 17, 2012**

January 13, 2012

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Defendants

**FACTUM OF THE PLAINTIFFS
RE: SETTLEMENT AND FEE APPROVAL
(MOTION RETURNABLE JANUARY 17, 2012)**

PART I – OVERVIEW

1. This motion seeks approval of settlement of this Proceeding as well as approval of fees and disbursements requested by Class Counsel.
2. This Proceeding relates to a retail tax shelter for the years 2003-2007 that, in hindsight, sounded “too good to be true” when individuals agreed to participate. It was a leveraged charitable donation program which promised that in exchange for an out-of-pocket payment, a participant would receive a charitable donation

tax receipt in an amount more than 3 ½ times the out-of-pocket payment. Approximately one-half the out-of-pocket payment, a security deposit, was to be invested to yield sufficient return to pay annual interest on a loan taken to fund the balance of the donation and retire the debt in full before it became due.

3. The tax effect of participation in the Gift Program was promised to be a cash positive position of approximately \$1,900.00 for Ontario and Manitoba residents, at a 46.4% tax rate.
4. The Gift Program was backed by legal opinions from FMC.
5. Unfortunately, the Gift Program was in fact “too good to be true”.
6. As might be expected, the mechanics of the Gift Program were complicated. It was designed to enable Canadian taxpayers to obtain a financial benefit, by way of tax deduction, that was more than their out-of-pocket payment, or “donation”. It was also designed to reap substantial profits for the Gift Program Defendants.
7. Canadian taxpayers, like Rick and Kathy, who participated in the Gift Program, made an out-of-pocket payment of approximately \$2,700.00 for each \$10,000.00 in receipt amount issued. \$1,350.00 was paid to Banyan Tree, and \$1,350.00 was paid to Rochester. In return, Rick and Kathy received a charitable donation tax receipt in the amount of \$10,000.00. Rochester was to loan the balance of funds, or approximately \$8,650.00, to Rick and Kathy who pledged that money to Banyan Tree for a total charitable donation of \$10,000.00. The balance of the out-of-pocket payment, \$1,350.00, was the security deposit to be invested to pay

the annual interest on the loan and pay the loan in full before Rick and Kathy were called upon to pay it. Rick and Kathy pledged the loan proceeds to Banyan Tree and directed Rochester to make the payment. For a taxpayer in the highest tax bracket, this would result in tax savings of \$4,640.00 on an out-of-pocket payment of \$2,700.00, for a net cash return of more than \$1,900.00. Obviously, this was a very attractive “investment”.

8. The charities that participated in the program were said to be Sunnybrook Hospital, Equine Canada, Bishop Strachan School, King Bay Chaplaincy and others. The upshot was that everyone was happy. The participant had effectively made a profit on the investment by achieving tax savings that substantially exceeded the amount of his or her cash payment. The Gift Program Defendants were happy because they acquired real cash and what was promised to be a long-term income stream. The salespeople, largely independent financial advisors, received healthy commissions. Thiessen and other employees of the Gift Program Defendants received salary payments. Most of the money paid was in the pockets of various participants in the Gift Program with actual charities receiving very little of the total purported donations.
9. Unfortunately, the happiness did not last, at least for Rick and Kathy and the other Gift Program participants. CRA disallowed the charitable donation tax credits claimed leaving participants having to repay CRA for taxes owing with interest.

10. In addition, the amounts paid as security deposits for the loans were compromised with the investment manager having made off with the money and being criminally charged. CRA asserted that the emperor had no clothes. Its position was and is that the purported donations made by Rick and Kathy and all other Gift Program participants were not in fact “gifts”¹.

PART II – FACTS

A) Background

11. This is a certified class proceeding which involves:
 - all individuals who participated in the Banyan Tree Foundation Gift Program for the taxation years 2003, 2004, 2005, 2006 and 2007 (“Class” or “Class Members”).
12. The Gift Program was structured as a mechanism to provide donations to various charities and to enable participants to obtain charitable donation tax receipts in amounts greater than the actual out-of-pocket payments made.
13. Banyan Tree was a private charitable foundation registered December 18, 1987, formerly known as the Ronald and Joan Ball Foundation. In 2002, Thiessen, a chartered accountant, became president and director of Banyan Tree. The Gift Program Defendants are Ontario corporations. Thiessen is an officer and director of each of the Gift Program Defendants.
14. FMC is a limited liability partnership of lawyers with offices in Toronto and elsewhere which provided legal opinions that the Gift Program complied with

¹ Adapted from *Cannon v. Funds for Canada Foundation*, 2010 CarswellOnt 5935, at paras. 18, 19, 20, 25-27

applicable tax rules for charitable donations and that the charitable donation tax receipts issued by Banyan Tree would be recognized by CRA.

15. This Proceeding was certified by order of Justice Lax dated January 19, 2009.
16. The Statement of Defence of the Gift Program Defendants was struck out by order of Justice Strathy dated May 25, 2011.
17. A Settlement Agreement was entered into on January 11, 2012. The settlement was reached in principle following a mediation session before the Honourable George Adams, Q.C., in September, 2011. Class Counsel have developed a Distribution Plan which sets-out the proposed distribution of settlement monies to Class Members.

B) Summary of the Settlement Agreement

18. A Settlement Fund of \$11,000,000.00 has been created. Class Counsel fees and disbursements, as well as administration costs, will be paid from the Settlement Fund, with the balance being distributed to Class Members *pro-rata* in accordance with their participation in the Gift Program, measured based on the amounts of charitable donation tax receipts issued by Banyan Tree.
19. In addition, the Court is being asked to grant a declaration that the promissory notes executed by Class Members in connection with participation in the Gift Program, are void and unenforceable.

C) Factors Considered/Litigation Risk

20. Class Counsel undertook considerable investigation in pursuing this litigation and assessing the merits of the proposed settlement. In agreeing to settlement, Class Counsel considered the following:
- (i) information provided by the Plaintiffs and other Class Members;
 - (ii) information received from the Plaintiffs' tax consultants, Professor Krishna and Loukidelis, both of whom have considerable experience in income tax law, as well as the tax consultant engaged by FMC;
 - (iii) information publicly available concerning the Gift Program and other similar leveraged charitable donation programs;
 - (iv) information received from CRA in respect of the Gift Program and in respect of other leveraged charitable donation programs;
 - (v) information obtained from the Gift Program Defendants pursuant to the court order requiring production of information and documentation;
 - (vi) information provided by the Gift Program Defendants and FMC by way of voluminous documentary disclosure;
 - (vii) information provided by the Gift Program Defendants and FMC during examination for discovery;
 - (viii) information provided by FMC during the course of settlement discussions;

- (ix) information provided by the Plaintiffs' damages experts, Alan Mak and Cyrus Khory of Rosen & Associates Limited; and from Robert Low of Deloitte & Touche LLP, damages expert on behalf of FMC; and,
 - (x) significant legal research regarding the income tax issues; and theories of liability and damages as against the Gift Program Defendants and FMC.
21. Class Counsel considered the proposed settlement in light of the significant procedural and litigation risks including:
- (i) the risk that no recovery would be possible from the Gift Program Defendants;
 - (ii) the risk that the Plaintiffs would not prevail against FMC at a common issues trial;
 - (iii) the risk that a court would require individual damage assessments, making proof for individual Class Members extremely onerous; and,
 - (iv) even in the event that the Plaintiffs were successful at all phases of the litigation, the possibility that the defendants could file appeals in respect of multiple issues, thus resulting in considerable delay in obtaining compensation for Class Members.

D) Distribution and Administration of Settlement

22. The proposed Distribution Plan was developed by Class Counsel as a simple, straightforward and fair way of distributing the Settlement Fund to Class Members.
23. The Distribution Plan provides that Class Members will receive a *pro-rata* share of the monies available in the Settlement Fund based on their participation in the Gift Program.
24. Class Counsel are proposing to serve as Administrator. Class Counsel will remain subject to the supervision of the Court and will report back to the Court with respect to implementation and administration of the settlement.

E) Class Counsel Fees and Disbursements

25. Class Counsel are seeking approval of payment of their fees and disbursements with a holdback of \$350,000.00 plus H.S.T., which will be subject to further Court approval following substantial implementation and administration of the settlement.

i) Risks Undertaken by Class Counsel

26. By agreeing to pursue this matter on a contingency fee basis, Class Counsel assumed the risk of the time and expense which would be required to litigate the matter to conclusion, including appeals. When negotiations were entered into, Class Counsel assumed the risk that negotiations would not succeed and the

time spent and expense incurred in that process would be wasted and would be in addition to the time and expense required to prosecute the Proceeding.

ii) Time and Expenses Incurred by Class Counsel

27. Significant time and money have been expended by Class Counsel in pursuing this litigation. As of January 10, 2012, Class Counsel have docketed time having a value of \$1,958,203.20, plus applicable taxes; and has incurred disbursements of \$199,358.15, plus applicable taxes.
28. Class Counsel have funded all the disbursements associated with this matter and has not applied to the Class Proceedings Fund for assistance.
29. Considerable work remains to be done by Class Counsel. The future involvement of Class Counsel includes:
 - (i) preparing for and attending the settlement approval hearing;
 - (ii) responding to questions from Class Members regarding the Settlement Agreement and Distribution Plan;
 - (iii) following-up to ensure a fair and efficient administration of the Settlement Agreement and Distribution Plan working cooperatively and collaboratively with the Administrator; and,
 - (iv) further application to the Court for direction as required under the Settlement Agreement and Distribution Plan.

iii) Appropriateness of Class Counsel Fees Sought

30. In calculating the value of settlement for the purpose of determining Class Counsel fees, Class Counsel has not included the value of the sought declaration in respect of promissory notes executed by Class Members in connection with participation in the Gift Program. The promissory notes under the Gift Program have face value in excess of \$100,000,000.00.
31. Class Counsel are seeking approval of legal fees of 25% (\$2,750,000.00) of the \$11,000,000.00 Settlement Fund, plus disbursements and applicable taxes.
32. Class Counsel propose that it be paid in two stages, a fee payment of \$2,400,000.00 plus disbursements and applicable taxes now; and a further payment of \$350,000.00, plus applicable taxes, to be paid upon further Court order after Class Counsel and the Administrator report to the Court as to implementation and administration of the settlement.
33. The fees sought are consistent with the Class Proceeding Contingency Fee Retainer Agreement entered into with the Plaintiffs. The Plaintiffs support Class Counsel's fee request.

Part III – Issues and Law

A) Settlement Approval

34. The Settlement Agreement and Distribution Plan are fair, reasonable and in the best interests of the Class, and ought to be approved. The Settlement

Agreement and Distribution Plan achieve the goals of the CPA, and provide fair and reasonable benefits to members of the Class.

(i) General Principles

35. In *Nunes v. Air Transat A.T. Inc.*, Cullity J. summarized the principles to be applied on a motion for settlement approval²:

- (i) to approve a settlement, the court must find that it is fair, reasonable, and in the best interests of the class;
- (ii) the resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy;
- (iii) there is a strong initial presumption of fairness when a proposed settlement, which was negotiated at arm's-length by counsel for the class, is presented for court approval;
- (iv) to reject the terms of a settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a zone of reasonableness;
- (v) a court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within a zone or range of reasonableness.

² *Nunes v. Air Transat A.T. Inc.*, 2005 CarswellOnt 2503 (S.C.J.) at para. 7; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1118 (S.C.J.)

All settlements are the product of compromise and a process of give and take, and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs obligation;

- (vi) it is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement. Nor is it the court's function to litigate the merits of the action or to simply rubber-stamp a proposal; and,
- (vii) the burden of satisfying the court that a settlement should be approved is on the party seeking approval.

36. The standard to be applied in determining whether to approve a settlement is one of reasonableness, not perfection. To merit approval, a settlement need fall within a “zone of reasonableness”. The basic test is that “the court must find that in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it³.”

37. In determining whether to approve a settlement, the court may consider the following factors:

- (i) the presence of arm's-length bargaining and the absence of collusion;

³ *Dabbs v. Sun Life Assurance Company of Canada*, [1998] O.J. No.1598 at 13 (Gen. Div.); and (1998), 40 O.R. (3d) 429 at 440-444 (Gen. Div.); aff'd (1998), 41 O.R. (3d) 97 (C.A.); leave to appeal to S.C.C. denied [1998] S.C.C.A. No. 372

- (ii) the proposed settlement terms and conditions;
- (iii) the number of objectors and nature of objections;
- (iv) the amount and nature of discovery, evidence or investigation;
- (v) the likelihood of recovery or likelihood of success;
- (vi) the recommendations and experience of counsel;
- (vii) the future expense and likely duration of litigation;
- (viii) information conveying to the court the dynamics of, and the positions taken by the parties during the negotiations;
- (ix) the recommendation of neutral parties, if any; and,
- (x) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation⁴.

38. These factors should be a guide in the process, and no more. In a particular case, some factors will have greater significance than others and weight should be attributed accordingly.

39. The role of the court is not to rewrite or modify the terms of the settlement, but only to approve or reject it⁵.

(ii) Arm's-Length Bargaining and the Presumption of Fairness

40. The Settlement Agreement was negotiated in good faith at arm's-length by experienced counsel on both sides. Settlement negotiations were ongoing for many months, and two mediation sessions were held.

⁴ *Nunes v. Air Transat A.T. Inc.*, *supra*, at paras. 6, 7; *Dabbs v. Sun Life Assurance Company of Canada*, *supra*; *Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572 at paras. 71-73 (S.C.J.)

⁵ *Dabbs v. Sun Life Assurance Company of Canada*, *supra*.

41. There is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arm's-length by counsel for the class, is presented for court approval. In order to reject the terms of the settlement and deem that the litigation ought to continue, the court must conclude that the settlement falls outside of a range or zone of reasonableness⁶.

(iii) Settlement Benefits

42. The court must be assured that a settlement secures an adequate advantage for the class in return for the surrender of litigation rights against the defendants. The function of the court in reviewing a settlement is not to reopen and enter into negotiations with the parties. The court can indicate areas of concern and afford the parties the opportunity to answer those concerns with changes to the settlement. However, the court's power to approve or reject settlements does not extend to modifying the terms of a negotiated settlement⁷.

(iv) Monetary Benefits

43. The proposed settlement will result in reasonable monetary compensation for all Class Members. All Class Members will receive a payment from the Settlement Fund *pro-rata* based on participation in the Gift Program, measured based on the amount of charitable donation tax receipt(s) issued by Banyan Tree.

⁶ *Dabbs v. Sun Life Assurance Company of Canada, supra.*

⁷ *Newberg on Class Actions*, 3rd ed. (Shepard's/McGraw-Hill, 1992) s.11.46; *Dabbs v. Sun Life Assurance Co. of Canada, supra*; *Manual of Complex Litigation*, 3rd ed. (Federal Judicial Centre: West Publishing, 1995) at s. 30.42 at 240

(v) Non-Monetary Benefits

44. A declaration is sought that all promissory notes executed by Class Members in favour of Rochester and any other lender in connection with participation in the Gift Program, are void and unenforceable.
45. Many Class Members have been and remain concerned about possible liability under the promissory notes and a declaration of invalidity will come as great relief to those individuals.

(vi) Opt-Out Rights

46. The proposed settlement contemplates that all individuals who earlier opted-out of the Proceeding will now be able to opt back in.
47. Class Members who do not wish to participate in the settlement and who have already opted-out of the Proceeding can maintain their opt-out, and are not required to do anything further.

(vii) Discovery, Evidence and Investigation

48. On a motion for settlement approval, the court need not possess the evidence required to decide the merits of the issue, because compromise is proposed in order to avoid further litigation. Instead, the court need only possess sufficient information to raise its decision above mere conjecture⁸.
49. While the court requires sufficient evidence to permit the judge to exercise an objective, impartial and independent assessment of the fairness of the settlement

⁸ Newberg on Class Actions, 3rd ed. (Shepard's/McGraw-Hill, 1992) s.11.45 at pp. 11-100, 11-111; *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 at 152 (S. C.J.)

in all of the circumstances, it is not necessary that formal discovery have occurred at the time of settlement⁹. In this case, discovery was partially complete when settlement was achieved.

50. In situations where the litigation may continue if the settlement is not approved, the court must be mindful that there are constraints to which parties can be expected to make a full disclosure of the strengths and weaknesses of their case¹⁰.
51. The Court has been provided sufficient information to permit it to exercise its function of independently assessing the fairness and reasonableness of the Settlement Agreement and Distribution Plan.

(viii) Recommendation of Counsel / Litigation Risks

52. In the absence of evidence to the contrary, the recommendation of experienced counsel should be given great weight. Class counsel and defence counsel have a unique ability to assess the potential risks and rewards of the litigation¹¹. All counsel in this case have considerable experience in class proceedings and complex litigation matters generally.
53. The courts have recognized that the practical value of an expedited recovery is a significant factor for consideration. In addition to the legal and factual risks, a

⁹ *Dabbs v. Sun Life Assurance Co. of Canada, supra*, at paras. 15 and 24

¹⁰ *Dabbs v. Sun Life Assurance Co. of Canada, supra*, at para.16

¹¹ *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 at 440 (Gen. Div.); aff'd (1998), 41 O.R. (3d) 97 (C.A.); leave to appeal to S.C.C. denied [1998] S.C.C.A. No. 372; Manual for Complex Litigation, 3rd ed. (Federal Judicial Center: West Publishing, 1995) s. 30.42 at p. 240

practical concern favouring settlement includes the potential that a case would take several years to reach trial and exhaust all appeals¹².

54. Although Class Counsel are of the view that the Proceeding has merit, the success of litigation which would be required, in the event that the settlement is not approved, would be uncertain.

(ix) Distribution

55. The Distribution Plan is fair and reasonable. All Class Members will receive a *pro-rata* payment from the Settlement Fund, and the benefit of the declaration that promissory notes executed in connection with the participation in the Gift Program, are void and unenforceable.

B) Allowing Opt-Outs Back In

56. In *Levesque v. Ford*, Court File No. 4767/08 (Settlement Approval Order of Justice Sproat dated November 9, 2011), Justice Sproat allowed individuals who had previously opted-out of the proceeding to opt back in, as part of the settlement approval process.
57. The *CPA* is silent as to whether an opt-out may opt back into a class proceeding. The *U.S. Federal Rules of Civil Procedure* are also silent, however, courts in the U.S. have allowed opt-outs to re-enter an action.

¹² *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 at 441 (Gen. Div.); aff'd (1998), 41 O.R. (3d) 97 (C.A.); leave to appeal to S.C.C. denied [1998] S.C.C.A. No. 372

58. *In re Electrical Carbon Products Antitrust Litigation*¹³, opt-outs sought re-entry to a class action for purposes of settlement. The court indicated it must scrutinize whether no special benefit will be conferred upon those individuals at the expense of other class members and whether the resulting settlement would be to the benefit of those class members.
59. In *Spencer v. Hartford*, the court approved a settlement which permitted opt-outs to opt back in. Notice was sent to those who opted-out, advising of their opportunity to opt back in¹⁴.
60. No Class Members relied, to their detriment, on the decision of the opt-outs to exclude themselves from the Proceeding. Class Counsel negotiated settlement on the basis that opt-outs would be given an opportunity to opt back in.
61. Allowing individuals who earlier opted-out to opt back in is particularly appropriate in this case given the significant misinformation campaign that was perpetrated by the Gift Program Defendants and/or a number of financial advisors during the notice and opt-out processes, and throughout the course of the Proceeding.
62. Permitting Class Members to opt back in is to the benefit of the defendants as it broadens the effect of the judgment and maximizes the *res judicata* effect of the issues.

¹³ *In re Electrical Carbon Products Antitrust Litigation*, MDL No. 1514 (D.N.J.), Master Civil No. 03-2182, Document 265

¹⁴ *Spencer v. Hartford* (6 July 2010), Connecticut 03-CV-1681-JCH (Con. Dist. Ct)

63. The Court has discretion to allow opt-outs back into the Proceeding under section 12 of the *CPA*. Section 12 permits the court the discretion to make any order that it considers appropriate to ensure the fair and expeditious determination of the class proceeding.
64. The right to opt-out is a right conferred on the party opting-out and not on the defendant or any other person. The purpose is to allow the individual to oppose being part of the action, and/or pursue alternative means. If an individual decides that settlement is his or her preferable procedure, then opting back in should be allowed. There are other examples where the court has used its discretionary power under section 12 to allow something that is not expressly permitted under the *CPA*.
65. In *Ronald Smith and Associates Inc. v. Intuit Canada*, Justice Lax observes that:
- Section 12 of the *CPA* gives the court a broad discretion to make any order it considers appropriate respecting the conduct of a class proceeding and to ensure its fair and expeditious determination¹⁵.
66. Permitting individuals to opt back into an action prevents further litigation of the same issues in another action and/or forum, therefore saving the individuals the extra expense of pursuing claims, the expense of the defendants in defending on the same issues, and the expense of the court in dealing with the matter again.

¹⁵ *Ronald Smith and Associates Inc. v. Intuit Canada*, 2009 CanLii 10682 (O.N.S.C.)

C) Views of Class Members/Objectors

67. In analyzing the fairness of a settlement, the role of the Court is independent of the presence or absence of objectors. The test remains the same. The court must be satisfied that the settlement is fair, reasonable and in the best interest of those affected by it, regardless of whether or not objectors participate in the approval hearing process.
68. The presence or absence of objectors does not relieve the proponents of the settlement of their burden to establish that the settlement is fair.
69. The presence of even a large number of objectors does not spell doom for the settlement. In *Stewart v. General Motors of Canada Ltd.*, Justice Cullity reviewed 106 objections to settlement and ultimately concluded that the objectors failed to recognize that a settlement is a compromise and that there would be risks, delays and great expense in continuing with the litigation. The objectors did not seem to understand that the court did not have the power to amend the settlement¹⁶.
70. The same situation exists here. The objectors want a revised settlement, not more money or a “better” settlement, just a different one which is not supported by the facts or evidence, nor sound in law.

¹⁶ *Stewart v. General Motors of Canada Ltd.*, 2008 CarswellOnt 6590 (S.C.J.), at para. 29

71. Objections which raise issues that relate to the merits of individual claims as opposed to the merits of the Settlement Agreement itself are not the proper subject matter of a settlement approval hearing¹⁷.
72. The objections received have quite obviously been solicited by a few financial advisors who were significantly involved in promoting and selling the Gift Program and who are in a conflict-of-interest position in advising Gift Program participants.
73. The objections are ill-conceived and uninformed for the following reasons:
 - (a) there is no legal opinion as to the likelihood of success of an appeal to the Tax Court of Canada despite passage of more than 4 ½ years and expenditure of hundreds of thousands of dollars in legal fees on the tax representation issues;
 - (b) there is no appeal to the Tax Court of Canada under way in respect of any year to which this Proceeding relates;
 - (c) case law including the decision in *Maréchaux* indicates that it is highly unlikely that any tax appeal launched would be successful. There is no realistic possibility of obtaining the promised tax benefits¹⁸;
 - (d) in any event, Class Members cannot obtain the promised tax benefits without being obliged to make payment of the promissory notes they signed;

¹⁷ *Directright Cartage Ltd. v. London Life Insurance Co.*, 2001 CarswellOnt 3658 (S.C.J.), at para. 25

¹⁸ *Marechaux v. R.*, 2009 CarswellNat 3685 (T.C.C.); aff'd 2010 CarswellNat 3593 (F.C.A); leave to appeal dismissed 2011 CarswellNat 1911 (S.C.C.)

- (e) it is not necessarily the case that the Tax Court of Canada will consider itself bound by the sought declaration with respect to the invalidity of the promissory notes. The Tax Court of Canada might make its own determination with respect to the validity of the promissory notes in assessing the tax issues relating to the Gift Program on a full evidentiary record;
- (f) the declaration sought is based upon the default of the Gift Program Defendants and in accordance with the settlement negotiated;
- (g) objectors apparently want to receive payment from the Settlement Fund but do not want the declaration in respect of the promissory notes. If the objectors pursue an appeal to the Tax Court of Canada and are successful, they will receive exactly what they bargained for, i.e., the promised tax benefits, and in that case should not be entitled to any payment from the Settlement Fund; and,
- (h) all evidence before the Court indicates that the loans were never funded so the promissory notes should be void. There is no evidence whatsoever that the loans were actually funded. Indeed, all evidence points to no money flowing and only paper entries being processed.

D) Role of Objectors

- 74. Objectors to a class action settlement may be granted leave to participate in the approval hearing motion under section 14 of the *CPA*.
- 75. Objectors granted leave to participate are not parties to the action and, accordingly, do not have rights of parties respecting such matters as oral

discovery or production of documents. In this respect, the role of the objector is to reflect the non-adversarial settlement approval process.

76. On the other hand, the section provides a broad discretion to the Court to allow the objectors to participate, “in whatever manner and whatever terms... the court considers appropriate”¹⁹.
77. Individuals who earlier opted-out of the Proceeding do not have standing to object to the settlement or participate in the approval hearing motion. Those individuals are not part of the Class, their rights are unaffected by the settlement, they are free to pursue whatever legal remedy they see fit and their views as to the settlement are irrelevant to the court in the settlement approval process.
78. There is absolutely no merit whatsoever to the allegations made by Harrington in respect of the conduct of Class Counsel. Class Counsel conducted themselves properly, professionally and honourably and represented the Class with excellence.

E) Opt-Out Issues

79. Individuals who do not opt-out of the Proceeding are bound by the judgment and settlement on the common issues. As a general rule, it is extremely difficult for Class Members who have not opted-out of the proceeding to avoid the *res judicata* effect of a class proceeding judgment²⁰.

¹⁹ CPA, s.14

²⁰ *Philips Petroleum and Co. v. Shutts*, 472 US 797 (1985)

80. Class Members who opted-out of the Proceeding are not bound by the determination of the common issues.
81. As Eizenga points-out in his text, from a legal perspective the only reason to opt-out of a class proceeding is to pursue individual litigation. Class Members who do not opt-out are in no way obligated to participate in the proceeding nor to share in the expenses of the proceeding²¹.
82. As a practical matter, individuals sometimes opt-out of a proceeding for a variety of reasons unrelated to any intention to pursue individual litigation.
83. Courts have been and should be reluctant to relieve against opt-out deadlines/requirements. In *Smith v. Kronos Machinery Co.*, a class member sought to opt-out passed the established deadline. The class member had taken advantage of the process established by the class proceeding settlement but wished to avoid the payment of legal fees to class counsel. The court did not let him do so²².
84. The situation here is similar. Objectors want to receive a share of the Settlement Fund, but wish to avoid the potential effect of a declaration of invalidity with respect to the promissory notes.

²¹ Eizenga, Peerless, Wright and Callaghan, *Class Actions Law and Practice* (2nd Edition) (LexisNexis Canada Inc., 2010)

²² *Smith v. Kronos Machinery Co.*, 2000 CarswellOnt 68 (S.C.J.), at para. 18

F) Effect of the Sought Declaration Upon a Possible Tax Appeal

85. The Plaintiffs acknowledge that a declaration from this Court that promissory notes executed by Gift Program participants are void and unenforceable, might be recognized by the Tax Court of Canada²³.
86. It is fair to note, however, that the Tax Court of Canada might make its own determination with respect to the validity of the promissory notes in assessing the tax issues relating to the Gift Program on a full evidentiary record.

G) Representative Plaintiff Compensation

87. The Class Proceeding Contingency Fee Retainer Agreement executed by Rick and Kathy allows for the possibility of a representative plaintiff compensation payment, if approved by the court:

KATHRYN ROBINSON and RICK ROBINSON (and any additional representative plaintiff(s)) acknowledge that he/she is not entitled to receive any payment or fee for acting as a representative plaintiff in the class proceeding. However, Courts have on occasion awarded a fee in favour of a representative plaintiff in recognition of the individual's time and expense incurred in the conduct of the proceeding and Scarfone Hawkins ^{LLP} will make its best efforts to seek similar compensation on behalf of the representative plaintiff(s) in this class proceeding if so instructed by the representative plaintiff(s);

88. At the suggestion of Class Counsel, a request is being made for Plaintiff compensation in the amount of \$5,000.00 each.

²³ *Sussex Square Apartments Ltd. v. R.*, 1998 CarswellNat 2543 (T.C.C.), at paras. 20 and 40, aff'd 2000 CarswellNat 1947 (F.C.A.)

89. Class Counsel submit that this is the type of extraordinary case that warrants compensation for the Plaintiffs for their efforts.
90. While the *CPA* makes no specific reference to compensation for the representative plaintiff, courts in the United States have made “incentive awards” to the class representatives.
91. In Canada such awards are justified in special circumstances²⁴. In *Windisman*, the representative plaintiff was active at all stages of the action and was awarded \$4,000.00 which was deducted from the fund recovered on behalf of the class. The court said that the representative plaintiff in undertaking the proceeding on behalf of a wider group benefitted the wider group by his effort and that if the representative plaintiff was not compensated in some way for time and effort, the class would be enriched at the expense of the representative plaintiff to the extent of that time and effort. Where the representative plaintiff can show that he or she rendered “active and necessary assistance” to the preparation of presentation of the case which resulted in monetary success for the class, the representative plaintiff may be compensated for the time spent.
92. The payment of compensation to a representative plaintiff is exceptional and rarely done²⁵. Awards of representative plaintiff compensation should not be seen as routine, however, where plaintiffs have devoted time and effort

²⁴ *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen.Div.)

²⁵ *McCarthy v. Canadian Red Cross Society* [2007] O.J. No. 2314 (S.C.J.), at para. 20; *Windisman v. Toronto College Park Ltd.*, *supra*; *Sutterland v. Boots Pharmaceutical PLC*, [2002] O.J. No. 1361 (S.C.J.); *Belaire v. Daya* [2007] O.J. No. 4819 (S.C.J.), at para. 71

communicating with other Class Members, acting as liaison with counsel and assisting counsel at all stages of the proceeding, an award is justified.

93. Any proposed payment should be closely examined because it will result in the representative plaintiff receiving an amount that is in excess of what will be received by any other member of the class he or she has been appointed to represent²⁶.
94. Recognition was also found for representative plaintiffs in *Garland v. Enbridge*, *McCutcheon v. Cash Store Inc.* and *Fakhri v. Alfafa's Canada Inc*²⁷.
95. The quantum of representative plaintiff compensation should never be in an amount so large as to create the impression that the representative plaintiff was put into a conflict-of-interest. The appropriate quantum will vary on a case-by-case basis depending on factors such as the terms of settlement or award at issue and the personal circumstances of the representative plaintiff.
96. The Court of Appeal has recently indicated that any compensation paid to the representative plaintiff should normally be paid out of the settlement fund and not out of class counsel's fee, to avoid concerns with respect to fee splitting²⁸.
97. This is a situation where the representative plaintiffs have gone well above and beyond the call of duty, and have done far more than what is expected of them.

²⁶ *McCutcheon v. Cash Store Inc.* [2008] O.J. No. 5241 (S.C.J.), at para. 12

²⁷ *Garland v. Enbridge Gas Distribution Inc.*, [2006] O.J. No. 4907 (S.C.J.); *McCutcheon v. Cash Store Inc.*, [2008] O.J. No. 5241 (S.C.J.); *Fakhri v. Alfalfa's Canada Inc.* [2005] B.C.J. No. 1723 (S.C.J.)

²⁸ *Smith Estate v. National Money Mart Co.*, 2011 O.N.C.A. 233, 106 OR (3d) 37 at paras. 134-135

98. When this Proceeding was commenced, there was enormous apathy of the Class with no other individuals being prepared to step-forward and serve as Plaintiffs.
99. Serving as Plaintiffs in this Proceeding involved exposure of private, personal financial information including production of income tax returns of Rick and Kathy for the years that they participated in the Gift Program. Most individuals would be extremely reluctant to publicly share their personal financial information as Rick and Kathy did.
100. The Plaintiffs each spent more than 300 hours assisting Class Counsel in prosecuting this Proceeding on behalf of the Class. An award of compensation is appropriate, particularly the small amounts that are being suggested, when compared to the time spent by them. It equates to slightly more than \$16.00/hour for their efforts.
101. The personal time spent by the Plaintiffs over 4 ½ years included taking time away from their employment, public exposure of their personal financial information, being cross-examined, attending in Court and attending at two mediation sessions.
102. Rick and Kathy will receive a modest award of approximately \$6,600.00 from the Settlement Fund. Pursuit of individual litigation by Rick and Kathy for recovery of \$6,600.00 would not have required a time commitment of anything close to the 600 hours spent by them for the benefit of the Class.

103. Many Class Members have a far greater personal stake in the outcome of this Proceeding than Rick and Kathy do. One would have expected that one of the more significant participants in the Gift Program in terms of out-of-pocket payment would have agreed to step-forward and serve as representative plaintiff, however, that did not happen.
104. There is evidence before the Court that were it not for the efforts of Rick and Kathy, no litigation would have been commenced and some Class Members would have suffered even greater losses.
105. The representative plaintiffs should not benefit from serving, however, they should not be worse-off either. If representative plaintiffs are financially disadvantaged as a result of agreeing to act in a class proceeding, that will significantly impact upon access to justice in a very negative way.

H) Class Counsel Fees

(i) Approval of Retainer Agreement

106. The right of representative plaintiffs to enter into contingent fee arrangements with Class Counsel is recognized in the *CPA*²⁹.
107. Section 33 of the *CPA* recognizes that Class Counsel may enter into a contingency fee arrangement with a representative plaintiff. Section 32(2) provides that an agreement respecting fees and disbursements between counsel and the class representative is not enforceable unless approved by the court.

²⁹ *CPA*, s.33.

The agreement must be in writing, must state the terms under which the fees and disbursements are to be paid and must give an estimated fee. It must also state the method by which payment is to be made, whether by lump sum, salary or otherwise. Where the court does not approve the agreement, it may nevertheless determine the amount of fees and disbursements owing to counsel.

108. An agreement respecting fees and disbursements shall be in writing and shall:
 - (i) state the terms under which fees and disbursements shall be paid;
 - (ii) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
 - (iii) state the method by which payment is to be made, whether by lump sum, salary or otherwise³⁰.
109. The Class Proceeding Contingency Fee Retainer Agreement entered into with the Plaintiffs complies with the *CPA* and ought to be approved.
110. The Class Proceeding Contingency Fee Retainer Agreement between Class Counsel and the Plaintiffs calls for a contingent fee of 25% of the total value of the settlement available to the Class.
111. The Class Proceeding Contingency Fee Retainer Agreement meets the requirements of the *CPA*.

³⁰ *CPA*, s.32(1).

(ii) Fees in Class Proceedings Generally

112. The Court should resist the temptation to engage in armchair quarterbacking when assessing the value of Class Counsel's time. The total time spent on this matter, by Class Counsel and their team to date, is approximately 4,600 hours, having a face value of \$1,800,000.00. This is not a case in which everyone from the most senior partner to the most junior clerk was thrown at the file in order to pump-up the fee. None of the lawyers engaged in unnecessary or redundant work. Class Counsel conducted themselves efficiently throughout.
113. In the context of the *CPA*, a premium on fees is the reward for taking on meritorious but difficult matters. The courts have recognized that the objectives of the *CPA* - judicial economy, access to justice and behaviour modification – are dependent, in part, upon counsel's willingness to take on class proceedings, which, in turn, depends on the incentives available to counsel to assume the risks and accept the financial burden of carrying class proceedings³¹.
114. Given the broad media coverage of this Proceeding, it is likely that the issues relating to similar leveraged charitable donation tax programs and legal opinions supporting them have transcended the issues in this Proceeding. Arguably, the debates in the public forum are influencing positive behavioural change.
115. In *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, the court recognized that class counsel take on significant risk in undertaking a class proceeding on a

³¹ *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, *supra*, at paras. 59-61; *Parsons v. Canadian Red Cross Society*, *supra*, at 287; *Kranjcec v. Ontario* 2006 CarswellOnt 5535 (S.C.J.) at para. 24

contingency basis and that it is important to reward successful lawyers for accepting this risk³².

116. A contingent fee retainer in the range of 20-30% is very common in class proceedings, as it has been in other kinds of litigation in Ontario for many years. There have been a number of instances in recent years in which this court has approved fees that fall within that range. These include:

- *Abdul Rahim v. Air France*³³: 30%
- *Ainslie v. Afexa Life Sciences Inc.*³⁴: 19.4%
- *Robertson v. ProQuest LLC*³⁵: 24%
- *Osmun v. Cadbury Adams Canada Inc.*³⁶: 25%
- *Pichette v. Toronto Hydro*³⁷: 28.5%
- *Robertson v. Thompson Canada Ltd.*³⁸: 36%
- *Cassano v. Toronto Dominion Bank*³⁹: 20%
- *Martin v. Barrett*⁴⁰: 29%

117. Personal injury litigation has been conducted in Ontario for many years based on counsel receiving a contingent fee as high as 33%. In such litigation, it is generally considered to reflect a fair allocation of risk and reward as between

³² *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, *supra*, at para. 60

³³ *Abdul Rahim v. Air France*, [2011] O.J. No. 326

³⁴ *Ainslie v. Afexa Life Sciences Inc.*, [2010] O.J. No. 3302

³⁵ *Robertson v. ProQuest LLC*, [2011] O.J. No. 2013

³⁶ *Osmun v. Cadbury Adams Canada Inc.*, [2010] O.J. No. 2093

³⁷ *Pichette v. Toronto Hydro*, [2010] O.J. No. 315

³⁸ *Robertson v. Thompson Canada Ltd.*, [2009] O.J. No. 2650

³⁹ *Cassano v. Toronto Dominion Bank*, [2009], 98 O.R. (3d) 542

⁴⁰ *Martin v. Barrett*, [2009] O.J. No. 2015

lawyer and client. The fee serves as an inducement to counsel to maximize recovery for the client and is regarded as fair to the client because it is based upon the “no cure, no pay” principle. The profession and the public have for years recognized that the system works and that it is fair. It allows people with injury claims of all kinds to obtain access to justice without risking their life’s savings. The contingent fee is recognized as fair because the client is usually concerned only with the result and the lawyer gets well-paid for a good result⁴¹.

118. The reality of class proceeding litigation is that defendants tend to be well resourced and represented by larger law firms.
119. Class Counsel faced experienced and very able defence counsel on behalf of FMC in Glenn Smith and Peter Griffin of Lenczner Slaght Royce Smith Griffin LLP, a litigation boutique of 45 lawyers which focuses exclusively on complex litigation; and, prior to May, 2011, on behalf of the Gift Program Defendants in Timothy Pinos and Robert Cohen of Cassels Brock and Blackwell LLP, a national law firm with hundreds of lawyers. These are among the best law firms and class action defence lawyers in the country, charging substantial hourly rates, with virtually unlimited resources and no incentive to roll over and play dead.
120. As is the case here, Class Counsel are frequently associated with smaller firms and are invariably engaged on a contingent basis. Defendants frequently employ a strategy of wearing down the opposition by motioning everything, appealing everything and settling nothing. If class proceedings are to realize the goal of

⁴¹ *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105, at para. 64

access to justice, Class Counsel must be liberally compensated to ensure that they take on challenging but difficult cases such as this one⁴².

121. There must be economic incentive to encourage counsel to take on litigation of this kind and this is factor to be considered in assessing the reasonableness of the fee⁴³.
122. If first-class lawyers cannot be assured that the courts will support their reasonable fee requests, how can the court and the public expect them to take on risky and expensive litigation that can go for years before there is a resolution⁴⁴?
123. This is one area where the court should free itself from the chains of the hourly rate. The result achieved for the class should generally be the most important test of the value of counsel's services⁴⁵.
124. One should consider the proposed fee from the perspective of the class member, both prospectively and retrospectively. Had it been possible for class counsel and class members to discuss the issue from the outset, would the class have considered the fee arrangement reasonable? If so, in light of the ultimate resolution, does the fee remain reasonable?

⁴² *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, *supra*, at para. 66

⁴³ *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) (417) (C.A.); *Parsons v. Canadian Red Cross Society*, *supra*; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, *supra*, at paras. 59-61

⁴⁴ *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, *supra*, at para. 67

⁴⁵ *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, *supra*, at para. 68

125. In this case, there is evidence that if Class Counsel had proposed a fee of 50 percent of gross monetary recovery that would have been reasonable to the Class. The Class was extremely concerned about liability under the promissory notes executed in connection with participation in the Gift Program and wanted to be absolved from all such liability. Monetary compensation was of less significance and viewed as a “bonus”.
126. The factors that have traditionally been considered in determining the fees of class counsel were summarized by Cumming J. in *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*⁴⁶:
- (i) the factual and legal complexities of the matters dealt with;
 - (ii) the risk undertaken, including the risk that the matter might not be certified;
 - (iii) the degree of responsibility assumed by class counsel;
 - (iv) the monetary value of the matters in issue;
 - (v) the importance of the matter to the class;
 - (vi) the degree of skill and competence demonstrated by Class Counsel;
 - (vii) the result achieved;
 - (viii) the ability of the class to pay;
 - (ix) the expectations of the class as to the amount of the fee; and
 - (x) the opportunity cost to class counsel and the expenditure of time in pursuit of the litigation and settlement⁴⁷.

⁴⁶ *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd. supra*, at para. 67

The weight to be given to a particular factor varies from case to case.

(iii) Factors to Consider in Assessing Class Counsel Fees

127. The Court's responsibility on this motion is to determine a fee that is "fair and reasonable" in all of the circumstances⁴⁸.
128. As outlined in section 33 of the *CPA*, the fee awarded must be fair and reasonable in light of the risk undertaken by class counsel and the manner in which class counsel conducted the proceeding⁴⁹.
129. The case of *Serwaczek v. Medical Engineering Corp.* identified the following factors as being relevant in the assessment of legal fees:
- (i) the time expended by the solicitor;
 - (ii) the legal complexity of the matters to be dealt with;
 - (iii) the degree of responsibility assumed by the solicitor;
 - (iv) the monetary value of the matters in issue;
 - (v) the importance of the matter to the client;
 - (vi) the degree of skill and competence demonstrated by the solicitor;
 - (vii) the results achieved;
 - (viii) the ability of the client to pay; and
 - (ix) the client's expectations as to the amount of the fee⁵⁰.

⁴⁷ See also *Endean v. Canadian Red Cross Society*, [2000] BCJ No. 1254 (S.C.); *Wamboldt v. Northstar Aerospace (Canada)*, [2009] O.J. No. 2583 (S.C.J.), at para. 33; *Smith Estate v. National Money Mart*, [2011] O.J. No. 1321, 2011 ONCA 233 (C.A.).

⁴⁸ *Parsons v. Canadian Red Cross Society (2000)*, *supra*, at paras 13 and 56

⁴⁹ *CPA*, ss. 33(7), 33(9)

130. Other important factors are the time spent and the risks incurred by counsel, the agreement between counsel and the representative plaintiff and the level of fees awarded in other proceedings of a similar nature.
131. The matter was important to the Class. The monetary value of the matter was significant, with \$11,000,000.00 in cash recovery being obtained. There is also the matter of forgiveness of debt of more than \$100,000,000.00 which, while arguably of lesser value, is still important to the Class.
132. The degree of responsibility assumed by counsel was also significant, in light of the size of the Class and the amount at issue. Class Counsel was ultimately responsible and accountable for the prosecution of the litigation.
133. The factual and legal complexities of the matter were significant. The issues in the Proceeding were essentially unique and unprecedented and required thorough investigation. There were multiple parties.
134. This Proceeding asserts a novel claim. It alleges the existence of a duty of care by a national law firm based on opinion letters given, that for the most part were not received, read or relied upon by those said to have been harmed. The Statement of Claim was carefully and creatively drafted so as to survive preliminary scrutiny and attack. Class Counsel demonstrated a high degree of skill and competence in doing so.

⁵⁰ *Crown Bay Ltd. Partnership v. Zurich Indemnity Co. of Canada* (1998), 40 O.R. (3d) 83 at 88 (Gen. Div.); *Serwaczek v. Medical Engineering Corp.* (1996), 3 C.P.C. (4th) 386 at 393 (Gen. Div.)

135. The Gift Program Defendants defended this proceeding on the basis that the Gift Program operated as structured and they relied upon the FMC opinion letters. As Class Counsel had expected, the Gift Program Defendants eventually gave up their defence, however, recovery against them remained highly unlikely.
136. FMC vigorously defended the proceeding and strenuously advanced the following arguments on issues of liability:
- (i) FMC owed no duty of care to Class Members;
 - (ii) in any event, FMC did not breach the standard of care;
 - (iii) the vast majority of Class Members did not receive, read or rely upon the FMC opinion letters; and,
 - (iv) the FMC opinion letters were restricted to the 2003 and 2004 taxation years.
137. FMC also vigorously defended on the basis of no causation and damages, and alleged that the Class Members were contributorily negligent. FMC cross-claimed against the Gift Program Defendants.
138. At mediation, FMC advanced that Class Members ought to receive only a nominal amount through settlement, because:
- (i) FMC was entitled to the full benefit of mitigation based upon the CRA settlement offer;

- (ii) Class Members received the benefit of the tax refunds for approximately 4 years;
- (iii) Class Members ought not have made interest or principal payments under the promissory notes;
- (iv) FMC was not responsible for any damages for the 2005 – 2007 years having provided no opinion letters for those years;
- (v) the loss of security deposits could not in any way be visited upon FMC's conduct;
- (vi) FMC was entitled to a discount for all individuals who had opted-out of the Proceeding;
- (vii) the value of donations of those who have opted-out is proportionally greater than those who remain as Class Members;
- (viii) Class Members were negligent themselves and contributed to their own losses; and,
- (ix) a substantial litigation risk discount must apply given the live issues of liability.

139. Class Counsel developed and executed an aggressive strategy designed to bring this Proceeding forward for certification and then through documentary and oral

discovery. The credibility and efforts of Class Counsel brought the defendants to the bargaining table and ultimately to settlement.

140. Class Counsel developed and executed an aggressive strategy designed to bring this Proceeding forward for certification and then through documentary and oral discovery. The credibility and efforts of Class Counsel brought the defendants to the bargaining table and ultimately to settlement.
141. The objectors do not take issue with the skill and competence of counsel, other than to point-out that the sought declaration of invalidity with respect to the promissory notes might compromise the position of Class Members *vis-à-vis* CRA in the event that an appeal to the Tax Court of Canada is ever actually pursued.
142. The risks undertaken by Class Counsel and the opportunity cost were sizable.
143. The expectation of the Class as to the amount of the fee and the ability of the Class to pay does not detract from the fee proposed by Class Counsel.
144. This was a difficult, hard-fought piece of litigation of which the outcome was by no means assured. This Court case-managed this Proceeding for three years, conducted a number of case conferences and presided over many motions and is familiar with the procedural and substantive challenges that exist.
145. The positions taken by the defendants from time-to-time were highly adversarial and the positions were aggressively and effectively advanced. The settlement

was certainly not a “cake-walk” for Class Counsel. It was hard work and the risk of failure of the resolution strategy was also present.

146. Class Counsel were insistent that if the matter was not resolved, the case would proceed to trial. This was not posturing. The very satisfactory result in the proceeding was due to the preparedness of Class Counsel to go to the wall and to conduct a trial if a satisfactory settlement could not be achieved. The resolve of Class Counsel was demonstrated to the defendants throughout and resulted in a better and more effective settlement for the Class.

(iv) Legal Fee Request

147. Class Counsel are requesting approval of their legal fees, disbursements, and taxes in the amount of \$3,252,682.65, including disbursements and taxes. The net fee requested represents 25% of the Settlement Fund available to Class Members, but is a significantly lower percentage of the value of the settlement as a whole.

(v) Litigation Risk Assumed by Counsel

148. The litigation risk assumed by counsel is materially related to the complexity of the proceedings. A more complex proceeding requires that class counsel invest more time and resources in pursuing the litigation:

Complex class actions subsume the productive time of counsel. The risk undertaken by counsel is not merely a function of the probability of winning or losing. Some

consideration must also be given to the commitment of resources made by the Class Counsel and the impact that this will have in the event the litigation is unsuccessful⁵¹.

149. The risks involved in pursuing the class litigation must be assessed as they existed when the litigation commenced, and as it continued. Risk cannot be assessed with the benefit of hindsight⁵².
150. In addition to the traditional analysis which addresses litigation risk, the court has considered “certification risk” and “resolution strategy risk” as substantial factors to consider in assessing whether the proposed fees in a class proceeding are fair and reasonable⁵³.
151. As outlined above, Class Counsel assumed considerable substantive and procedural risks in undertaking this Proceeding, including the risk of the Court refusing to certify the Proceeding.

(vi) Results Achieved

152. One of the most important factors on a fee approval motion is the result achieved in relation to the amount at issue and the complexity of the case. Some assessment must be made of what the plaintiff was able to obtain, in relation to what the case was really “worth”⁵⁴.

⁵¹ *Parsons v. Canadian Red Cross Society*, *supra*, at para, 293

⁵² *Gagne v. Silcorp Ltd.*, *supra*.

⁵³ *Parsons v. Canadian Red Cross Society*, *supra*.

⁵⁴ *Ainslie v. Afexa Life Sciences Inc.*, *supra*.

153. The result achieved is a relevant consideration in assessing whether the fees sought by counsel are fair and reasonable⁵⁵.

(vii) Conduct of Proceeding by Class Counsel

154. In determining a fee award, the court may consider the manner in which counsel has conducted the proceeding. Class Counsel have conducted this Proceeding in a manner that has resulted in significant savings for the Class. For example, the decision by Class Counsel to fund all disbursements and to not apply to the Class Proceedings Fund for assistance resulted in a substantial increased recovery for the Class⁵⁶.
155. In addition, Class Counsel has pursued the litigation efficiently and shared the responsibilities and costs as efficiently as possible in order to reduce the duplication of effort.

(viii) Proper Fee Compensation

156. Class Counsel fees may be determined through percentage-based calculation. A percentage fee arrangement promotes the policy objective of judicial economy in that it encourages efficiency in the litigation and discourages unnecessary work that might otherwise be done simply to increase the lawyer's base fee. In *Crown*

⁵⁵ *Parsons v. Canadian Red Cross Society, supra.*

⁵⁶ *CPA, s. 33(9)*

Bay Ltd. Partnership v. Zurich Indemnity Co. of Canada, the court addressed the benefits of a percentage-based fee arrangement:

A contingency fee arrangement limited to the notion of a multiple of the time spent may, depending on the circumstances, have the effect of encouraging counsel to prolong the proceeding unnecessarily and of hindering settlement, especially in those cases where the chance of some recovery at trial seems fairly certain. On the other hand, where a percentage fee, or some other arrangement such as that in *Nantais*, is in place, such a fee arrangement encourages rather than discourages settlement. In the case before this court the settlement averted a seven to ten day trial. Fee arrangements that reward efficiency and results should not be discouraged⁵⁷.

157. Using a percentage-based calculation in determining class counsel fees "properly places the emphasis on the quality of representation, and the benefit conferred to the class⁵⁸.
158. In *Stone Paradise Inc. v. Bayer Inc. et al.*, the court recognized that there has recently been a shift in the academic community towards abandoning the lodestar and multiplier approach to class counsel fees in favour of percentage fees. Justice Rady cited, with approval, the following passage from "Rethinking the Approval of Class Counsel's fees in Ontario Class Actions" (prepared for the 2006 Class Actions Without Borders conference by Professor Benjamin Alarie):

The first recommendation is to de-emphasize the use of the lodestar method of determining the compensation of class counsel. In most Ontario class actions, the retainer

⁵⁷ *Crown Bay Ltd. Partnership v. Zurich Indemnity Co. of Canada*, *supra*, at page 88

⁵⁸ *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, *supra*, at para. 107

agreement between class counsel and representative plaintiffs provides for a contingency fee calculated on a percentage of the settlement or judgment. Unless a compelling case can be mounted for regarding this agreement as unsuitable, compensation at the rate agreed to by the representative plaintiff should be the court's starting point in deciding a "fair and reasonable fee." First resort should not be made to the base fee and multiplier method, because of the considerable incentives class counsel and defendants have for tacit collusion in allowing class counsel's base fee to rise to a level conducive to settlement, and the inefficiencies this endangers. If this recommendation is taken up, and the percentage method (if agreed to by the representative plaintiff and class counsel) is specified in the retainer agreement, there are four specific concerns judges should consider. First, the court should examine whether there is any reason to think that the compensation provided for by the retainer agreement does not represent a fair and reasonable return to class counsel given what was known *ex ante* about the strength of the case, the costs of making the case, and the likelihood of success. This may be a difficult determination to make; nevertheless courts should strive to make accurate determinations in this regard. Second, the court should consider whether the settlement takes the form of coupons or in-kind benefits to class members. If so, the court should discount the judgment appropriately. Third, if there is a reversionary interest to the defendant of the settlement fund, then the court should consider allowing class counsel to recover the stated percentage only of the amount actually distributed to class members. Finally, the court should be attuned to the incentives class counsel have under the percentage method of premature settlement. If it appears that class counsel has settled too quickly for an amount grossly lower than what one might consider to be the value of the claims of the class members, then the lodestar method might be more appropriately used than the percentage method (assuming the percentage method is provided for in the retainer agreement)⁵⁹.

⁵⁹ *Stone Paradise Inc. v. Bayer Inc. et al.*, (19 April 2006), London 45604CP (S.C.J.) at para. 21; *CCWIPP v. Royal Group et al.*, (11 January 2008), London 965/06 (S.C.J.) at para. 13

159. Class Counsel is seeking a contingency fee of 25% of only the actual cash recovery, not of the total value of the settlement. This fee request is less than allowed under the terms of the Class Proceeding Contingency Fee Retainer Agreement entered into; and the fees awarded by courts in other class proceeding cases⁶⁰.

160. The reasonableness of class counsel fees can be tested as a multiplier of the base fee. The multiplier will typically range from slightly greater than one at the low end and four or higher in the most deserving cases⁶¹.

161. The multiplier is a reward to class counsel for bearing the risk of the litigation:

The multiplier is in part a reward to the solicitor for bearing the risks of acting in the litigation. The court must determine whether these risks were sufficient that together with the other relevant considerations a multiplier is warranted. While this determination is made after the class proceeding has concluded successfully, it is the risks when the litigation commenced and as it continued that must be assessed⁶².

162. Class Counsel's fee request equates to a modest multiplier of less than 2 based on the value of the actual time spent.

⁶⁰ 799376 *Ontario Inc. (c.o.b. Lonsdale Printing Services) (Trustee of) v. Cascades Fine Papers Group Inc.*, [2008] O.J. No. 5280 (S.C.J.); *Toevs v. Yorkton*, [2006] O.J. No. 538 (S.C.J.) at para. 6; *Bona Foods Ltd. v. Ajinomoto U.S.A., Inc.*, [2004] O.J. No. 908 (S.C.J.) at paras. 40-42.

⁶¹ *CPA*, s. 33; *Gagne v. Silcorp Ltd.*, *supra*, at para. 425

⁶² *Gagne v. Silcorp Ltd.* (1998), *supra*, at para. 423

PART IV - ORDER REQUESTED

163. The Plaintiffs request an order declaring the Settlement Agreement and Distribution Plan to be fair, reasonable and in the best interest of the Class; and approving payment of Class Counsel fees, disbursements and taxes, as well as the other incidental relief requested in the Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of January, 2012.



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**SCHEDULE A
LIST OF AUTHORITIES**

<u>TAB</u>	<u>DESCRIPTION</u>
1.	<i>Cannon v. Funds for Canada Foundation</i> , 2010 CarswellOnt 5935 (S.C.J.)
2.	<i>Nunes v. Air Transat A.T. Inc.</i> , 2005 CarswellOnt 2503 (S.C.J.)
3.	<i>Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.</i> , [2005] O.J. No. 1118 (S.C.J.)
4.	<i>Dabbs v. Sun Life, Assurance Company of Canada</i> (1998), 40 O.R. (3d) 429 (Gen. Div.); aff'd (1998), 41 O.R. (3d) 97 (C.A.); leave to appeal to S.C.C. denied [1998] S.C.C.A. No. 372
5.	<i>Parsons v. The Canadian Red Cross Society</i> , [1999] O.J. No. 3572 (S.C.J.)
6.	<i>Newberg on Class Actions</i> , 3rd ed. (Shepard's/McGraw-Hill, 1992)
7.	<i>Manual of Complex Litigation</i> , 3rd ed. (Federal Judicial Centre: West Publishing, 1995)
8.	<i>Ontario New Home Warranty Program v. Chevron Chemical Co.</i> (1999), 46 O.R. (3d) 130 (S. C.J.)
9.	<i>In re Electrical Carbon Products Antitrust Litigation</i> , MDL No. 1514 (D.N.J.), Master Civil No. 03-2182, Document 265
10.	<i>Spencer v. Hartford</i> (6 July 2010), Connecticut 03-CV-1681-JCH (Con. Dist. Ct.)
11.	<i>Ronald Smith and Associates Inc. v. Intuit Canada</i> , 2009 CanLii 10682 (O.N.S.C.)
12.	<i>Stewart v. General Motors of Canada Ltd.</i> , 2008 CarswellOnt 6590 (S.C.J.)
13.	<i>Directright Cartage Ltd. v. London Life Insurance Co.</i> , 2001 CarswellOnt 3658 (S.C.J.).
14.	<i>Maréchaux v. R.</i> , 2009 CarswellNat 3685 (T.C.C.); aff'd 2010 CarswellNat 3593 (F.C.A); leave to appeal dismissed 2011 CarswellNat 1911 (S.C.C.)
15.	<i>Philips Petroleum and Co. v. Shutts</i> , 472 US 797 (1985)
16.	Eizenga, Peerless, Wright and Callaghan, <i>Class Actions Law and Practice</i> (2nd Edition) (LexisNexis Canada Inc., 2010)

17. *Smith v. Kronos Machinery Co.*, 2000 CarswellOnt 68 (S.C.J.)
18. *Sussex Square Apartments Ltd. v. R.*, 1998 CarswellNat 2543 (T.C.C.); aff'd 2000 CarswellNat 1947 (F.C.A.)
19. *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen.Div.)
20. *McCarthy v. Canadian Red Cross Society* [2007] O.J. No. 2314 (S.C.J.)
21. *Sutterland v. Boots Pharmaceutical PLC*, [2002] O.J. No. 1361 (S.C.J.)
22. *Belaire v. Daya* [2007] O.J. No. 4819 (S.C.J.)
23. *McCutcheon v. Cash Store Inc.*, [2008] O.J. No. 5241 (S.C.J.)
24. *Garland v. Enbridge Gas Distribution Inc.*, [2006] O.J. No. 4907 (S.C.J.)
25. *Fakhri v. Alfalfa's Canada Inc.* [2005] B.C.J. No. 1723 (S.C.J.)
26. *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233
27. *Kranjcec v. Ontario* 2006 CarswellOnt 5535 (S.C.J.)
28. *Abdul Rahim v. Air France*, [2011] O.J. No. 326
29. *Ainslie v. Afexa Life Sciences Inc.*, [2010] O.J. No. 3302
30. *Robertson v. ProQuest LLC*, [2011] O.J. No. 2013
31. *Osmun v. Cadbury Adams Canada Inc.*, [2010] O.J. No. 2093
32. *Pichette v. Toronto Hydro*, [2010] O.J. No. 315
33. *Robertson v. Thompson Canada Ltd.*, [2009] O.J. No. 2650
34. *Cassano v. Toronto Dominion Bank*, [2009], 98 O.R. (3d) 542
35. *Martin v. Barrett*, [2009] O.J. No. 2015
36. *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105
37. *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) (417) (C.A.)
38. *Endean v. Canadian Red Cross Society*, [2000] BCJ No. 1254 (S.C.);

39. *Wamboldt v. Northstar Aerospace (Canada)* [2009] O.J. No. 2583 (S.C.J.)
40. *Smith Estate v. National Money Mart*, 2011 ONCA 233 (C.A.)
41. *Crown Bay Ltd. Partnership v. Zurich Indemnity Co. of Canada (1998)*, 40 O.R. (3d) 83 (Gen. Div.)
42. *Serwaczek v. Medical Engineering Corp.* (1996), 3 C.P.C. (4th) 386 (Gen. Div.)
43. *Stone Paradise Inc. v. Bayer Inc. et al.*, (19 April 2006), London 45604CP (S.C.J.)
44. *CCWIPP v. Royal Group et al.*, (11 January 2008), London 965/06 (S.C.J.)
45. *799376 Ontario Inc. (c.o.b. Lonsdale Printing Services) (Trustee of) v. Cascades Fine Papers Group Inc.*, [2008] O.J. No. 5280 (S.C.J.)
46. *Toevs v. Yorkton*, [2006] O.J. No. 538 (S.C.J.)
47. *Bona Foods Ltd. v. Ajinomoto U.S.A., Inc.*, [2004] O.J. No. 908 (S.C.J.)

Schedule B

Text of Relevant Statutes, Regulations and By-laws

1. *Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 12*
2. *Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 14*
3. *Class Proceedings Act, 1992, S.O. 1992, c.6., s.32(1)*
4. *Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 33*

CLASS PROCEEDINGS ACT, 1992, S.O. 1992, C.6., S.12

Court may determine conduct of proceeding

12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate. 1992, c. 6, s. 12.

CLASS PROCEEDINGS ACT, 1992, S.O. 1992, C.6., S.14

Participation of class members

14.1 In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding. 1992, c. 6, s. 14 (1).

Idem

2. Participation under subsection (1) shall be in whatever manner and on whatever terms, including terms as to costs, the court considers appropriate. 1992, c. 6, s. 14 (2).

CLASS PROCEEDINGS ACT, 1992, S.O. 1992, C.6., S.32(1)

Fees and disbursements

32.1 An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,

- (a) state the terms under which fees and disbursements shall be paid;
- (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
- (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise. 1992, c. 6, s. 32 (1).

CLASS PROCEEDINGS ACT, 1992, S.O. 1992, C.6., S.33

Agreements for payment only in the event of success

33.1 Despite the *Solicitors Act* and *An Act Respecting Champerty*, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding. 1992, c. 6, s. 33 (1).

Interpretation: success in a proceeding

2. For the purpose of subsection (1), success in a class proceeding includes,
- (a) a judgment on common issues in favour of some or all class members; and
 - (b) a settlement that benefits one or more class members. 1992, c. 6, s. 33 (2).

Definitions

3. For the purposes of subsections (4) to (7),
- “base fee” means the result of multiplying the total number of hours worked by an hourly rate; (“honoraires de base”)
 - “multiplier” means a multiple to be applied to a base fee. (“multiplicateur”) 1992, c. 6, s. 33 (3).

Agreements to increase fees by a multiplier

4. An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier. 1992, c. 6, s. 33 (4).

Motion to increase fee by a multiplier

5. A motion under subsection (4) shall be heard by a judge who has,
- (a) given judgment on common issues in favour of some or all class members; or
 - (b) approved a settlement that benefits any class member. 1992, c. 6, s. 33 (5).

Idem

6. Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose. 1992, c. 6, s. 33 (6).

Idem

7. On the motion of a solicitor who has entered into an agreement under subsection (4), the court,
- (a) shall determine the amount of the solicitor's base fee;
 - (b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and
 - (c) shall determine the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement. 1992, c. 6, s. 33 (7).

Idem

8. In making a determination under clause (7) (a), the court shall allow only a reasonable fee. 1992, c. 6, s. 33 (8).

Idem

9. In making a determination under clause (7) (b), the court may consider the manner in which the solicitor conducted the proceeding. 1992, c. 6, s. 33 (9).

KATHRYN ROBINSON et al.
Plaintiffs

-and-

ROCHESTER FINANCIAL LIMITED et al.
Defendants

Court File No. 08-CV-349792

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

**FACTUM OF THE PLAINTIFFS
RE: SETTLEMENT AND FEE APPROVAL
(MOTION RETURNABLE JANUARY 17, 2012)**

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