Court File No. CV-20-00641059-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*,
R.S.O. 1990, C. B.16, AS AMENDED

AND IN THE MATTER OF THE *CANADA BUSINESS CORPORATIONS ACT*,
R.S.C., 1985, C. C-44, AS AMENDED

AND IN THE MATTER OF A WINDING UP OF
PACE SECURITIES CORP., PACE FINANCIAL LIMITED,
PACE INSURANCE BROKERS LIMITED AND
PACE GENERAL PARTNER LIMITED

Applicants

FACTUM OF THE INVESTOR CLAIMANTS IN SUPPORT OF SETTLEMENT
(Motion Returnable July 30, 2021)

Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West
35th Floor
Toronto ON M5V 3H1
Tel: 416.646.4300
Fax: 416.646.4301

Kenneth T. Rosenberg (LSO# 21102H)
Tel: 416.646.4304
ken.rosenberg@paliareroland.com
Lily Harmer (LSO# 31880T)
Tel: 416.646.4326
lily.harmer@paliareroland.com
Massimo (Max) Starnino (LSO# 41048G)
Tel: 416.646.7431
max.starnino@paliareroland.com
Jesse Wright (LSO# 80382Q)
Tel: 416.646.6314
jesse.wright@paliareroland.com

CHAITONS LLP 5000 Yonge Street, 10th Floor Toronto, ON M2N 7E9 **George Benchetrit** Tel: 416.218.1141 george@chaitons.com Lawyers for Ernst & Young Inc., in its capacity as Court-Appointed Liquidator of the estate and effects of Pace Securities Corp., Pace Financial Limited, Pace Insurance Brokers Limited and Pace General Partner Limited	**ERNST & YOUNG INC.** EY Tower 100 Adelaide Street West PO Box 1 Toronto, ON M5H 0B3 **Jeffrey Kerbel** jeffrey.d.kerbel@ca.ey.com **Alison Ho** alison.ho@ca.ey.com
LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP 130 Adelaide Street West, Suite 2600 Toronto, ON M5H 3P5 **Shara Roy** Tel: 416.865.2942 sroy@litigate.com Lawyers for Laurentian Bank Securities Limited	**GOODMANS LLP** 333 Bay Street, Suite 3400 Toronto, ON M5H 2S7 **Jason Wadden** Tel: 416.597.5165 jwadden@goodmans.ca **Michael Wilson** Tel: 416.597.4130 mwilson@goodmans.ca Lawyers for Financial Services Regulatory Authority of Ontario
LAX O'SULLIVAN LISUS GOTTLIEB LLP Counsel Suite 2750, 145 King Street West Toronto, ON M5H 1J8 **Crawford G. Smith** (LSO# 42131S) Tel: 416.598.8648 csmith@lolg.ca **Andrew Winton** (LSO# 54473) Tel: 416.644.5342 awinton@lolg.ca **Jasmine K. Landau** (LSO# 74316K) Tel: 416.956.0110 jlandau@lolg.ca Lawyers for Pace Savings & Credit Union Ltd.	**BLANEY MCMURTRY LLP** 2 Queen Street East, Suite 1500 Toronto, Ontario M5C 3G5 **Mervyn Abramowitz** Tel: 416-597.4887 mabramowitz@blaney.com Lawyers for MNP Ltd., court-appointed liquidator of First Hamilton Holdings Inc.

MNP LTD. 300 - 111 Richmond Street West Toronto, ON M5H 2G4 **Jerry Henechowicz** jerry.henechowicz@mnp.ca	**KUSHNERYK MORGAN LLP** 200 Bay Street North Tower, Suite 1200 Toronto, ON M5J 2J2 **Susan Kushneryk** Tel: 647.317.1526 skushneryk@kmcounsel.ca **Eric Morgan** Tel: 647.907.1536 emorgan@kmcounsel.ca Lawyers for Ernie Eves, Tim Huxley, Mike Leskovec and Grant Walsh
PALIARE ROLAND ROSENBERG ROTHSTEIN LLP 155 Wellington Street West, 35th Floor Toronto ON M5V 3H1 **Kenneth T. Rosenberg** (LSO# 21102H) Tel: 416.646.4304 ken.rosenberg@paliareroland.com **Lily Harmer** (LSO# 31880T) Tel: 416.646.4326 lily.harmer@paliareroland.com **Massimo (Max) Starnino** (LSO# 41048G) Tel: 416.646.7431 max.starnino@paliareroland.com **Jesse Wright** (LSO# 80382Q) Tel: 416.646.6314 jesse.wright@paliareroland.com Representative Counsel for the Investor Claimants	**CAMP ADVOCACY PROFESSIONAL CORPORATION** 40 University Ave, Suite 720 Toronto, ON M5J 1T1 **James Camp** Tel: 416.786.1880 james@campadvocacy.com Lawyer for Harry Mahesh
CRAWLEY MACKEWN BRUSH LLP 179 John Street, Suite 800 Toronto, ON M5T 1X4 **Alistair Crawley** Tel: 416.217.0806 ACrawley@CMBLaw.ca **Clarke Tedesco** Tel: 416.217.0884 ctedesco@cmblaw.ca Lawyers for Larry Smith	**CRAWLEY MACKEWN BRUSH LLP** 179 John Street, Suite 800 Toronto, ON M5T 1X4 **Melissa MacKewn** (LSO# 39166E) Tel: 416.217.0840 mmackewn@cmblaw.ca **Anna K. Markiewicz** (LSO# 45460H) Tel: 416.217.0803 amarkiewicz@cmblaw.ca **Elizabeth McLellan** (LSO# 79681N) Tel: 416.217.0853 lmclellan@cmblaw.ca

	Lawyers for Gerald McRae, Joseph Thomson and Andre Sian
INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA Suite 2000, 121 King Street West Toronto, Ontario M5H 3T9 Tel: 416.646.7225 **Tatsiana Okun** tokun@IIROC.CA	**WALDIN BARRISTERS** TD Centre North Tower 77 King Street West, Suite 3000 Toronto, Ontario, M5K 1G8 **Jan-Paul Waldin** Tel: 416.364.6762 jan-paulwaldin@waldin.ca Lawyers for Mr. Ariel Simms,(PSC investment advisor)
DALE & LESSMAN LLP 181 University Avenue, Suite 2100 Toronto, ON M5H 3M7 **Geoffrey Janoscik** Tel: 416.369.7823 gjanoscik@dalelessmann.com Lawyers for Brett McFarquhar/ 7903197 Canada Inc. (investor in PACE Capital Partners)	**WEISZ FELL KOUR LLP** 100 King Street W., Suite 5600 Toronto, ON M5X 1C9 **Steven Weisz** Tel: 416.613.8281 Email: sweisz@wfklaw.ca **Pat Corney** Tel: 416.613.8287 Email: pcorney@wfklaw.ca Lawyers for Philip Smith

Court File No. CV-20-00641059-00CL
Court File No. CV-20-00641372-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*,
R.S.O. 1990, C. B.16, AS AMENDED

AND IN THE MATTER OF THE *CANADA BUSINESS CORPORATIONS ACT*,
R.S.C., 1985, C. C-44, AS AMENDED

AND IN THE MATTER OF A WINDING UP OF
PACE SECURITIES CORP., PACE FINANCIAL LIMITED,
PACE INSURANCE BROKERS LIMITED AND
PACE GENERAL PARTNER LIMITED

AND IN THE MATTER OF A WINDING UP OF
FIRST HAMILTON HOLDINGS INC., FIRST HAMILTON FINANCIAL SERVICES INC., FIRST HAMILTON CAPITAL INC., FIRST HAMILTON GENERAL PARTNER 2 INC. and FIRST HAMILTON MORTGAGE BROKERS INC.

Applicants

FACTUM THE INVESTOR CLAIMANTS IN SUPPORT OF SETTLEMENT (Motion Returnable July 30, 2021)

PART I. OVERVIEW

1. Representative Counsel seeks an order ("**Settlement Approval Order**") pursuant to sections 207 and 209 of Ontario's *Business Corporations Act*[1] (the "**OBCA**") approving the terms of a $40 million settlement ("**Settlement**") for the benefit of approximately 700 investors of PACE Financial Limited and First Hamilton Holdings Inc. who purchased an estimated $48 million of certain preference shares and partnership units which currently have little or no market value ("**Investor Claimants**").

2. The Settlement is supported by the committee chosen to consult with and represent the interests of the Investor Claimants (the "**Representative Consultative Committee**"), by the many Investor Claimants who have reached out upon receipt of notice of the settlement and who are anxious to receive their share of the settlement funds, by FSRA, the liquidators, and by all of the settling parties.

3. The Settlement is expected to provide Investor Claimants with approximately 70% (possibly more) of their net invested capital, on average and depending on allocation, before the end of 2021.

4. The Settlement was reached prior to the commencement of contemplated litigation by Representative Counsel on behalf of the Investor Claimants ("**Investor Claims**"), and involves most, but not all, of the potential defendants in that intended litigation. The litigation was expected to be complex, multi-layered, expensive, and lengthy, with considerable uncertainty of outcome for all parties.

---

[1] RSO 1990, c B.16, ss. 207, 209 [OBCA].

5. It is the considered view of Representative Counsel and the entire Representative Consultative Committee that this Settlement is a much better and preferred alternative to further litigation. Reasons for this view include that the Settlement:

(a) is the product of careful negotiations conducted by experienced counsel;

(b) provides a substantial cash contribution to the Investor Claimants, many of whom are older and in need of funds, in an expedited timeframe;

(c) constitutes a fair and reasonable compromise of the Investor Claims in light of the risks and merits of those claims, the costs of potential actions against various parties, as well as uncertainties regarding recoveries; and

(d) is consistent with the spirit and purpose of the OBCA and the Claims Procedure Orders that were established to resolve the Investor Claims, and with the broad purpose of efficient resolution of claims in a Liquidation proceeding.

6. In contrast to the Settlement, there is a real possibility that the alternative of litigation could provide less of a return to Investor Claimants than the Settlement, even if successful and with an award of interest and costs. Factors that could result in such an outcome include: the obvious risk that the litigation could be unsuccessful; contingency costs associated with the Representative Counsel fee related to a long and complex litigated outcome; contingency costs of litigation funding if/as needed; disbursements; the cost of experts; and the increased risks associated with collection due to the inevitable depletion of insurance by defence costs.

7. Representative Counsel strongly believes that this Settlement is in the best interests of the Investor Claimants, and asks this Court to approve the Settlement Order to permit the Settlement to be implemented without delay.

8. If the Settlement is approved, Representative Counsel intends to return to court to seek approval of a plan and process for allocation among and between the Investor Claimants, approval of counsel fees, and resolution of any other remaining issues. The overriding goal is to distribute the Settlement funds as quickly as possible to Investor Claimants, many of whom have suffered greatly for over a year due to the loss of their investments.

PART II. FACTS

A. The Investor Claimants and Representative Counsel

9. The Investor Claimants are a group of approximately 700 individuals. Their claims arise out of their collective investment in, and subsequent loss in value of, approximately \$48 million of Preference Shares of PACE Financial Limited ("**PFL**"), First Hamilton Holdings Inc. ("**FHH**") (collectively, the "**Preference Shares**"), and in respect of 7903197 Canada Inc., Pace Capital Partners Series A Limited Partnership Units ("**PCP Units**") ("**Investor Claims"**).[2]

10. Most of the approximately 700 Investor Claimants are members of the Credit Union. A large number of the Investor Claimants are individuals at or near retirement age who purchased the Preference Shares with a significant portion of their retirement

---

[2] Second Report of the Court Appointed Representative Counsel to the Investor Claimants ["Second Report"], Motion Record of Investor Claimants in the Matter of the Winding Up of First Hamilton Holdings Inc. et al., ["IC MR"], Tab 2, p. 41, para. 6.

savings.[3] A live issue between the parties was whether most of the Investor Claimants were sophisticated enough investors to qualify to purchase the Preferred Shares.[4]

11. On August 6, 2020, this court appointed Paliare Roland Rosenberg Rothstein LLP ("**Paliare Roland**") as Representative Counsel (the "**Representation Orders**").[5] Among other things, Representative Counsel were appointed to represent and advance the interests of the Investor Claimants in the liquidation proceedings of PFL and FFH and other related entities (collectively, the "**Liquidation Proceedings**"). The Representation Orders were amended on March 2, 2021 to expand the definition of "Preferred Shares" to include the PCP Units.[6]

12. Twelve Investor Claimants volunteered for and were selected to participate on the Representative Consultative Committee. The Representative Consultative Committee meets regularly with Representative Counsel, and was very involved in the Mediation.

13. No Investor Claimants opted out of representation by Representative Counsel, and none filed notices of objection to the Settlement. Many have expressed clear support for the Settlement.[7] The resolution of the Investor Claims through the proposed Settlement ends significant uncertainty for the Investor Claimants.

---

[3] Second Report, IC MR, Tab 2, p. 42, para. 9.

[4] Second Report, IC MR, Tab 2, pp. 47, 49, paras. 31, 38.

[5] Representation Orders, IC MR, Tab 2, Appendix "B," pp. 63-69.

[6] Amendment to Representation Orders regarding PCP Units, IC MR, Tab 2, Appendix "B," pp. 73-74.

[7] Supplement to the Second Report of Representative Counsel Re Notice ["Notice Report"], Supplementary Motion Record of the Investor Claimants in the Matter of the Winding Up of First Hamilton Holdings Inc. et al. ["Supp. IC MR"], p. 11, para. 19.

B. The Settling Parties

14. The other parties participating in the Settlement (the "**Settling Parties**") are:

(a) PACE Savings and Credit Union Limited (the "**Credit Union**" or "**PACE**") and its administrator, the Financial Services Regulatory Authority of Ontario ("**FSRA**");

(b) AIG Insurance Company of Canada ("**AIG**") in its capacity as the insurer for PACE Securities Corporation ("**PSC**"), FHH, and PFL (collectively, the "**Insured Organizations**") and certain of the Individual Insureds (as defined below); and

(c) AXIS Reinsurance Company (Canadian Branch) and Liberty Mutual (together, the "**PSC Investment Advisors**") in their capacity as insurers of various investment advisors formerly employed by PSC, some of whom were also officers and directors of PSC (the "**Individual Insureds**").[8]

C. The Liquidators

15. The court-appointed liquidators of FHH and PFL were also parties to the Settlement but are not included in the definition of "Settling Parties." They are:

(a) Ernst & Young Inc. in its capacity as Court-Appointed Liquidator of PSC, PFL, Pace Insurance Brokers Limited, and Pace General Partner Limited (the "**PACE Liquidator**"); and

[8] Settlement Term Sheet, IC MR, Tab 2, Appendix "C," p. 113, para. 1(c).

(b) MNP Ltd. in its capacity as Court-Appointed Liquidator of the estate and effects of FHH, First Hamilton Financial Services Inc., First Hamilton General Partner 2 Inc., First Hamilton Capital Inc., and First Hamilton Mortgage Brokers Inc., (the “**FHH Liquidator**”, and, together with the PACE Liquidator, the “**Liquidators**”).

D. The Preference Shares

16. The Investor Claims arise in connection with the purchase, distribution, and sale of the Preferred Shares and Partnership Units.

17. PSC is a wholly-owned subsidiary of the Credit Union and is registered as an investment dealer under the *Securities Act*.[9] On June 22, 2017, the Credit Union formed PFL as a subsidiary of PSC. PSC managed the PFL investment portfolio and received asset management fees and performance fees.[10]

18. PFL offered Series A, 5% Cumulative Redeemable Retractable Non-voting Term Preference Shares as an exempt distribution without a prospectus by a confidential offering memorandum dated June 27, 2017.[11] The PFL Preference Shares were sold to the Investor Claimants between July 2017 and February 2018.

19. Prior to 2018, the Deposit Insurance Corporation of Ontario (“**DICO**”) instructed the Credit Union to cause PSC to stop selling the Preference Shares of PFL. Thereafter, PSC

[9] Second Report, IC MR, Tab 2, p. 46, para. 23.
[10] Second Report, IC MR, Tab 2, p. 47, para. 28
[11] Second Report, IC MR, Tab 2, p. 46, para. 24.

shifted focus to the sale of Preference Shares of FHH, which was not owned by the Credit Union.[12]

20. FHH was incorporated on February 2, 2018.[13] On or about March 19, 2018 and April 30, 2018, pursuant to an FHH Offering Memorandum, FHH offered the FHH 7% Preference Shares and the FHH 5% Preference Shares, respectively, as exempt distributions without a prospectus.[14]

21. PFL, and subsequently FHH, appointed PSC to manage the PFL and FHH investment portfolios for which PSC received asset management fees and performance fees, in addition to selling commissions.[15]

22. Each of the PFL and FHH Offering Memoranda described an investment in the Preference Shares as “highly speculative” and suitable only for investors “who can afford a total loss of their investment”, and also noted that PFL’s and FHH’s business “involves a high degree of risk, which a combination of experience, knowledge and careful evaluation may not be able to overcome.”[16]

23. The PFL Offering Memorandum disclosed that PFL intended to invest in debt instruments that would include Canadian and US debt instruments with at least 50% of the portfolio rated “B” or better.[17]

---

[12] Second Report, IC MR, Tab 2, p. 49, para. 40.
[13] Second Report, IC MR, Tab 2, p. 47, para. 32.
[14] Second Report, IC MR, Tab 2, p. 48, para. 33.
[15] Second Report, IC MR, Tab 2, pp. 47, 48, paras. 28, 36.
[16] Second Report, IC MR, Tab 2, p. 47, 48, paras. 29, 37.
[17] Second Report, IC MR, Tab 2, p. 46, para. 25.

24. The FHH Offering Memorandum disclosed that FHH intended to invest in debt instruments that would include Canadian and US debt instruments and that the weighted average of the portfolio should be rated "B" or better.[18]

25. The risk associated with the debt securities was substantially increased by the undisclosed use of margin investing by PFL, as well as other investment strategies employed by FHH that went undisclosed to the Investor Claimants.[19]

26. The Investor Claims allege that the Preference Shares were inappropriate for the Investor Claimants to whom they were sold and that inadequate disclosure was made in respect of the material risks associated with the Preference Shares.[20]

E. Events leading to the Investor Claimants' losses

1. FSRA places the Credit Union under administration

27. In May 2018, the DICO commenced a special audit and examination of the conduct and certain transactions of the Credit Union. DICO's investigation identified serious concerns that the conduct of the Credit Union's former management had resulted in material losses to the Credit Union, and identified multiple and serious alleged breaches of the *Credit Unions and Caisses Populaires Act*[21] by the Credit Union's former officers and directors.[22]

---

[18] Second Report, IC MR, Tab 2, p. 48, para. 34.
[19] Second Report, IC MR, Tab 2, pp. 47 para. 30.
[20] Second Report, IC MR, Tab 2, pp. 47, 48 paras. 30, 37.
[21] SO 1994, c 11.
[22] Second Report, IC MR, Tab 2, p. 49, paras. 39-42.

28. On September 28, 2018, DICO issued an Administration Order which suspended the powers of the Credit Union's board (the "**Administration Order**"). The Administration Order was continued under FSRA, which amalgamated with DICO on June 8, 2019.[23]

29. Subsequent to the Administration Order, in or about March 2019, the Credit Union, by its administrator, commenced a civil lawsuit (Court File No.: CV-19-00616388-CL) alleging fraud, misconduct and negligence as against the Credit Union's former officers and directors, including Larry Smith and Philip Smith (the "**Credit Union Action**").[24]

2. Laurentian Bank Securities' margin call

30. PSC did not hold its customers' cash and securities itself. Rather, it was licensed by the Investment Industry Regulatory Organization of Canada ("**IIROC**") as a "Type 2 Introducing Broker," and as such contracted its back-office functions to Laurentian Bank Securities Limited ("**LBS**") as PSC's carrying broker and the custodian of its securities and its clients' cash and securities.[25]

31. PFL and FHH both raised capital by selling Preference Shares. Both entities used those proceeds to purchase high-yield bonds on "margin" through their accounts at PSC. In early 2020, LBS significantly tightened its margin requirements for PSC and raised the required margin rate from 7% to 52% for a significant percentage of the portfolio.[26]

---

[23] Second Report, IC MR, Tab 2, p. 49, para. 43.
[24] Second Report, IC MR, Tab 2, pp. 49-50, para. 44.
[25] Second Report, IC MR, Tab 2, p. 50, para. 45.
[26] Second Report, IC MR, Tab 2, p. 50, para. 46.

3. Liquidation

32. These unilateral changes occurred in the context of the turmoil in the global capital markets caused by the Covid-19 pandemic. FHH was required to liquidate significant parts of its portfolio to meet the new margin requirements in a market affected by the Covid-19 pandemic. On April 30, 2020, LBS reduced FHH's borrowing capacity to zero.[27]

33. Ultimately, PSC, PFL, and FHH commenced liquidation proceedings, triggering the liquidation of the PFL and FHH investment portfolios, and the loss of the Investor Claimants' investments, which were in the total principal amount of approximately $48 million. While assets with potential value remain in the estates of PSC, PFL and FHH, which might ultimately mitigate the Investors Claimants' losses, the Investor Claimants are choosing through the Settlement to disclaim any interest in those assets because of the contingent nature of their value. The Settling Parties have accepted that disclaimed interest.[28]

4. The Credit Union's current situation

34. The Credit Union remains under administration by FSRA.[29]

35. By letter dated April 12, 2021, FSRA announced that it would provide a $500 million credit facility to the Credit Union to help it "continue to operate" and to protect its members. At its Annual General Meeting held April 28, 2021, the Chief Executive Officer of FSRA stated that, should compensation for the Investor Claimants add up to tens of millions of dollars, the Credit Union on its own did not have the financial capital to fund such

[27] Second Report, IC MR, Tab 2, p. 51, para. 48.
[28] Second Report, IC MR, Tab 2, p. 51, para. 50.
[29] Second Report, IC MR, Tab 2, p. 51, para. 51.

compensation. It has been reported in the media that a process has been launched to explore a sale or merger of the Credit Union. The Settlement provides much needed certainty to that process.[30]

F. The process leading to the Settlement

1. The Investor Claims

36. The Settlement, should it be approved, would resolve all potential claims by the Investor Claimants against the Settling Parties who make up the majority of potential defendants. These potential claims include, but would not be limited to, statutory claims for misrepresentation in offering memoranda and oppression, as well as common law claims for negligent misrepresentation, breach of fiduciary duty, and negligence.[31]

37. All of these claims have risks and merits that have been considered by Representative Counsel. At least some of these claims would likely result in costly litigation due to the complex legal and factual issues involved. Even if some or all of the claims were successfully litigated, significant uncertainties would likely remain regarding recovery.

2. The Mediation

38. On March 2, 2021, this Court issued the Claims Procedure Orders establishing a process to resolve the Investor Claims through early mediation followed by expedited litigation if required. Pursuant to and in accordance with the Claims Procedure Orders:[32]

---

[30] Second Report, IC MR, Tab 2, pp. 51-52, para. 52.
[31] Second Report, IC MR, Tab 2, p. 52, para. 54.
[32] Claims Procedure Orders, IC MR, Tab 2, Appendix “C,” pp. 90-100.

(a) on March 22, 2021 Representative Counsel delivered a Claims Brief;[33]

(b) on April 21, 2021 the Mediator declared the Mediation to have formally commenced;[34]

(c) following the formal start of the Mediation, various Interested Parties delivered Responding Briefs, and documents were produced in response to specific requests for documents and information and at the direction of the Mediator;[35]

(d) on June 14, 2021, the Mediator commenced plenary sessions; [36]

(e) late on June 22, 2021, Representative Counsel and the Settling Parties arrived at a settlement in principle, and executed the Settlement Term Sheet on June 24, 2021.[37]

39. Throughout the Mediation, Representative Counsel:

(a) were assisted by the Farber Group, which had been retained as a financial advisor for the purpose of calculating damages and modelling potential litigation outcomes; and,

(b) reported to, consulted with and obtained advice from the Representative Consultative Committee, who were integral to the articulation of the claim, negotiating strategy, and, ultimately, the Settlement.[38]

[33] Second Report, IC MR, Tab 2, p. 53, para. 57(a).
[34] Second Report, IC MR, Tab 2, p. 53, para. 57(b).
[35] Second Report, IC MR, Tab 2, p. 53, para. 57(c).
[36] Second Report, IC MR, Tab 2, p. 53, para. 57(d).
[37] Second Report, IC MR, Tab 2, p. 53, para. 57(e).
[38] Second Report, IC MR, Tab 2, p. 54, paras. 58(a)-(b).

G. The Settlement terms

1. Payment

40. The Settling Parties agree to pay $40 million to the Investor Claimants in exchange for the release of claims against the Settling Parties (collectively, the "**Released Claims**").[39]

41. Given ongoing concerns about the financial position of the Credit Union, Representative Counsel required assurance from FSRA that, should the Credit Union be unable to fund its contribution towards the Settlement Amount for any reason, FSRA would ensure payment. FSRA has provided such confirmation to Representative Counsel.[40]

42. The Settlement contemplates that the Settlement Amount will be paid to Representative Counsel, in trust, within 60 days of the Settlement Approval Order becoming final. A distribution scheme to be developed by Representative Counsel will be the subject of a future motion for approval by this Court following approval of the Settlement Approval Order. [41]

43. The precise recovery to a given individual Investor Claimant will not be known until the scheme is approved. Representative Counsel estimate that, on a *pro rata* basis, the Settlement Amount will result in a recovery to Investor Claimants of 70% or more of the principal that they invested.[42]

---

[39] Settlement Term Sheet, IC MR, Tab 2, Appendix "C,"pp. 113-114, paras. 1, 4.
[40] Second Report, IC MR, Tab 2, p. 54, para. 60.
[41] Settlement Term Sheet, IC MR, Tab 2, Appendix "C,"p.114, para. 3.
[42] Second Report, IC MR, Tab 2, p. 57, para. 70.

2. Releases

44. Upon payment and receipt of the Settlement Amount, the Investor Claimants will deliver and the Settling Parties will receive the benefit of (i) a full, unconditional, and binding contractual release and (ii) a corresponding bar order, in respect of the Investor Claims, all in a form satisfactory to the Settling Parties, the Liquidators, and the Investor Claimants, acting reasonably.[43]

45. Upon receipt of the release from the Investor Claimants, the Settling parties will exchange full and final releases as between the Settling Parties, except for the release to be provided by the Credit Union to Larry Smith, which will be limited to a release of Larry Smith's liability arising from his alleged position as a director of PSC.[44]

46. The Credit Union has agreed to limit any damages, costs, taxes or disbursements sought in the Credit Union Action to the damages attributable to the several liability of the existing parties in that action that may be proved at trial.[45]

47. AIG, the Individual Insureds, the Liquidators on behalf of the Insured Organizations, and the PSC Investment Advisors as represented by their insurers have agreed to exchange consents and releases.[46]

3. Non-disclosure

48. Investor Claimants, Representative Counsel, and the Settling Parties have agreed not to disclose information regarding the identity of the contributors to the Settlement

[43] Settlement Term Sheet, IC MR, Tab 2, Appendix "C,"p.114, para. 4.
[44] Settlement Term Sheet, IC MR, Tab 2, Appendix "C,"p.114, para. 5.
[45] Settlement Term Sheet, IC MR, Tab 2, Appendix "C,"p.114, para. 6.
[46] Settlement Term Sheet, IC MR, Tab 2, Appendix "C,"p.114, para. 7.

Amount in any public forum without explicit written authorization to do so from the parties to be disclosed.[47]

H. The proposed Settlement Approval Order

49. The proposed Settlement is conditional on the Court granting the Settlement Approval Order substantially in the form of the order included in the Motion Record of Representative Counsel.[48]

50. The Settlement Approval Order would, among other things:

(a) approve the Settlement, including for the purposes of the OBCA;[49]

(b) approve releases and bar orders made by the Investor Claimants;[50]

(c) confirm that each Investor Claimant will be deemed to have consented to all of the provisions of the Settlement;[51]

(d) confirm that Investor Claimants' recovery from any person who is not one of the Settling Parties (the "**Non-Settling Defendants**") shall be reduced in aggregate by the amount of funds ultimately received by the Investor Claimants in respect of a Released Claim pursuant to the Settlement;[52] and

(e) confirm that Investor Claimants shall thereafter be permitted to claim and recover from the Non-Settling Defendants only that portion of damages attributable to the liability of the Non-Settling Defendants as determined by the Court.[53]

---

[47] Settlement Term Sheet, IC MR, Tab 2, Appendix "C,"p.114, para. 8.
[48] Settlement Approval Order, IC MR, Tab 1, Schedule "B," pp. 21-26.
[49] Settlement Approval Order, IC MR, Tab 1, Schedule "B," p. 23, para. 4.
[50] Settlement Approval Order, IC MR, Tab 1, Schedule "B," pp. 25-26, paras. 13-14.
[51] Settlement Approval Order, IC MR, Tab 1, Schedule "B," p. 24, para. 10.
[52] Settlement Approval Order, IC MR, Tab 1, Schedule "B," p. 26, para. 15.
[53] Settlement Approval Order, IC MR, Tab 1, Schedule "B," p. 26, para. 15.

I. Notice

51. On July 8, 2021 on motion by Representative Counsel, this Court issued an order (i) approving the form and content of notice (the "**Notice**") to Investor Claimants of the Settlement and (ii) approving the process for distribution of the Notice ("**Notice Order")**.[54]

52. Representative Counsel has fully complied with the terms of the Notice Order. The Notice was sent to the last known email and mailing address of all Investor Claimants and to anyone who requested it; it was posted at https://www.paliareroland.com/pace-securities-litigation; it was published in the Globe and Mail on July 14, 2021; a link to the Notice was published to the Paliare Roland Twitter account; and Representative Counsel participated in the issuance of a press release by FSRA incorporating the Notice.[55]

53. The Notice provided Investor Claimants with a Notice of Objection to be sent to Representative Counsel by July 23, 2021. Only two Notices of Objection were received – both turned out to have been filled out in error and were retracted.[56] Accordingly, no Investor Claimant has formally objected to the Settlement.

54. As of July 23, 2021, Representative Counsel has received over 111 emails, letters and calls from or on behalf of Investor Claimants. The majority of inquiries were with respect to what percentage of their original investment an individual Investor Claimant is likely to recover, and when Investor Claimants are likely to receive funds. Representative

[54] Notice Report, Supp. IC MR, p. 7, para. 3.
[55] Notice Report, Supp. IC MR. pp. 7-8, paras. 6-9.
[56] Notice Report, Supp. IC MR. p. 8, para. 11.

Counsel has informed Investor Claimants that individual recoveries cannot be calculated until the distribution and allocation plan is approved by this Court.[57]

55. Another common inquiry was whether any action was required of Investor Claimants who do not intend to object. Representative Counsel indicated that Investor Claimants do not need to do anything at this time if they do not intend to object.[58]

PART III. ISSUES, LAW, & ARGUMENT

56. The sole issue on this motion is whether the Settlement should be approved and the Settlement Approval Order, including proposed releases and bar orders, should be granted. Representative Counsel submits that the Settlement meets all of the established tests for approval, and should be approved and the Settlement Approval Order granted.

A. This Court has Jurisdiction to Approve the Settlement

57. Sections 207 and 209 of the OBCA give the Court broad powers to make orders considered just for the purposes of the winding-up process.[59] This discretionary power includes the power to approve a settlement of potential future claims. In analogous proceedings described below, it has also been established that the Court has the jurisdiction to approve settlements similar in principle and purpose to the Settlement.[60]

58. The Claims Procedure Orders established a process, pursuant to sections 207 and 209 of the OBCA, intended to resolve the Investor Claims through early mediation,

[57] Notice Report, Supp. IC MR. p. 10, paras. 15-17.
[58] Notice Report, Supp. IC MR. p. 10, para. 16.
[59] OBCA, ss. 207, 209.
[60] See e.g., *Ironworkers Ontario Pension Fund v. Research in Motion Ltd.*, 87 OR (3d) 721 at para. 14 [*Ironworkers*]; *Robertson v. ProQuest Information and Learning Company*, 2011 ONSC 1647 at para. 22 [*Robertson*]; *Goyal v Niagara College of Applied Arts and Technology*, 2020 ONSC 739 at para. 31 [*Goyal*].

followed if necessary by an expedited litigation process. The Settlement is the successful and early outcome of that process. Granting approval of the Settlement, which enjoys the support of all involved, is the logical next step following from those Orders.

B. The Test for Approval of a Settlement

1. Application of the test for Settlement Approval under the OBCA

59. Pursuant to sections 207 and 209 of the OBCA, this court has the power to make any order that it sees fit and just, including as a remedy for oppression under s. 248.[61] In considering whether to approve settlements of oppression claims such as those contemplated in this case, courts have clearly articulated principles that can assist this court in assessing the merits of the Settlement.

60. In *Ironworkers Ontario Pension Fund v. Research in Motion Ltd.*, Justice Campbell examined cases involving settlements of derivative actions under the OBCA and settlements under the *Class Proceedings Act* to develop a list of factors to consider when approving a settlement.[62] When applied to the Settlement, each of those factors strongly supports approval of the Settlement by this Court, as follows:

(a) there is an overriding public interest in favour of the payment of $40 million (less fees, etc.) to the Investor Claimants on their capital losses of $48 million without the need for them to engage in complex, expensive, uncertain and lengthy litigation;

(b) the Settlement is fair and reasonable to all Investor Claimants;

---

[61] OBCA, s. 207(2).
[62] *Ironworkers*, at paras. 15-17.

(c) while the Settlement is a compromise of the Investor Claims, it represents a very good recovery in the circumstances;

(d) while acceptable settlements may fall within a broad range of upper and lower limits, the Settlement is well towards the upper end of the range;

(e) the Court's function is not to substitute its judgment for that of the parties who negotiated the settlement; and

(f) while it is not the Court's function to simply rubber-stamp settlements, the Settlement has the broad and enthusiastic support of all involved.[63]

61. Settlement approval necessarily invites a comparison between the result achieved in the proposed settlement and the likely results of litigation. While Representative Counsel is of the view that the Investor Claims have merit and were and remain prepared to attempt to try the claims on their merits, if required, there is no question that the Investor Claims are factually and legally complex, difficult to prosecute, and subject to uncertainty.

62. The comparison with litigation especially favours the Settlement when one considers the Investor Claimants as a group. The age and mental acuity of some of the Investor Claimants speaks to their ineligibility for and the unsuitability of the investments at issue, but can also present challenges in the context of a trial, especially if the 700 claims were required to be adjudicated separately. The advanced age of the Investor Claimants also speaks to the importance of a timely and efficient settlement, as opposed to protracted litigation.

[63] *Ironworkers*, at para. 15 citing *Sparling v. Southam Inc.*, [1988] 66 OR (2d) 225 at paras. 17-18.

2. Analogous settlement approval schemes

63. Similar tests have been developed under the *Companies Creditors' Arrangement Act* ("**CCAA**") and the *Class Proceedings Act* ("**CPA**"), which can assist by analogy and, when applied to the facts of this case, also favour approval of the Settlement.

(a) Settlement Approval under the CPA

64. The Investor Claimants are similarly situated to class members under the CPA, in that Representative Counsel, in consultation with the Representative Consultative Committee, acts in the interest of a large group of claimants with common legal issues for the sake of an efficient resolution of their claims.

65. Much like the OBCA's "broad range of reasonableness", the CPA asks whether the proposed settlement falls "within a zone of reasonableness."[64] This is a flexible test that often results in the approval of "less than perfect" settlements.[65] The Settlement meets and exceeds both of these standards.

66. To approve a settlement under s. 29(1) of the CPA, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class.[66]

67. Applied in this case, the CPA factors also clearly support approval of the Settlement:

(a) the likelihood of recovery or the likelihood of success – this is difficult to assess at such an early stage, and cannot really be known without

---

[64] *McIntosh v. Takata Corporation*, 2020 ONSC 968 at para. 33.
[65] *Nunes v. Air Transat AT Inc.* (2005), 20 CPC (6th) 93 at para. 7 [*Nunes*].
[66] *Class Proceedings Act*, SO 1992, c 6, s. 29(2); *Goyal,* at para. 31.

commencing litigation. The certainty provided by the Settlement, achieved at such an early stage, provides a very good recovery;

(b) the proposed settlement terms and conditions – these are favourable to all parties, with the payment of $40 million and the granting of valuable releases;

(c) the recommendation and experience of counsel – Representative Counsel who is experienced in these matters strongly recommends the Settlement as being in the best interest of Investor Claimants, and likely providing a better outcome than litigation;

(d) the future expense and likely duration of the litigation – litigation would undoubtedly be lengthy and expensive given the number of complex issues, the many parties, and the likely need for litigation funding, expert witnesses, and significant costs, not to mention appeals;

(e) the number of objectors and nature of objections – no Investor Claimants have objected to the Settlement;[67] and

(f) the presence of good faith, arm's-length bargaining and the absence of collusion – this was clearly the case for all parties under the auspices of the Mediator. [68]

68. All of these factors, in combination with the principle that public policy favours the resolution of complex litigation through the compromise of claims,[69] strongly support the court's approval of the Settlement.

---

[67] Notice Report, Supp. IC MR. p. 9, para. 11.

[68] *Goyal* at para. 32. See also *Robinson v. Medtronic Inc.*, 2020 ONSC 1688 at para. 65; *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643 at para. 32, aff'd 2010 ONCA 841.

[69] *Nunes* at para. 7.

(b) CCAA

69. Under the CCAA, the court has very broad powers to approve transactions, including settlements made during the course of CCAA proceedings.[70] The CCAA regime encourages compromise for the mutual benefit of debtor companies experiencing financial difficulties and those affected by those difficulties. The Claims Procedure Orders in this case have similar goals.[71]

70. Applying the tests developed pursuant to the CCAA to the facts of this case overwhelmingly confirms that the Settlement is beneficial to all involved parties:

(a) the settlement would be beneficial to the debtor and its stakeholders generally – benefits accrue to the Investor Claimants who receive a substantial cash settlement and to the settling parties who receive valuable releases without the need for drawn out litigation, and to the Credit Union in the form of certainty as it undergoes administration by FSRA and a potential sale or merger;

(b) the settlement is fair and reasonable – the Settlement enjoys the support of all involved as well as the Mediator and is on the high end of potential recovery; and

---

[70] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s. 11.

(c) by maximizing recovery for the Investor Claimants in the circumstances in which FHH and PFL are being liquidated - achieving approximately 70% recovery for the Investor Claimants is an impressive result.[72]

PART IV. RELIEF SOUGHT

71. For all of the reasons above, Representative Counsel submit that the Court should approve the Settlement and grant the Approval Orders substantially in the form included in the Motion Record of Representative Counsel.[73]

72. The Settlement is fair, reasonable, and consistent with the objectives of the Claims Procedure Orders. It is consistent with the principles that arise out of settlement approval procedures in analogous statutory schemes. Most importantly, it allows the Investor Claimants to begin rebuilding their lives in a timely manner.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

July 26, 2021

Lily Harmer

Lily Harmer

---

[72] See, for example, *Labourer's Pension Fund of Central and Eastern Canada v Sino-Forest Corporation*, 2013 ONSC 1078 at para. 49.

[73] Settlement Approval Order, IC MR, Tab 1, Schedule "B," p. 26, para. 15.

SCHEDULE "A"
TABLE OF AUTHORITIES

1. *Ironworkers Ontario Pension Fund. Research in Motion Ltd*., [2007] 87 OR (3d) 721
2. *Robertson v. ProQuest Information and Learning Company*, 2011 ONSC 1647
3. *Goyal v. Niagara College of Applied Arts and Technology*, 2020 ONSC 739
4. *Sparling v. Southam Inc. (HCJ)*, [1988] 66 OR (2d) 225
5. *McIntosh v. Takata Corporation*, 2020 ONSC 968
6. *Nunes v. Air Transat AT Inc.* (2005), 20 CPC (6th) 93
7. *Robinson v. Medtronic Inc.*, 2020 ONSC 1688
8. *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643, aff'd 2010 ONCA 841.
9. *Labourer's Pension Fund of Central and Eastern Canada v Sino-Forest Corporation*, 2013 ONSC

SCHEDULE "B"

Business Corporations Act, RSO 1990, c B. 16

Winding up by court

207 (1) A corporation may be wound up by order of the court,

(a) where the court is satisfied that in respect of the corporation or any of its affiliates,

(i) any act or omission of the corporation or any of its affiliates effects a result,

(ii) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(iii) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer; or

(b) where the court is satisfied that,

(i) a unanimous shareholder agreement entitled a complaining shareholder to demand dissolution of the corporation after the occurrence of a specified event and that event has occurred,

(ii) proceedings have been begun to wind up voluntarily and it is in the interest of contributories and creditors that the proceedings should be continued under the supervision of the court,

(iii) the corporation, though it may not be insolvent, cannot by reason of its liabilities continue its business and it is advisable to wind it up, or

(iv) it is just and equitable for some reason, other than the bankruptcy or insolvency of the corporation, that it should be wound up; or

(c) where the shareholders by special resolution authorize an application to be made to the court to wind up the corporation. R.S.O. 1990, c. B.16, s. 207 (1).

Court order

(2) Upon an application under this section, the court may make such order under this section or section 248 as it thinks fit. R.S.O. 1990, c. B.16, s. 207 (2).

…

Power of court

209 The court may make the order applied for, may dismiss the application with or without costs, may adjourn the hearing conditionally or unconditionally or may make any interim or other order as is considered just, and upon the making of the order may, according to its practice and procedure, refer the proceedings for the winding up to an officer of the court for inquiry and report and may authorize the officer to exercise such powers of the court as are necessary for the reference. R.S.O. 1990, c. B.16, s. 209.

Class Proceedings Act, SO 1992, c 6

Discontinuance, abandonment and dismissal for delay

Court approval required

29 (1) A proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate. 2020, c. 11, Sched. 4, s. 26.

Notice

(2) In approving a discontinuance or abandonment, or in dismissing a proceeding for delay, other than under section 29.1, the court shall consider whether notice should be given under section 19, and whether such notice should include,

(a) an account of the conduct of the proceeding;

(b) a statement of the result of the proceeding;

(c) any other prescribed information; and

(d) any other information the court considers appropriate. 2020, c. 11, Sched. 4, s. 26.

Companies' Creditors Arrangement Act, RSC 1985, c C-36

General power of court

11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Court File No. CV-20-00641059-00CL

IN THE MATTER OF A WINDING UP OF PACE SECURITIES CORP., PACE FINANCIAL LIMITED, PACE INSURANCE BROKERS LIMITED AND PACE GENERAL PARNER LIMITED

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

FACTUM OF THE INVESTOR CLAIMANTS

Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West
35th Floor
Toronto ON M5V 3H1
Tel: 416.646.4300

Kenneth T. Rosenberg (LSO# 21102H)
Tel: 416.646.4304
ken.rosenberg@paliareroland.com
Lily Harmer (LSO# 31880T)
Tel: 416.646.4326
lily.harmer@paliareroland.com
Massimo (Max) Starnino (LSO# 41048G)
Tel: 416.646.7431
max.starnino@paliareroland.com
Jesse Wright (LSO# 80382Q)
Tel: 416.646.6314
jesse.wright@paliareroland.com

Representative Counsel