

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
CANTRUST HOLDINGS INC., CANTRUST INC.,
CTI HOLDINGS (OSOYOOS) INC. AND ELMCLIFFE INVESTMENTS INC.**

Applicants

**FACTUM OF THE CCAA REPRESENTATIVES
(Additional RSAs, Notice, Claims Administrator)**

HENEIN HUTCHISON LLP
235 King Street East, First Floor
Toronto, ON M5A 1J9

Marie Henein (LSO #33289T)
mhenein@hhllp.ca

Scott Hutchison (LSO #29912J)
shutchison@hhllp.ca
Tel: (416) 368-5000
Fax: (416) 368-6640

KALLOGHLIAN MYERS LLP
250 Yonge St, Suite 2201
Toronto, ON M5H 3E5

A Dimitri Lascaris (LSO #50074A)
alexander.lascaris@gmail.com
Tel: (514) 941-5991
Fax: (519) 660-7845

Serge Kalloghlian (LSO#: 55557F)
serge@kalloghlianmyers.com
Tel: (647) 812-5615
Fax: (647) 243-6620

STROSBERG SASSO SUTTS LLP

151 Bloor St West, Suite 602
Toronto, ON M5S 1S4

David R Wingfield (LSO #28710D)

dwingfield@strosbergco.com

Tel: (416) 432-1443

Fax: (866) 316-5308

WEISZ FELL KOUR LLP

5600-100 King St W,
Toronto, ON, M5X1C9

Steven Weisz (LSO #32102C)

sweisz@wfklaw.ca

Tel: (416) 613-8281

Fax: (416) 613-8290

CCAA Representative Counsel

TO: **The Service List**

TABLE OF CONTENTS

	PAGE
PART I - OVERVIEW	1
PART II - SUBMISSIONS	1
A. Settlement Agreements (Additional RSAs)	1
i. The Aceto Settlement.....	2
ii. The Insurers Settlement.....	3
iii. Abramowitz Settlement Supplement	5
B. Claims Administrator	6
C. Notice.....	8
D. Holdback.....	9
i. Litigation with KPMG LLP	9
ii. Indemnities.....	10
iii. Co-operation Expenses.....	10
iv. Trust Expenses	11
PART III - ORDER REQUESTED	12
SCHEDULE “A” - LIST OF AUTHORITIES	13
SCHEDULE “B” - RELEVANT STATUTES	14

PART I - OVERVIEW

1. This motion is for an order:
 - (a) authorizing the CCAA Representatives and the Applicants to enter into settlement agreements totaling US\$ 36,900,000.00 approved in principle by the Sanction Order;
 - (b) appointing a Claims Administrator to process claims and distribute funds pursuant to the Allocation and Distribution Scheme approved by the Sanction Order;
 - (c) approving the form and method of disseminating notice to Securities Claimants of how to file claims for settlement proceeds and the deadline for doing so;
 - (d) Setting the amount of the funds to be held back from distribution for the purpose of paying expenses and liabilities of the Securities Claimant Trust (the “**Holdback**”).

PART II - SUBMISSIONS

A. Settlement Agreements (Additional RSAs)

2. On July 16, 2021, this court issued the Sanction Order approving CannTrust Holdings’ CCAA Plan. This Order also authorized the Applicants and the CCAA Representatives to enter into, and take steps to implement, a number of settlements for the benefit of Securities Claimants. These settlements provided (among other things) for payments of approximately \$83,000,000.00 to be paid to a litigation trust (the “**Securities Claimant Trust**”) and to be distributed to Securities Claimants (the beneficiaries of the trust) pursuant to the Allocation and Distribution Scheme (which was also approved by the Sanction Order).

3. At the time of the Sanction Order, the CCAA Representatives and Applicants had also reached agreements in principle with: (i) Peter Aceto, CannTrust Holdings’ former CEO; and (ii)

the Insurers that provided policies of insurance to CannTrust Holdings and its directors and officers. The CCAA Representatives also entered a supplemental agreement regarding indemnification with Ian Abramowitz, CannTrust Holdings' former CFO. The formal documentation for these agreements had not been finalized as of the date of the Sanction Order, but the key terms were summarized in the Affidavit of Serge Kalloghlian affirmed June 16, 2021 ("**June 16th Affidavit**") and before the Court on the CCAA Plan sanction hearing.¹

4. Paragraph 14 of the Sanction Order authorized the Applicants and CCAA Representatives to enter into one or more Additional RSAs with the Insurers and Peter Aceto, and a supplemental Additional RSA with Ian Abramowitz, in each case on terms substantially consistent with the terms in the June 16th Affidavit.² These settlements, which provide for payment of an additional \$36.9 million to the Securities Claimant Trust, have since been finalized.

i. The Aceto Settlement

5. Peter Aceto is the former chief executive officer of CannTrust Holdings. Peter Aceto faces both Secondary Market Claims and Prospectus Claims in the proposed class actions.

6. The CCAA Representatives, Peter Aceto, and the CannTrust Group entered into Minutes of Settlement effective as of June 11, 2021 pursuant to which Mr. Aceto will:

- (a) provide cooperation to the plaintiffs in the continuing litigation;
- (b) support the CCAA Plan in a manner consistent with the RSA; and
- (c) provide a release of all claims against the Insurers.³

¹ Affidavit of Serge Kalloghlian affirmed December 6, 2021 ("**Kalloghlian Affidavit**"), paras. 7-8, Motion Record of the CCAA Representatives (Additional RSAs, Notice, Claims Administrator) ("**Motion Record**"), Tab 2, pp. 16-17; June 16th Affidavit, paras 3-15, Motion Record, Tab 2-B, p. 68-70.

² Sanction Order, para. 14, Motion Record, Tab 2-C, p. 78.

³ Minutes of Settlement paras 2-3 and 9, Motion Record, Tab 2-D, p. 180 and 182.

7. As explained in the June 16th Affidavit, because Mr. Aceto is releasing his rights to insurance coverage that would respond to regulatory or criminal proceedings, the parties have agreed that the Securities Claimant Trust will reserve \$1 million to indemnify him in respect of legal costs incurred to defend against any such proceedings. Any such funds remaining after the final disposition of such proceedings would revert back to the Securities Claimant Trust.⁴

8. The CCAA Representatives have also separately agreed that the Securities Claimant Trust will indemnify Mr. Aceto for \$125,000 in legal defense costs incurred prior to execution of the Minutes of Settlement and which had not been reimbursed by the Insurers. The agreements set out in the Minutes of Settlements and this paragraph are referred to as the “**Aceto Settlement.**”⁵

9. The Aceto Settlement is substantially similar to the settlement terms described in the June 16th Affidavit.⁶ The Aceto Settlement was driven primarily by its impact on the negotiation with the Insurers, his ability to make a meaningful monetary contribution, and the value of his co-operation in pursuing claims against KPMG.⁷

ii. The Insurers Settlement

10. CannTrust Holdings’ Insurers denied coverage to CannTrust Holdings, and certain of the Insurers denied coverage to some of the directors and officers.⁸

19. The June 16th Affidavit explained that the CCAA Representatives and the CannTrust Group have entered into agreements with all Insurers pursuant to which they will pay \$36.9 million to the

⁴ June 16th Affidavit, para 8, Motion Record, Tab 2-B, p. 69; Minutes of Settlements, paras. 7-10, Motion Record, Tab 2-D, p. 182.

⁵ Kalloghlian Affidavit para. 13-14, Motion Record, Tab 2, p. 18.

⁶ June 16th Affidavit, paras 6, 8, Motion Record, Tab 2-B, p. 69.

⁷ Kalloghlian Affidavit para. 15, Motion Record, Tab 2, p. 18.

⁸ Kalloghlian Affidavit para. 17, Motion Record, Tab 2, p. 18.

Securities Claimant Trust in exchange for full policy releases from the insureds.⁹ The settlement is made up of two separate agreements to resolve claims against Insurers under two policy “towers”: (a) the ABC Policies; and (b) the DIC Policies.¹⁰

(a) The ABC Settlement and Supplement

11. Allianz Global Risks US Insurance Company, Markel Bermuda Limited, Ascot Bermuda Limited f/k/a Ascot Reinsurance Company Limited Bermuda, Aspen Bermuda Limited, Assicurazioni Generali S.p.A., and XL Specialty Insurance, (collectively, “**ABC Insurers**”) each issued a policy of insurance to CannTrust Holdings for the period February 25, 2019 to February 25, 2020, (collectively, the “**ABC Policies**”).¹¹

12. As explained in the June 16th Affidavit, the CCAA Representatives, the ABC Insurers, the CannTrust Group and certain insureds under the ABC Policies have reached an agreement (the “**ABC Settlement**”) pursuant to which, on the Plan Implementation Date:

(a) the ABC Insurers will collectively pay USD \$30,000,000 to the Securities Claimant Trust; and

(b) the ABC Insurers will be released from all claims concerning the ABC Policies.¹²

13. Following the Sanction Order, in connection with the ABC Settlement, the parties have also entered into a supplemental agreement (“**ABC Supplement**”) containing a limited number of confidential terms.¹³

⁹ June 16th Affidavit para. 12, Motion Record, Tab 2-B, p. 70.

¹⁰ Kalloghlian Affidavit para. 19, Motion Record, Tab 2, p. 19.

¹¹ Kalloghlian Affidavit para. 20, Motion Record, Tab 2, p. 19.

¹² Kalloghlian Affidavit para. 21, Motion Record, Tab 2, p. 19; ABC Settlement s 1.1, Motion Record, Tab 2-E, p. 195.

¹³ Kalloghlian Affidavit para. 22, Motion Record, Tab 2, p. 19.

(b) The DIC Settlement

14. Chubb Insurance Company of Canada, Newline Canada Insurance Limited, Allied World Assurance Company, and Arch Insurance Canada Limited (collectively, “**DIC Insurers**”) each issued a policy of insurance to CannTrust Holdings effective February 25, 2019 (collectively, the “**DIC Policies**”).¹⁴

15. As explained in the June 16th Affidavit, the CCAA Representatives, the DIC Insurers, the CannTrust Group and certain insureds under the ABC Policies have reached an agreement (the “**DIC Settlement**”), pursuant to which, on the Plan Implementation Date

(a) the DIC Insurers will collectively pay USD \$6,900,000 to the Securities Claimant Trust; and

(b) the DIC Insurers will be released from all claims concerning the DIC Policies.¹⁵

16. The DIC Settlement and the ABC Settlement and Supplement are together substantially similar to the terms of the Insurer settlements described in the June 16th Affidavit.¹⁶

iii. Abramowitz Settlement Supplement

17. The CCAA Representatives, Ian Abramowitz, and the CannTrust Group entered into the Abramowitz Settlement on May 5, 2021 pursuant to which, among other things: (a) Mr. Abramowitz assigned any Assigned Claims against Insurers that he may have to the Securities Claimant Trust, excluding any claims, rights or entitlement that he may have to insurance coverage for criminal, regulatory or administrative proceedings; (b) Mr. Abramowitz will provide co-

¹⁴ Kalloghlian Affidavit para. 23, Motion Record, Tab 2, p. 20.

¹⁵ Kalloghlian Affidavit para. 24, Motion Record, Tab 2, p. 20; DIC Settlement, Motion Record, Tab 2-F, p. 229.

¹⁶ June 16th Affidavit para. 12, Motion Record, Tab 2-B, p. 70.

operation to the plaintiffs; and (c) Mr. Abramowitz agreed to support the CCAA Plan in a manner consistent with the RSA.¹⁷

18. As explained in the June 16th Affidavit, to provide the Insurers with the full policy releases they required under their settlements, CCAA Representative Counsel determined that it was necessary and appropriate to enter into an agreement (the “**Abramowitz Settlement Supplement**”), memorialized in a supplemental Additional RSA, that supplements the Abramowitz Settlement to indemnify Mr. Abramowitz in respect of costs for criminal, regulatory, administrative and/or other costs.¹⁸

19. Pursuant to this agreement, the Securities Claimant Trust will reserve \$1 million to indemnify Abramowitz for costs incurred in defense of criminal or regulatory proceedings and certain civil defense costs. It will also pay certain counsel fees, capped at \$25,000.00, incurred prior to the Plan Implementation date.¹⁹

20. The Abramowitz Settlement Supplement is substantially similar to the terms described in the June 16th Affidavit.

B. Claims Administrator

21. Pursuant to the CCAA Plan and the settlement agreements, on the Plan Implementation Date, approximately \$126 million will be paid to the Securities Claimant Trust for the benefit of Securities Claimants. These funds will be held in a trust account (“**Trust Account**”) and (after

¹⁷ Affidavit of Serge Kalloghlian affirmed June 2, 2021, para. 79, Motion Record, Tab 2-A, p. 51-52.

¹⁸ June 16th Affidavit para. 15, Motion Record, Tab 2-B, p. 70.

¹⁹ Kalloghlian Affidavit para. 27, Motion Record, Tab 2, p. 21.; Abramowitz Settlement Supplement, Motion Record Tab 2-G, p. 249.

payment of fees and expenses) will be distributed to Securities Claimants pursuant to the court-approved Allocation and Distribution Scheme (“**A&DS**”).

22. The Sanction Order approved the A&DS which sets out the methodology by which claims of Securities Claimants will be processed, calculated, and distributed. The A&DS contemplates the appointment of a “**Claims Administrator**” that is responsible for administration of the A&DS, which appointment is to be confirmed by the Court.²⁰

23. The CCAA Representatives seek appointment of Epiq Class Action Services Canada Inc. (“**Epiq**”) as the Claims Administrator to administer the A&DS and to manage the Trust Account under the direction of the Trustees of the Securities Claimant Trust.²¹

24. Epiq is a recognized leader in the legal notice and administrative services industry, and has substantial experience administering class action settlements.²² Epiq has already been appointed by the U.S. Court as the Claims Administrator to administer notice and process claims pursuant to the settlement approval orders in the U.S. Class Action.²³

25. Epiq has established a website at www.canntrustsecuritiessettlement.ca for the purpose of receiving and processing claims and providing information to Securities Claimants about the settlements.²⁴

²⁰ Sanction Order para 6., Motion Record, Tab 2-C, p. 76. A&DS para. 1(e), Motion Record, Tab 2-C p. 149.

²¹ The Trustees are Serge Kalloghlian (a member of CCAA Canadian Representative Counsel) and James Johnson (a member of CCAA US Representative Counsel), as contemplated by the CCAA Plan section 4.1: Motion Record Tab 2-C, p. 122.

²² Kalloghlian Affidavit para 31, 33, Motion Record, Tab 2, p.22.

²³ U.S. Preliminary Approval Order dated September 2, 2021, para 8, Tab 2-I, p. 318.

²⁴ Kalloghlian Affidavit, para 32, Motion Record, Tab 2, p. 22.

C. Notice

26. The CCAA Representatives seek an order authorizing the form and method of distributing the notice to Securities Claimants of the method of filing claims and the deadline for doing so.

27. The proposed Notice is attached as Schedule “A” to the draft Order. The Notice advises Securities Claimants of the procedure to file claims and the deadline for doing so.²⁵

28. The Notice will be disseminated in accordance with the proposed Notice Plan at Schedule “B” of the draft Order.²⁶

29. The Notice Plan is designed to reach Canadian and Non-US Securities Claimants (as defined in the CCAA Representation Order). This is because a notice has already been issued and targeted to U.S investors regarding the claims filing procedure. As contemplated by the CCAA Plan, on September 2, 2021, the court supervising the U.S. Class Action issued an order preliminarily certifying a U.S. settlement class and approving notice of the settlement approval hearing and claims filing procedure. The order stated that the notice and plan “constitute the best notice to U.S. Settlement Class Members practicable under the circumstances” and “are reasonable and constitute due, adequate, and sufficient notice to all persons entitled to receive such notice.”²⁷ Notice to the US investors was issued in compliance with the approved notice program.²⁸

²⁵ Notice, Motion Record, Tab 4-B, p. 396.

²⁶ Notice Plan, Motion Record, Tab 4-C, p. 399.

²⁷ US Preliminary Approval Order para 7, Motion Record Tab 2-I, p. 317.

²⁸ US Final Judgment, dated December 2, 2021, Motion Record Tab 2-J, para M, page 333.

30. The Notice Plan is similar to notice plans approved by Ontario courts in the context of securities class action settlements and will reach a substantial majority of the Canadian and Non-US Securities Claimants.²⁹

D. Holdback

31. The Sanction Order approved the A&DS which sets out the methodology by which settlement funds will be distributed to Securities Claimants. The A&DS contemplates a “**Holdback**” of settlement funds to fund litigation expenses, disbursements, taxes, adverse costs awards, and/or other liabilities.³⁰

32. The CCAA Representatives seek authorization to hold back up to \$10,000,000.00 to fund (a) continuing litigation against KPMG LLP; (b) indemnities provided by the Securities Claimants Trust to certain directors and officers under the settlement agreements; (c) costs and expenses of co-operating parties pursuant to the cooperation agreements with certain settling defendants; and (d) other reasonable costs, expenses, and taxes of the Trustees and Securities Claimant Trust in accordance with the Trust Declaration.³¹ Each of these items is described below.

i. Litigation with KPMG LLP

33. On the Plan Implementation Date, the Securities Claimant Trust will assume the rights to CannTrust Holdings’ claim against KPMG LLP. The intention is to prosecute that claim concurrently with the Class Actions in parallel managed proceedings on the Commercial List for the benefit of Securities Claimants.³²

²⁹ Kalloghlian Affidavit, para 38, Motion Record, Tab 2, p. 23.

³⁰ A&DS para 1(p), Motion Record Tab 2-C, p. 151.

³¹ Kalloghlian Affidavit para. 40, Motion Record, Tab 2, p. 24.

³² Kalloghlian Affidavit para. 41, Motion Record, Tab 2, p. 24.

34. Counsel expects KPMG LLP to advance vigorous procedural and substantive defences. For example, KPMG LLP has already announced its intention to attempt to force CannTrust Holdings' claim into private arbitration and therefore require two separate proceedings to occur in two separate forums. Such an occurrence could substantially increase litigation expenses and increase the Securities Claimants' exposure to adverse costs.³³

35. In the circumstances CCAA Representative Counsel believe a reserve of \$6,000,000.00 is appropriate to fund litigation expenses and adverse costs awards.³⁴

ii. Indemnities

36. The CCAA Representatives' agreements with Peter Aceto, Eric Paul, and Ian Abramowitz each require the Securities Claimant Trust to maintain a reserve of \$1,000,000 million to fund indemnification for legal defense costs. Accordingly, \$3,000,000.00 are necessary to hold back to satisfy these obligations.³⁵

iii. Co-operation Expenses

37. Certain settling parties have agreed to cooperate with the plaintiffs in the continuing litigation. The co-operation agreements require the Securities Claimant Trust to cover certain legal cost and other expenses related to the cooperating parties' obligations. CCAA Representative Counsel believe a reserve of \$500,000.00 is sufficient to fund these obligations.³⁶

³³ Kalloghlian Affidavit para. 42, Motion Record, Tab 2, p. 24.

³⁴ Kalloghlian Affidavit para. 43, Motion Record, Tab 2, p. 24.

³⁵ Kalloghlian Affidavit para. 44, Motion Record, Tab 2, p. 24-25.

³⁶ Kalloghlian Affidavit para. 45-46, Motion Record, Tab 2, p. 25.

iv. Trust Expenses

38. The Trustees will incur expenses in the administration of the Securities Claimant Trust. CCAA Representative Counsel believe a reserve of \$500,000.00 is sufficient to fund these obligations.³⁷

39. Apart from the \$3 million required to comply with the Securities Claimant Trust's indemnity obligations, the figures set out above for litigation, cooperation, and trust expenses are estimates and the funds used for those purposes may deviate from those estimates. The order sought will permit the Trustees to use those \$7 million in Holdback funds for any of the purposes identified in this section without regard to the estimates set out above.³⁸

40. The Holdback is consistent with other class proceedings in which there is a partial settlement and it should be approved.³⁹

³⁷ Kalloghlian Affidavit paras. 47-48, Motion Record, Tab 2, p. 25.

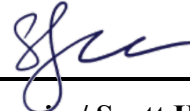
³⁸ Kalloghlian Affidavit para. 49, Motion Record, Tab 2, p. 25.

³⁹ See, e.g., *Mancinelli v. Royal Bank of Canada*, [2019 ONSC 626](#), para. 28, Authorities, Tab 16. Order of Justice Kalichman dated November 12, 2019 (*Catucci v. Valeant Pharmaceuticals International Inc.*), para. 11, Authorities, Tab 17-A.

PART III - ORDER REQUESTED

41. CCAA Representatives request that this court grant the relief requested in the form of the Order at Tab 4 of the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of December, 2021.



**Marie Henen / Scott Hutchison /
David Wingfield / A. Dimitri Lascaris**

SCHEDULE “A” - LIST OF AUTHORITIES

1. *Mancinelli v. Royal Bank of Canada*, [2019 ONSC 626](#)
2. Order of Justice Kalichman dated November 12, 2019 (*Catucci v. Valeant Pharmaceuticals International Inc.*) (Settlement Approval)
3. Order of Justice Kalichman dated November 12, 2019 (*Catucci v. Valeant Pharmaceuticals International Inc.*) (Fee Approval)

SCHEDULE “B” - RELEVANT STATUTES

1. N/A

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto**

**FACTUM OF THE CCAA REPRESENTATIVES
(Additional RSAs, Notice, Claims Administration)**

STROSBERG SASSO SUTTS LLP

1561 Ouellette Avenue
Windsor, ON N8X 1K5

David R. Wingfield (LSO #28710D)

dwingfield@strosbergco.com

Tel: (416) 432-1443

Fax: (866) 316-5308

HENEIN HUTCHISON LLP

235 King Street East, First Floor
Toronto, ON M5A 1J9

Marie Henein (LSO #33289T)

mhenein@hhllp.ca

Scott Hutchison (LSO #29912J)

shutchison@hhllp.ca

Tel: (416) 368-5000

Fax: (416) 368-6640

KALLOGHLIAN MYERS LLP

Suite 2201, 250 Yonge street
Toronto, ON M5B 2L7

A. Dimitri Lascaris (LSO#50074A)

alexander.lascaris@gmail.com

Tel: (514) 941-5991

Serge Kalloghlian (LSO# 55557F)

serge@kalloghlianmyers.com

Tel: (647) 812 5615

WEISZ FELL KOUR LLP

5600-100 King St W,
Toronto, ON M5X 1C9
Steven Weisz (LSO #32102C)

sweisz@wfkllaw.ca

Tel: 416.613.8281

CCAA Representative Counsel