

**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  
CANNTRUST HOLDINGS INC., CANNTRUST INC.,  
CTI HOLDINGS (OSOYOOS) INC. AND ELMCLIFFE INVESTMENTS INC.

**FACTUM OF THE CCAA U.S. REPRESENTATIVES  
(Motion For Approval of U.S. Counsel's Fees)**

December 15, 2021

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## I. OVERVIEW

1. This is a motion for an order approving of the fees and disbursements of Labaton Sucharow LLP (“**Labaton**”) and Levy & Korsinsky LLP, counsel in *In re CannTrust Holdings, Inc. Securities Litigation*, Civil Action No. 1:19-cv-06396-JPO (S.D.N.Y.) (the “**U.S. Class Action**”), and Girard Sharp LLP and Gibbs Law Group, counsel in *Owens v. CannTrust Holdings, Inc., et. al.*, Court File No. 19-cv-352374 (the “**California Action**”) (collectively, “**U.S. Counsel**”). U.S. Counsel seeks fees in the amount of CAD \$15,786,571.25 and USD \$302,000.62 for disbursements. This fee and disbursement request is made with the approval of the clients in the U.S. Class Action.

2. Labaton and Weisz Fell Kour LLP (“**CCAA U.S. Representative Counsel**”) were appointed by this Court to represent the interests of the U.S. class members in this CCAA proceeding.

3. CCAA U.S. Representative Counsel, along with Heinen Hutchinson LLP, Strossberg Sasso Sutts LLP, A. Dimitri Lascaris Law Professional Corporation and Kalloghlian Myers LLP (“**CCAA Canadian Representative Counsel**”), have secured settlements with CannTrust Holdings, Inc. (“**CannTrust**”), its directors, officers, underwriters and others for CAD \$129,542,570.00 plus the assignment of all of CannTrust’s claims against its former auditors to a litigation trust for the benefit of eligible investors (the “**Securities Claimants**”). CCAA U.S. Representative Counsel will continue to pursue these claims on behalf of this litigation trust.

4. For purposes of fee approval, 50% of the monetary value of the settlements has been notionally allocated to the U.S. claimants and 50% to the Canadian claimants. Based on this notional allocation, U.S. Counsel is seeking 25% of that notional allocation attributable to U.S. claimants.

5. The fee requested by U.S. Counsel is fair and reasonable and should be approved for the following reasons:

(a) the fee requested is supported by the court-appointed lead plaintiffs in the U.S. Class Action, Granite Point Master Fund, LP and Granite Point Capital Scorpion Focused Ideas Fund (“**Granite Point**” or “**U.S. Class Action Lead Plaintiffs**”);

(b) more than 115,000 notices of the settlements and requested fee percentage were issued to potential class members in the U.S. Class Action and no class member objected or opposed the fee request;

(c) the result achieved is excellent in light of the damages sustained by the Securities Claimants, the legal and factual impediments to recovery, and CannTrust’s financial position;

(d) U.S. Counsel took on significant risk in pursuing claims against these Defendants arising from the various potential factual and legal obstacles in establishing liability;

(e) The requested fee is within the range of percentages that Ontario and U.S. courts have approved; as noted by the Justice Strathy in *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, fees between 20% to 33% are typical in Canadian class proceedings, and multiple cases in the Southern District of New York have awarded fees in the 25% to 30% range as more fully set forth on pages 12-13, *supra*;

(f) U.S. Counsel assumed the risk of no success and/or minimal recovery while devoting a sizeable commitment of time, money and other resources to this litigation. U.S. Counsel has already committed millions of dollars in resources to this action, including 5,726.45 lawyer hours, with a time value of USD \$3,880,864.25, and disbursements of USD\$302,000.62; and

(g) The settlements, as a whole, are one of the largest securities class action settlements in Canadian history.

6. U.S. Counsel seeks fees from this Court on the basis that: (a) Section 4.2 of the CCAA Plan provides that the fees of CCAA Representative Counsel will be paid from accounts held in the Securities Claimant Trust Fund, in accordance with the terms of the Trust Declaration, subject to the approval of the CCAA Court; (b) the Securities Claimant Trust Fund is held in Canada; and (c) the U.S. Court overseeing the U.S. Class Action, while approving the settlements and allocation and distribution plan, did not award fees and understood that fees would be sought before this Court. It is common for courts in Canada to award fees to U.S. counsel in cross-border securities class actions.<sup>1</sup>

7. The jurisprudence governing fee percentages in Ontario and the U.S., the excellent monetary result and the risks accepted by U.S. Counsel support this fee request. For the reasons more fully set forth below, U.S. Counsel respectfully requests that the fees be approved.

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<sup>1</sup> The Court is respectfully referred to the Book of Authorities of the CCAA U.S. Representatives (“**U.S. Authorities**”) for all authority particular to this Factum of the CCAA U.S. Representatives (Motion for Approval of U.S. Counsel’s Fees). To avoid duplication, authority that is also cited in the Factum of the CCAA Canadian Representatives (Motion for Approval of CCAA Canadian Representative Counsel Fees) and provided in the Book of Authorities of the CCAA Representatives and CCAA Canadian Representatives (“**Authorities**”) is not reproduced in the U.S. Authorities. *In the Matter of a Plan of Compromise and Arrangement of 1511419 Ontario Inc. Formally Known as the Cash Store Financial Inc. et al*, (November 19, 2015), Toronto CV-14-10518-00CL (Ont SCJ [Comm List]); *In the Matter of a Plan of Compromise and Arrangement of Sino-Forest Corporation*, (December 27, 2013), Toronto CV-11-431153-00CP (Ont SCJ [Comm List]), U.S. Authorities, Tab 3 and 27.

## II. STATEMENT OF FACTS

### A. Background of the U.S. Proceedings

8. Following CannTrust’s disclosures on July 8, 2019 that its manufacturing facilities were not compliant with applicable laws, CannTrust’s share price declined and class actions were commenced in Canada and the United States on behalf of shareholders to recover losses arising from alleged misrepresentations.<sup>2</sup> In April 2020, the court in the U.S. Class Action appointed the U.S. Class Action Lead Plaintiffs and appointed Labaton as lead counsel for the U.S. Class.<sup>3</sup>

9. On June 26, 2020, following an extensive investigation, U.S. Counsel filed and served their 275 page Consolidated Class Action Complaint against CannTrust and multiple other parties alleging violation of the U.S. securities laws.<sup>4</sup> On July 6, 2020, the parties to the U.S. Class Action stipulated to a stay of that action until such time as the court-appointed mediator, Hon. Dennis O’Connor, Q.C. (the “**Mediator**”), declared that the mediation process had concluded or this Court lifted the stay of proceedings in Canada.<sup>5</sup>

### B. Overview of the Mediation and Settlements

10. On May 8, 2020, the Mediator was appointed by the Court to mediate a global resolution of the various securities actions, inter-related claims, cross-claims and indemnities against CannTrust and others.<sup>6</sup>

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<sup>2</sup> Declaration of James W. Johnson, affirmed December 8, 2021 (“**Johnson Declaration**”), [para. 6](#).

<sup>3</sup> Johnson Declaration, [para. 8](#).

<sup>4</sup> Johnson Declaration, [paras. 9-19](#) and [Exhibit B](#).

<sup>5</sup> Johnson Declaration, [paras. 12-13](#).

<sup>6</sup> Johnson Declaration, [para. 20](#).

11. CCAA Canadian Representative Counsel and CCAA U.S. Representative Counsel have worked together as a single negotiation unit to advance the interests of all Securities Claimants.<sup>7</sup>

12. Following months of complex negotiations with multiple parties facilitated by the Mediator, CCAA Canadian and CCAA U.S. Representative Counsel resolved the Securities Claims against CannTrust and related claims against all Defendants except for KPMG, LLP (“KPMG”).<sup>8</sup>

13. The settlements resulted from extensive and hard-fought negotiations with counsel to more than thirty defendants and nine insurers over 18 months. CCAA Canadian and CCAA U.S. Representative Counsel participated in more than one hundred formal and informal mediation sessions and discussions with the Mediator and other mediation participants. The negotiations were adversarial and hard-fought.<sup>9</sup>

14. In exchange for releases, upon implementation of the CCAA Plan and satisfaction of certain preconditions, CannTrust and other settling co-defendants and insurers will:

(a) collectively pay CAD \$129,542,570.00 into a trust for Securities Claimants; and

(b) assign to the Securities Claimants Trust CannTrust’s direct claim against its former auditor, KPMG, which will be prosecuted for the benefit of the Securities Claimants in conjunction with their securities-based and other claims against KPMG.<sup>10</sup>

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<sup>7</sup> Johnson Declaration, [Tab A, para. 31](#).

<sup>8</sup> Johnson Declaration, [para. 21](#).

<sup>9</sup> Johnson Declaration, [para. 59](#).

<sup>10</sup> Johnson Declaration, [para. 27](#).



15. After payment to the Zola Plaintiffs under the Zola RSA, the gross settlement amount totals CAD \$126,292,570.00. The proceeds of the settlements will be distributed to Securities Claimants under the Court approved Allocation & Distribution Scheme.<sup>11</sup>

**C. Notional Value of the Settlement Amount**

16. The settlements provide for a total payment of CAD \$126,292,570.00 to Securities Claimants. CCAA Canadian and U.S. Representative Counsel have agreed that the fees of Representative Counsel will be determined by allocating 50% to U.S. claimants and 50% to Canadian claimants. CCAA Canadian Representative Counsel's and U.S. Counsel's requested fees are each based on a recovery of CAD \$63,146,285.00 (50% of CAD \$126,292,570.00).<sup>12</sup>

**D. The Contingency Fee Retainer Agreement Between U.S. Counsel and the U.S. Class Action Lead Plaintiffs**

17. U.S. Counsel has acted in these proceedings and the U.S. Class Action on a contingent fee basis. The retainer agreement between Labaton and U.S. Class Action Lead Plaintiffs provides that the court will determine U.S. Counsel's fee.<sup>13</sup> The U.S. Class Action Lead Plaintiffs have submitted a declaration supporting U.S. Counsel's fee request of 25%.<sup>14</sup> Furthermore no class member in the U.S. Class Action objected to the 25% fee request.<sup>15</sup>

18. Based on these facts, U.S. Class Counsel requests fees of CAD \$15,786,571.25, equal to 25% of the settlement amount notionally attributable to U.S. Claimants.

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<sup>11</sup> Johnson Declaration, [paras. 27-29](#).

<sup>12</sup> Johnson Declaration, [paras. 38-39](#).

<sup>13</sup> Johnson Declaration, [Tab F at 388](#).

<sup>14</sup> Johnson Declaration, [Tab G](#).

<sup>15</sup> Johnson Declaration, [para. 43](#).

**E. Counsel's Efforts to Advance This Action**

19. U.S. Class Counsel expended significant effort in advancing the U.S. Class Action and CCAA U.S. Representative Counsel expended significant effort in advancing the CCAA proceedings and obtaining the settlements by, among other things:

- (a) conducting an extensive legal and factual investigation, including and in particular:
- (i) reviewing CannTrust's public disclosure documents and other publicly available information on CannTrust;
  - (ii) holding discussions with more than 50 former employees and obtaining relevant documents;
  - (iii) identifying and interviewing potential "fact" witnesses;
  - (iv) retaining a cannabis consultant to advise counsel;
  - (v) retaining Cyrus Khory, managing director at Froese Forensic Partners Ltd., to provide an expert opinion on applicable accounting standards;
  - (vi) retaining Professor Efrim Boritz, Ph.D., FCPA, FCA, CISA, to provide an expert opinion on applicable auditing standards;
  - (vii) retaining James Miller to provide an expert opinion on applicable underwriting standards;
  - (viii) retaining Sunita Surana, Ph.D., of Forensic Economics to provide and expert economic opinion on market efficiency, materiality and damages;
  - (ix) reviewing CannTrust's responsive insurance policies and other non-public information in the mediation process;
  - (x) considering the written mediation briefs, information and documents provided, and positions taken by the parties during the mediation process;
  - (xi) negotiated cooperation agreements with settling defendants to assist in continuing litigation;
  - (xii) preparing the Complaint;

- (xiii) preparing for, arguing, and attending motions and other appearances in this CCAA proceeding;
- (xiv) participating in the mediation process, including attendance at dozens of formal and informal mediation session over a one-year period;
- (xv) negotiation of the RSA settlement framework which ensured claims against non-debtor defendants would be minimally affected;
- (xvi) negotiating the additional RSA's;
- (xvii) retaining and receiving advice from tax counsel on the structure of the Securities Claimant Trust;
- (xviii) filing a proof of claim on behalf of Securities Claimants and voted for the CCAA Plan;
- (xix) preparing for and making submissions in support of the representation order;
- (xx) preparing for and making submission in support of the motions to sanction the CCAA Plan, to authorize the settlements and Allocation & Distribution Scheme;
- (xxi) preparing, the motions and supporting papers for notice approval sand settlement approval in the U.S. Court;
- (xxii) designing the Allocation & Distribution Scheme to distribute the settlement proceeds to Securities Claimants; and
- (xxiii) retaining and working with the Claims Administrator on the claims filing procedure, website, and notice to Securities Claimants.<sup>16</sup>

**F. Counsel's Time and Disbursements Incurred**

20. CCAA U.S. Representative Counsel have already expended more than USD \$3.8 million in docketed time and USD \$302,000.62 in disbursements.<sup>17</sup> The disbursements comprise expert fees and other costs. Considering the amount of work required, the steps taken, the division of work and responsibility between the firms, the time spent was reasonable.

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<sup>16</sup> Johnson Declaration, [para. 54](#).

<sup>17</sup> Johnson Declaration, [para. 47](#).

**G. The Continuing Litigation Against KPMG**

21. Litigation on behalf of the Securities Claimants has been resolved with all parties except KPMG. CCAA Canadian and U.S. Representative Counsel will continue to prosecute the class action claims and CannTrust’s claims against KPMG.

**III. ISSUES AND LAW**

22. The fees and disbursements requested are consistent with the retainer agreement entered into with the U.S. Class Action Lead Plaintiffs, and are authorized by the CCAA Plan. The amounts sought are also fair and reasonable given the significant risks that U.S. Counsel undertook in these proceedings and the very significant success achieved.

**A. Counsel Fees to Be Paid from Securities Claimant Trust**

23. Section 4.2 of the CCAA Plan as endorsed by the Court states that CCAA Representative Counsel fees will, subject to court approval, be paid from the Securities Claimant Trust in accordance with the terms of the Trust Declaration:

**4.2 Settlement-Related Agreements<sup>18</sup>**

The Settlement-Related Agreements will:

[...](c) provide that all fees and costs of the CCAA Representatives, CCAA Representative Counsel, the Trustees and the Securities Claimant Trust, as approved by the CCAA Court, will be paid from amounts held in the Securities Claimant Trust from

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<sup>18</sup> “**Settlement-Related Agreements**” is defined in the CCAA Plan as: the Trust Declaration, the Allocation and Distribution Scheme, the Cooperation Agreement and all other agreements, releases, consents or other documents contemplated by, or necessary or desirable to implement the transactions contemplated by, the CCAA Plan, the RSA or the RSA Supplemental Letter Agreement in relation to the settlement of or otherwise addressing the Securities Claims, the other Released Claims and the Channelled Claims, in each case in form and content satisfactory to the RSA Parties.

time to time in accordance with the terms of the Trust Declaration and any other applicable Definitive Document.<sup>19</sup>

24. The parties will execute the Trust Declaration in advance of the Plan Implementation date in a form substantially similar to that in the motion record. In respect of fees, it states:

### **3.4 Payment of Fees and Expenses from Securities Claimant Trust**

[...] the Trustees shall make payments out of the Securities Claimant Trust Assets [...] (vii) to pay counsel fees and reimbursement of expenses to CCAA Canadian Representative Counsel and to CCAA US Representative Counsel in respect of amounts recovered for the benefit of Securities Claimants in accordance with their contingency fee retainer agreements or other agreement, in each case subject to court authorization.<sup>20</sup>

#### **B. The Standards for Fee Approval**

25. Canadian case law governing fee awards is consistent with standards under U.S. precedent. For the Court’s convenience, both concepts are discussed below.

26. The United States Supreme Court has emphasized that private securities actions are “an essential supplement to criminal prosecutions and [SEC] civil enforcement actions....”<sup>21</sup> Compensating counsel for bringing these actions is important because “[s]uch actions could not be sustained if plaintiffs’ counsel were not to receive remuneration from the settlement fund for their efforts on behalf of the class.”<sup>22</sup>

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<sup>19</sup> CCAA Plan s. 4.2(c), Motion Record of the CCAA Representatives (Additional RSAs, Notice, Claims Administration), [Tab 2-C p. 123](#).

<sup>20</sup> Trust Declaration s 3.4, Motion Record of the CCAA Canadian Representatives (Fee Approval), [Tab 2-K, pp. 357-358](#).

<sup>21</sup> *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007), U.S. Authorities, Tab 30; *accord Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (private securities actions provide “a most effective weapon in the enforcement of the securities laws and are a necessary supplement to [SEC] action”), U.S. Authorities, Tab 2.

<sup>22</sup> *Hicks v. Morgan Stanley*, No 01-cv-10071, 2005 WL 2757792, at \*9 (S.D.N.Y. Oct. 24, 2005), U.S. Authorities, Tab 16.

27. Ontario courts have recognized that class proceedings depend on entrepreneurial lawyers willing to take on these cases and that class counsel compensation should reflect this. Compensation must be sufficiently rewarding to “provide a real economic incentive to lawyers to take on class proceedings and do it well.”<sup>23</sup>

28. In the U.S. Second Circuit, courts “may award attorneys’ fees in common fund cases under either the ‘lodestar’ method or the ‘percentage of the fund’ method.”<sup>24</sup> However, it is recognized that the “trend in [the Second Circuit] is toward the percentage method.”<sup>25</sup> In Ontario, awarding fees on a percentage of gross recovery is more appropriate than the multiplier or lodestar methodology, which “has been criticized for, among other things, encouraging inefficiency and duplication of and discouraging early settlement.”<sup>26</sup>

29. In this case, the requested fee award—25% of the settlement amount notionally attributable to U.S. Claimants, translating to a lodestar “multiplier” of 4.0—is well supported under either the “percentage” or “lodestar” method.

**A. The Requested Attorneys’ Fee Would Be Reasonable Under the Percentage-of-the-Fund Method**

30. U.S. Counsel respectfully submits that the Court should award a fee based on a percentage of the common fund obtained. The U.S. Second Circuit, the Circuit in which the U.S. Class Action was filed, has approved the percentage method, recognizing that the method

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<sup>23</sup> *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962 at para. 37, U.S. Authorities, Tab 25.

<sup>24</sup> *McDaniel v. Cnty. of Schenectady*, 595 F.3d 411, 417 (2d Cir. 2010), U.S. Authorities, Tab 18.

<sup>25</sup> *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 121 (2d Cir. 2005), U.S. Authorities, Tab 32.

<sup>26</sup> [\*Mancinelli v. Royal Bank of Canada\*](#), 2017 ONSC 2324, para. 52, Authorities Tab 10.

“directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation.”<sup>27</sup>

31. The 25% fee requested by U.S. Counsel is well within the range of percentage fees awarded within the Second Circuit in comparable class actions achieving significant recoveries.<sup>28</sup>

32. Similarly, fees in the range of 20% to 30% are “very common” in Ontario class proceedings and there have been many recent cases in which this Court has approved fees that fall within this range.<sup>29</sup>

<i>Baroch v. Canada Cartage</i> , 2021 ONSC 7376	30%
<i>C.S. v. Ontario</i> , 2021 ONSC 6851	27%
<i>Mancinelli v. Royal Bank of Canada</i> , 2021 ONSC 6306	21.9%
<i>Good v. Toronto Police Services Board</i> , 2020 ONSC 6332	28%
<i>Middlemiss v. Penn West Petroleum</i> , 2016 ONSC 3537	33%

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<sup>27</sup> *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 121 (2d Cir. 2005), U.S. Authorities, Tab 32; *see also*, *Goldberger v. Integrated Res. Inc.*, 209 F.3d 43, 48-50 (2d Cir. 2000) (either percentage of fund method or lodestar method may be used to determine fees, but noting the “lodestar method proved vexing” and results in “inevitable waste of judicial resources”), U.S. Authorities, Tab 15; *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 586 & n.7 (S.D.N.Y. 2008) (“[T]here is a strong consensus – both in this Circuit and across the country – in favor of awarding attorneys’ fees in common fund cases as a percentage of the recovery.”), U.S. Authorities, Tab 29.

<sup>28</sup> *See In re Monster Worldwide, Inc. Sec. Litig.*, 07-cv-2237 (JSR), 2008 WL 9019514, at \*1-2 (S.D.N.Y. Nov. 25, 2008) (awarding 25% of settlement), U.S. Authorities, Tab 21; *City of Pontiac Gen. Emps. Ret. Sys. v. Lockheed Martin Corp.*, 954 F. Supp. 2d 276 (S.D.N.Y. 2013) (awarding 25% of settlement), U.S. Authorities, Tab 7; *In re NQ Mobile, Inc. Sec. Litig.*, Case No. 1:13-cv-07608-WHP, slip op. (S.D.N.Y. Mar. 11, 2016) (awarding 30% of settlement), U.S. Authorities, Tab 22; *In re Facebook, Inc. IPO Sec. & Deriv. Litig.*, MDL No. 12-2389, 343 F. Supp. 3d 394 (S.D.N.Y. Nov. 26, 2018) (awarding 25% of settlement), U.S. Authorities, Tab 12; *City of Austin Police Ret. Sys. v. Kinross Gold Corp.*, No. 12-cv-01203-VEC, 2015 WL 13639234 (S.D.N.Y. Oct. 19, 2015) (awarding 30% of settlement), U.S. Authorities, Tab 6; *In re Celestica Inc. Sec. Litig.*, No. 07-cv-00312-GBD, slip op. at 2 (S.D.N.Y. July 28, 2015) (awarding 30% fee of settlement), U.S. Authorities, Tab 4; *In re OSG Sec. Litig.*, No. 12-cv-07948-SAS, slip op. at 1 (S.D.N.Y. Dec. 2, 2015) (awarding 30% of settlement), U.S. Authorities, Tab 23.

<sup>29</sup> *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105, para. 63, Authorities, Tab 1.

*The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. Lavalin Group, Inc.*, 2018 ONSC 6447 <sup>30</sup> 22.95%

33. Additionally, a recent analysis by NERA Economic Consulting of securities class action settlements in the United States found that from 2011-2020, the median attorneys' fee award for settlements of between USD \$25 million and USD \$100 million was 25%.<sup>31</sup>

**B. The Requested Attorneys' Fee Would Be Reasonable Under the Lodestar Method**

34. The Second Circuit permits district courts to “cross-check” the proposed award against counsel’s lodestar.<sup>32</sup> In Ontario, some courts use a multiplier as a cross-check on the percentage fee approach.

35. Here, U.S. Counsel spent more than 5,726 hours of attorney and other professional staff time litigating the case from inception through November 30, 2021.<sup>33</sup> U.S. Counsel’s lodestar, derived by multiplying the hours spent by each attorney and other professional by their current hourly rates, is USD \$3,880,864.25.<sup>34</sup> The requested fee of 25% of the settlement amount notionally attributable to U.S. Claimants therefore represents a multiplier of 4.0 of the total lodestar.

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<sup>30</sup> *Mancinelli v. Royal Bank of Canada*, 2021 ONSC 6306, para. 21; *Good v. Toronto Police Services Board*, 2020 ONSC 6332, para. 40; *Middlemiss v. Penn West Petroleum*, 2016 ONSC 3537, para. 19; *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.*, 2018 ONSC 6447, paras. 64, 77, Authorities, Tabs 2, 3, 12, 6, 13 and 18.

<sup>31</sup> See Janeen McIntosh and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2020 Full-Year Review* (NERA 2021), U.S. Authorities, Tab 33 at p. 23.

<sup>32</sup> *Wal-Mart*, 396 F.3d at 123 (quoting *Goldberger*, 209 F.3d at 50), U.S. Authorities, Tab 32.

<sup>33</sup> Johnson Declaration, [para. 47](#).

<sup>34</sup> Johnson Declaration, [para. 47](#).



36. This multiplier is comparable to those awarded in securities class actions and other complex class litigation both in the Southern District of New York and Ontario.<sup>35</sup>

37. Similarly, in Ontario, this Court recently noted in a fee approval order in *Pace Securities Corp., et al. v. First Hamilton Holdings Inc., et al.* that “[a] multiplier of up to 4 times docketed time was recently described as ‘presumptively fair’ and courts have accepted multipliers in excess of 7 times docketed time. Regardless of whether a fee is calculated as a percentage of recovery or as a multiplier of a base, the premium must result in fair and reasonable compensation.”<sup>36</sup>

38. Fees representing multiples above a lodestar are awarded to reflect the contingency risk and other relevant enhancement factors.<sup>37</sup>

39. Here, U.S. Counsel carefully and efficiently staffed the Action from the beginning and litigated the case with just two main partners. Other partners were involved, but only at particular stages of the case, such as lead plaintiff appointment and settlement, consistent with their areas of expertise. The result of this deliberate staffing by U.S. Counsel was that associates

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<sup>35</sup> See, e.g., *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 347, 353 (S.D.N.Y. 2014) (awarding multiplier of 5.2); *Wal-Mart*, 396 F.3d at 123 (upholding multiplier of 3.5 as reasonable); *In re Deutsche Telekom, AG Sec. Litig.* No. 00-cv-9475, 2005 WL 7984326, at \*4 (S.D.N.Y. June 14, 2005) (awarding a 3.96 multiplier); *Cornwell v. Credit Suisse Grp.*, No. 08-cv-03758 (VM), slip op. at 4 (S.D.N.Y. July 18, 2011) (awarding fee equal to a 4.7 multiplier); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (awarding fee equal to a 4.65 multiplier, “well within the range awarded by courts in this Circuit”), U.S. Authorities, Tabs 8, 11, 10, 17.

<sup>36</sup> [\*Pace Securities Corp., et al. v. First Hamilton Holdings Inc.\*](#), 2021 ONSC 6956, para. 28, Authorities Tab 16.

<sup>37</sup> See *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02-cv-3400, 2010 WL 4537550, at \*26 (S.D.N.Y. Nov. 8, 2010) (“[A] positive multiplier is typically applied to the lodestar in recognition of the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors[.]”); *In re Comverse Tech., Inc. Sec. Litig.*, No. 06-cv-1825, 2010 WL 2653354, at \*5 (E.D.N.Y. June 24, 2010) (“Where, as here, counsel has litigated a complex case under a contingency fee arrangement, they are entitled to a fee in excess of the lodestar[.]”), U.S. Authorities, Tabs 13, 9.

and of counsel with lower hourly rates handled the case on a day-to-day basis, as opposed to more expensive partners.

40. Additional work will be required of U.S. Counsel on an ongoing basis, including correspondence with U.S. Settlement Class Members; supervising the claims administration process being conducted by the Claims Administrator; and supervising the distribution of the settlements to eligible class members who have submitted valid claim forms.

41. For all these reasons, the lodestar “cross-check” supports the reasonableness of the requested fee.

\* \* \*

42. In sum, U.S. Counsel’s requested fee award is well within the range of what courts regularly award in comparable class actions, whether calculated as a percentage of the fund or in relation to U.S. Counsel’s lodestar.

**C. The Requested Fee Is Also Fair and Reasonable When Applying the U.S. Second Circuit’s Factors**

43. To offer the Court additional guidance, the U.S. Second Circuit has set forth the following criteria that courts in the U.S. consider when reviewing a request for attorneys’ fees in a common fund case, whether under the percentage approach or the lodestar multiplier approach:

- (1) the time and labour expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.<sup>38</sup>

The criteria are similar to those considered by Courts in Ontario. As discussed below, these factors and the analyses above demonstrate that U.S. Counsel’s requested fee would be reasonable.

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<sup>38</sup> *Goldberger*, 209 F.3d at 50, U.S. Authorities, Tab 15.

**D. U.S. Counsel Has Devoted Significant Time and Labour to the Proceedings**

44. The substantial time and effort expended by U.S. Counsel in prosecuting the U.S. Class Action, participating in these CCAA proceedings, and achieving the Settlements support the requested fee. As set forth in greater detail in the Johnson Declaration, U.S. Counsel, among other things:

- conducted a comprehensive international investigation of the claims and potential claims against CannTrust and the other Defendants, including conducting 51 interviews of potential witnesses (including former CannTrust employees;
- researched and drafted a detailed amended complaint; and
- engaged in extensive settlement negotiations with Defendants' Counsel, including the exchange of mediation submissions and countless mediation sessions.

45. As noted above and discussed further in the Johnson Declaration, U.S. Counsel expended more than 5,726 hours prosecuting this Action with a lodestar value of USD \$3,880,864.25.<sup>39</sup> At all times, U.S. Counsel took care to staff the matter efficiently and to avoid unnecessary duplication of effort.

**E. The Magnitude and Complexity of the Proceedings Support the Requested Fee**

46. The magnitude and complexity of the proceedings support the requested fee. Courts routinely recognize that securities class action litigation is “notably difficult and notoriously uncertain.”<sup>40</sup> This case was no different.

47. As detailed in the Johnson Declaration, the proceedings raised particularly thorny questions concerning—among other things—ability to pay and scienter of the non-CannTrust

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<sup>39</sup> Johnson Declaration, [para. 47](#).

<sup>40</sup> *FLAG Telecom*, 2010 WL 4537550, at \*27 (quoting *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999)), U.S. Authorities, Tab 13.

Defendants, along with damages and issues of traceability with respect to the Offering.

Prosecuting the class's claims required skill and perseverance, including the marshalling of extensive expert evidence.

48. Accordingly, the magnitude and complexity of the proceedings support the conclusion that the requested fee is fair and reasonable.

**F. The Risks of the Litigation Support the Requested Fee**

49. The risks associated with this contingency fee case also support the requested fee. “Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation.”<sup>41</sup>

50. U.S. Class Action Lead Plaintiffs faced the substantial burdens of class certification, summary judgment, *Daubert* motions, trial, and likely appeals – a process that could possibly extend for years and might lead to a smaller recovery, or no recovery at all, particularly given CannTrust's financial situation. Indeed, in recent years, even securities class actions that survive pleading-stage motions to dismiss have faced increasing risk of failure at class certification, *Daubert* motions, summary judgment, trial, and appeals. According to analyses conducted by NERA Consulting, 2020 saw a new record number of dismissals, “The number of cases dismissed in 2020 also set a new 10-year record with approximately 6% more cases dismissed than in 2018, the second highest year in the period.”<sup>42</sup> In 2020, out of 320 cases, 247 were dismissed or 77%.

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<sup>41</sup> *Comverse*, 2010 WL 2653354, at \*5; see also *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 433 (S.D.N.Y. 2001) (it is “appropriate to take [contingent-fee] risk into account in determining the appropriate fee.”), U.S. Authorities, Tab 9, 1.

<sup>42</sup> Janeen McIntosh and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2020 Full-Year Review* (NERA 2021), U.S. Authorities Tab 33, pp. 11-12.

51. In the face of the many uncertainties, U.S. Counsel undertook this case on a wholly contingent basis, knowing that the litigation would require the devotion of a substantial amount of time and expense with no guarantee of compensation. U.S. Counsel’s assumption of this contingency fee risk strongly supports the reasonableness of the requested fee.<sup>43</sup>

**G. The Quality of U.S. Counsel’s Representation Supports the Requested Fee**

52. The quality of the representation by U.S. Counsel is another important factor that supports the reasonableness of the requested fee. U.S. Counsel respectfully submits that the quality of its representation is best evidenced by the progress of the litigation and the quality of the result achieved.<sup>44</sup>

53. Furthermore, Labaton is a nationally recognized leader in the field of securities class action litigation and has substantial experience litigating and trying securities class actions in courts throughout the country.<sup>45</sup> The attorneys who were principally responsible for prosecuting this case relied upon their skill to develop and implement sophisticated strategies to overcome myriad obstacles raised by Defendants throughout the litigation.

**H. The Requested Fee in Relation to the Settlements**

54. “When determining whether a fee request is reasonable in relation to a settlement amount, ‘the court compares the fee application to fees awarded in similar securities class-action settlements of comparable value.’”<sup>46</sup> As discussed in detail in Section III.B, *infra*, the requested

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<sup>43</sup> See *FLAG Telecom*, 2010 WL 4537550, at \*27 (“Courts in the Second Circuit have recognized that the risk associated with a case undertaken on a contingent fee basis is an important factor in determining an appropriate fee award.”), U.S. Authorities, Tab 13.

<sup>44</sup> See, e.g., *In re Veeco Instruments Inc. Sec. Litig.*, MDL No. 05-1695, 2007 WL 4115808, at \*7 (S.D.N.Y. Nov. 7, 2007); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004), U.S. Authorities, Tab 31, 14.

<sup>45</sup> Johnson Declaration, [para. 62](#).

<sup>46</sup> *Comverse*, 2010 WL 2653354, at \*3, U.S. Authorities, Tab 9.

fee is well within the range of percentage fees that this Court and other courts have awarded in comparable cases and, accordingly, the fee requested is reasonable in relation to the Settlement.

**I. Public Policy Considerations Support the Requested Fee**

55. Strong public policy considerations favour rewarding firms for bringing successful securities litigation.<sup>47</sup>

**J. The Reaction of the U.S. Securities Claimants Supports the Requested Fee**

56. The reaction of the U.S. Securities Claimants to date also supports the fee request. Through November 2021, the Claims Administrator has mailed more than 115,000 copies of the Notice to potential U.S. Settlement Class Members and nominees informing them that, among other things, U.S. Counsel intended to apply to the Court for an award of attorneys' fees in an amount not to exceed 25% of the settlement amount notionally attributable to U.S. Claimants.<sup>48</sup>

57. No U.S. class member objected to the fee request.<sup>49</sup>

**K. The Fee Request Is Supported by U.S. Class Action Lead Plaintiffs**

58. The requested fee of 25% is made with the full support of the U.S. Class Action Lead Plaintiffs.<sup>50</sup> The 25% request is a highly-competitive cap on U.S. Counsel's fees, based on

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<sup>47</sup> See *FLAG Telecom*, 2010 WL 4537550, at \*29 (if the “important public policy [of enforcing the securities laws] is to be carried out, the courts should award fees which will adequately compensate U.S. Counsel for the value of their efforts, taking into account the enormous risks they undertook”); *Maley*, 186 F. Supp. 2d at 373 (“In considering an award of attorney’s fees, the public policy of vigorously enforcing the federal securities laws must be considered.”); *Hicks*, 2005 WL 2757792, at \*9 (“To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding.”), U.S. Authorities, Tab 13, 17, 16.

<sup>48</sup> Johnson Declaration, [paras. 23-27](#) and [Exhibit C, at 13](#).

<sup>49</sup> Johnson Declaration, [para. 43](#).

<sup>50</sup> Declaration of C. David Bushley, [Exhibit G](#) to the Johnson Declaration.

negotiations between U.S. Counsel and Granite Point. Accordingly, U.S. Class Action Lead Plaintiffs' endorsement of the fee supports its approval.<sup>51</sup>

**L. U.S. Counsel's Disbursements Are Reasonable and Were Necessarily Incurred to Achieve the Benefit Obtained**

59. U.S. Counsel's fee application includes a request for payment of U.S. Counsel's litigation expenses, which were reasonably incurred and necessary to prosecute the Action. As set forth in the Johnson Declaration, U.S. Counsel incurred USD \$302,000.62 in disbursements.<sup>52</sup>

60. The amount of litigation expenses is consistent with the stage of the litigation. U.S. Counsel has incurred considerable expenses related to, among other things, expert and consultant fees. It is respectfully submitted that the expenses are properly recoverable by counsel.<sup>53</sup>

61. Overall, the expenses sought are the types of expenses that are necessarily incurred in litigation and routinely charged to clients who pay by the hour.

**M. U.S. Class Action Lead Plaintiffs Should Be Awarded an Honorarium Consistent with Canadian Caselaw and the Private Securities Litigation Reform Act of 1995**

62. U.S. Counsel also seeks an honorarium in the amount of USD \$10,000 for U.S. Class Action Lead Plaintiffs, Granite Point, directly related to their representation of the U.S.

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<sup>51</sup> See *Veeco*, 2007 WL 4115808, at \*8 ("Public policy considerations support the award in this case because the Lead Plaintiff . . . conscientiously supervised the work of U.S. Counsel and has approved the fee request[.]"), U.S. Authorities, Tab 31.

<sup>52</sup> Johnson Declaration, [paras. 47-48](#).

<sup>53</sup> See *In re China Sunergy Sec. Litig.*, No. 07-cv-7895, 2011 WL 1899715, at \*6 (S.D.N.Y. May 13, 2011) (in a class action, attorneys should be compensated "for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were 'incidental and necessary to the representation'"), U.S. Authorities, Tab 5.

Settlement Class. The request is supported both by Canadian precedent and the Private Securities Litigation Reform Act of 1995, 15 U.S.C. §78u-4(A)(4) (the “PSLRA”).

63. Awards of this nature were granted in *Merlo v. Canada*<sup>54</sup> where the court canvassed the prevailing test and jurisprudence, identifying the following factors to assess whether a representative plaintiff ought to receive an honorarium:

- (a) active involvement in the initiation of the litigation and the retention of counsel;
- (b) exposures to a risk of costs;
- (c) personal hardship or inconvenience in connection with the prosecution of the litigation;
- (d) time spent and activities undertaken in advancing the litigation;
- (e) communication and interaction with other class members; and
- (f) participation at various stages in the litigation, including discovery, settlement negotiations and/or trial.

64. Similarly, the PSLRA specifically provides that an “award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class” may be made to “any representative party serving on behalf of a class.”<sup>55</sup> Within the United States, courts “award such costs and expenses to both reimburse named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as provide an incentive for

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<sup>54</sup> *Merlo v. Canada*, 2017 FC 533, paras. 68–74, U.S. Authorities, Tab 19.

<sup>55</sup> 15 U.S.C. § 78u-4(a)(4), U.S. Authorities, Tab 34.



such plaintiffs to remain involved in the litigation and incur such expenses in the first place.”<sup>56</sup>  
Numerous cases, have approved payments to compensate lead plaintiffs.<sup>57</sup>

65. Here, U.S. Class Action Lead Plaintiffs have been committed to pursuing the Securities Claimants’ claims throughout these unique and challenging circumstances, and have taken an active role in so doing both in the U.S. and within the CCAA Proceedings.

#### IV. ORDER REQUESTED

66. For the foregoing reasons, CCAA U.S. Representatives, on behalf of U.S. Counsel, respectfully request that the Court award U.S. Counsel attorneys’ fees in the amount of 25% of the settlement amount notionally attributable to U.S. Claimants; USD \$302,000.62 in disbursements incurred by U.S. Counsel; and USD \$10,000 as an honorarium to U.S. Class Action Lead Plaintiffs.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 15<sup>th</sup> day of December, 2021



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**Steven Weisz / James W. Johnson**

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<sup>56</sup> *Hicks*, 2005 WL 2757792, at \*10, U.S. Authorities, Tab 16.

<sup>57</sup> *See, e.g., Silvercorp Metals*, No. 12-cv-09456, slip op. at 9 (awarding two lead plaintiffs \$12,500 each); *In re Petrobras Sec. Litig.*, 317 F. Supp. 3d 858, 879 (S.D.N.Y. 2018) (awarding institutional lead plaintiffs \$300,000, \$50,000, and \$50,000), U.S. Authorities, Tab 26, 24.

**SCHEDULE “A” – LIST OF AUTHORITIES**

1.	<i>In re Am. Bank Note Holographics, Inc. Sec. Litig.</i> , 127 F. Supp. 2d 418 (S.D.N.Y. 2001)
2.	<i>Bateman Eichler, Hill Richards, Inc. v. Berner</i> , 472 U.S. 299 (1985)
3.	<i>In the Matter of a Plan of Compromise and Arrangement of 1511419 Ontario Inc. Formally Known as the Cash Store Financial Inc. et al</i> (November 19, 2015), Toronto CV-14-10518-00CL (Ont SCJ [Comm List])
4.	<i>In re Celestica Inc. Sec. Litig.</i> , No. 07-cv-00312-GBD, slip op. (S.D.N.Y. July 28, 2015)
5.	<i>In re China Sunergy Sec. Litig.</i> , No. 07-cv-7895, 2011 WL 1899715 (S.D.N.Y. May 13, 2011)
6.	<i>City of Austin Police Ret. Sys. v. Kinross Gold Corp.</i> , No. 12-cv-01203-VEC, 2015 WL 13639234 (S.D.N.Y. Oct. 19, 2015)
7.	<i>City of Pontiac Gen. Emps. Ret. Sys. v. Lockheed Martin Corp.</i> , 954 F. Supp. 2d 276 (S.D.N.Y. 2013)
8.	<i>In re Colgate-Palmolive Co. ERISA Litig.</i> , 36 F. Supp. 3d 344 (S.D.N.Y. 2014)
9.	<i>In re Comverse Tech., Inc. Sec. Litig.</i> , No. 06-cv-1825, 2010 WL 2653354 (E.D.N.Y. June 24, 2010)
10.	<i>Cornwell v. Credit Suisse Grp.</i> , No. 08-cv-03758 (VM), slip op. (S.D.N.Y. July 18, 2011)
11.	<i>In re Deutsche Telekom, AG Sec. Litig.</i> No. 00-cv-9475, 2005 WL 7984326 (S.D.N.Y. June 14, 2005)
12.	<i>In re Facebook, Inc. IPO Sec. &amp; Deriv. Litig.</i> , 343 F. Supp. 3d 394 (S.D.N.Y. Nov. 26, 2018)
13.	<i>In re FLAG Telecom Holdings, Ltd. Sec. Litig.</i> , No. 02-cv-3400, 2010 WL 453755 (S.D.N.Y. Nov. 8, 2010)
14.	<i>In re Global Crossing Sec. &amp; ERISA Litig.</i> , 225 F.R.D. 436 (S.D.N.Y. 2004).
15.	<i>Goldberger v. Integrated Res.</i> , 209 F.3d 43 (2d Cir. 2000)
16.	<i>Hicks v. Morgan Stanley</i> , No 01-cv-10071, 2005 WL 2757792 (S.D.N.Y. Oct. 24, 2005)

17.	<i>Maley v. Del Global Techs. Corp.</i> , 186 F. Supp. 2d 358 (S.D.N.Y. 2002)
18.	<i>McDaniel v. Cnty. of Schenectady</i> , 595 F.3d 411 (2d Cir. 2010)
19.	<i>Merlo v. Canada</i> , 2017 FC 533
20.	<i>Missouri v. Jenkins</i> , 491 U.S. 274 (1989)
21.	<i>In re Monster Worldwide, Inc. Sec. Litig.</i> , 07-cv-2237 (JSR), 2008 WL 9019514 (S.D.N.Y. Nov. 25, 2008)
22.	<i>In re NQ Mobile, Inc. Sec. Litig.</i> , Case No. 1:13-cv-07608-WHP, slip op. (S.D.N.Y. Mar. 11, 2016)
23.	<i>In re OSG Sec. Litig.</i> , No. 12-cv-07948-SAS, slip op. (S.D.N.Y. Dec. 2, 2015)
24.	<i>In re Petrobras Sec. Litig.</i> , 317 F. Supp. 3d 858 (S.D.N.Y. 2018)
25.	<i>Sayers v. Shaw Cablesystems Ltd.</i> , 2011 ONSC 962
26.	<i>Silvercorp Metals</i> , No. 12-cv-09456, slip op. (S.D.N.Y. Feb. 15, 2015)
27.	<i>In the Matter of a Plan of Compromise and Arrangement of Sino-Forest Corporation</i> (December 27, 2013), Toronto CV-11-431153-00CP (Ont SCJ [Comm List])
28.	<i>In re Sumitomo Copper Litig.</i> , 189 F.R.D. 274 (S.D.N.Y. 1999)
29.	<i>In re Telik, Inc. Sec. Litig.</i> , 576 F. Supp. 2d 570 (S.D.N.Y. 2008)
30.	<i>Tellabs, Inc. v. Makor Issues &amp; Rights, Ltd.</i> , 551 U.S. 308 (2007)
31.	<i>In re Veeco Instruments Inc. Sec. Litig.</i> , MDL No. 05-1695, 2007 WL 4115808, (S.D.N.Y. Nov. 7, 2007)
32.	<i>Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.</i> , 396 F.3d 96 (2d Cir. 2005)
33.	Janeen McIntosh and Svetlana Starykh, <i>Recent Trends in Securities Class Action Litigation: 2020 Full-Year Review</i> (NERA 2021)
34.	Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(a)(4)

**SCHEDULE “B” – RELEVANT STATUTES**

**1. Private Securities Litigation Reform Act of 1995, 15 U.S.C. §78u-4(A)(4) – relevant excerpt**

**(4) Recovery by plaintiffs**

The share of any final judgment or of any settlement that is awarded to a representative party serving on behalf of a class shall be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class. Nothing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class.

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

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

*Proceedings commenced at Toronto*

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