

C A N A D A

(CLASS ACTION)

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

S U P E R I O R C O U R T

No.: 500-06-000215-034

MARK RABINOVITCH

PLAINTIFF

v.

CIBC ASSET MANAGEMENT INC.

DEFENDANT

**MOTION TO APPROVE A CLASS ACTION SETTLEMENT
AGREEMENT AND TRANSACTION
(Article 1025 C.C.P.)**

TO THE HONOURABLE PIERRE JOURNET, J.S.C., SITTING IN AND FOR THE DISTRICT OF MONTREAL, DESIGNATED AS THE PRESIDING JUDGE TO HEAR MATTERS REGARDING THE PRESENT CLASS ACTION, THE PLAINTIFF RESPECTFULLY SUBMITS THE FOLLOWING:

INTRODUCTION

1. By consent, the Plaintiff and the Defendant seek the Court's approval of an agreement to settle the present class action;

BACKGROUND

2. On November 21, 2003, the Plaintiff instituted a Motion for Authorization to Institute a Class Action against the Defendant on behalf all persons who, prior to April 4, 2002, were unitholders of the Atlas American RSP Index Fund (subsequently known as the Merrill Lynch U.S. RSP Index Fund, then known as the Renaissance U.S. RSP Index Fund and thereafter known as the Renaissance U.S. Index Fund) (the "Fund"), and who remained unitholders of the Fund for any period of time thereafter (the "Class");

3. On February 23, 2004, the Superior Court authorized the institution of a class action against the Defendant and ascribed the status of Class Representative to the Plaintiff on behalf of the Class;
4. The Plaintiff subsequently instituted a Class Action against the Defendant, seeking to recover damages for the Class in respect of losses sustained by unitholders of the Fund as a result of the decline in the U.S dollar relative to the Canadian dollar (the "Class Action");
5. The Defendant filed a Defence to the Class Action and the Plaintiff filed an Answer to Plea;
6. The parties litigated numerous preliminary motions and objections in the Superior Court and the Court of Appeal, held examinations on discovery out of Court, engaged several experts and filed numerous exhibits to be produced at trial;
7. The trial was scheduled to take place from December 3 to December 18, 2007;

THE SETTLEMENT

8. Prior to the commencement of the trial of the Class Action, the parties entered into serious settlement discussions;
9. The parties subsequently attended a settlement conference presided by the Honourable Brian Riordan, J.S.C., at which time an agreement was reached pursuant to which the Defendant would pay \$20 million to the Class to settle the Class Action;
10. Over the course of several months, the parties thereafter negotiated the terms and conditions of a comprehensive settlement agreement;
11. On December 10, 2007, the Plaintiff and the Defendant executed a Memorandum of Agreement and Settlement and Transaction, a copy of which is produced herewith as Exhibit R-1, setting forth the terms and conditions of a comprehensive settlement of the Class Action on behalf of all members of the Class who did not opt out pursuant to Article 1007 of the *Code of Civil Procedure* (the "Settlement Agreement");
12. Pursuant to the Settlement Agreement, the Defendant will pay \$20 million to the Class, as well as the cost of administering the settlement,

the cost of expertise in determining the entitlement of each member of the Class who makes a valid Proof of Claim, the cost of publication of notices and the sending of letters to the members of the Class to advise of the Settlement Agreement and of their right to obtain compensation by filing a Proof of Claim;

13. Notices were published in the newspapers the Globe & Mail and La Presse on December 13, 2007 to advise Class members of the proposed Settlement Agreement, of the date of the hearing to approve the Settlement Agreement and of their right to make representations in respect of the Settlement Agreement, the whole as appears more fully from copies of the Notices produced herewith *en liasse* as Exhibit R-2;
14. The amount paid by the Defendant pursuant to the Settlement Agreement (\$20 million) represents approximately 90% of Raymond Chabot Grant Thornton's ("RCGT") valuation of the quantum of the maximum total damages caused to the Class as a result of the decline of the U.S. dollar relative to the Canadian dollar (approximately \$22,300,000). Moreover, the amount paid by the Defendant (\$20 million) exceeds RCGT's valuation of the damages caused to the Class under the scenarios that the Defendant contended apply to the Class Action;
15. Pursuant to the Settlement Agreement, Class Members will be sent a letter advising of the Settlement Agreement and informing them of their right to file a simple Proof of Claim form in order to receive their share of the \$20 million settlement amount, the whole as appears more fully from a copy of the letter to unitholders produced herewith as **Exhibit R-3** and the Proof of Claim form produced herewith as **Exhibit R-4**;
16. In addition, the Settlement Agreement provides for publication of notices in the newspapers the Globe & Mail and La Presse, advising of the Judgment approving the proposed Settlement Agreement, the whole as appears more fully from copies of the proposed Notices of Final Judgment produced herewith *en liasse* as **Exhibit R-5**;
17. Pursuant to the Settlement Agreement, Crawford Class Action Services will act as the Claims Administrator;
18. The cost of administering the Settlement Agreement, of publishing notices in the newspapers, of sending letters to unitholders and of paying experts to determine each individual Class member's damages entitlement, will be paid by the Defendant over and above the \$20 million settlement amount to the Class;

19. The Settlement Agreement accordingly results in substantial benefits to the members of the Class;
20. Class Counsel is entitled to the payment of fees in accordance with their statement of account, a copy of which is produced herewith as Exhibit R-6, which is based upon the agreement entered into with the Plaintiff at the outset of the matter, as set forth in Schedule 4 of the Settlement Agreement;
21. The fees are reasonable in that:
 - a. Class Counsel entered into Schedule 4 of the Settlement Agreement (the "Agreement") at the outset of the matter. Pursuant to the Agreement, Class Counsel would not be paid for their services and would not be reimbursed the necessary expertise costs and disbursements unless and until a favourable result would be obtained for the Class;
 - b. At the time that the Agreement was entered into, Class Counsel did not know how long the case would last, how the case would be defended or the merits of the grounds of defence that would be raised. Class Counsel accordingly assumed a significant risk;
 - c. There were and there remain very few authorities in Quebec relating to mutual fund administrators;
 - d. The Defendant raised numerous serious grounds of defence;
 - e. The case required legal expertise in class actions and in securities law;
 - f. The case required engaging and paying significant amounts to experts to address complicated matters in the areas of securities/investments, disclosures in prospectuses and the valuation of damages;
 - g. Class Counsel worked on the case for over four years without being paid for their services and assumed substantial expertise costs and disbursements;
 - h. The case was not resolved until the eve of the trial;
 - i. The Settlement Agreement obtains an excellent result for the Class;

- j. The Plaintiff, personally, and in his quality as financial advisor for numerous members of the Class, agrees that Class Counsel's fees are reasonable and justified;
- k. Any reasonable Class member would have agreed to pay Class Counsel the fees in question in return for the excellent result obtained, especially given that the Class members did not incur any expenses for four years and incurred no risk and no expense in the event of the dismissal of the case;

REMEDY

- 22. Accordingly, the parties respectfully request that this Honourable Court:
 - a. Approve the Settlement Agreement (Exhibit R -1), and order the parties and the Claims Administrator to comply with the terms thereof;
 - b. Declare that the Settlement Agreement is fair and reasonable;
 - c. Approve the form and content of the Notices of Final Judgment (Exhibit R-5 *en liasse*);
 - d. Declare that the deadline for members of the Class to file Proofs of Claim is 150 days from the latter of (a) date of last publication of the Notices of Final Judgment, (b) the date of the establishment of the Class Member's Determined Damages, as defined in the Settlement Agreement, and (c) the date the Defendant sends the letter to unitholders (Exhibit R-3);
 - e. Authorize the Plaintiff to enter into and grant the release set forth in the Settlement Agreement to the Defendant in his quality as designated representative of the members of the Class who have not opted out of the class action;
 - f. Declare that the Defendant is released in accordance with the terms of the Settlement Agreement;
 - g. Approve the form and content of the letter to members of the Class advising of the Final Judgment (Exhibit R-3);

- h. Approve the form and content of the Proof of Claim to be filed by members of the Class to benefit from the Settlement Agreement (Exhibit R-4);
 - i. Approve the payment to Class Counsel of fees from the \$20 million settlement amount in accordance with their statement of account (Exhibit R-6);
 - j. Designate Crawford Expertises Canada (Crawford Class Action Services division) as the Claims Administrator; and,
 - k. Approve the procedure stipulated in the Settlement Agreement for the payment of the Settlement Proceeds;
23. The present Motion is well-founded in fact and in law;

WHEREFORE, MAY IT PLEASE THIS HONOURABLE COURT TO:

GRANT the present Motion;

APPROVE the Settlement Agreement produced as Exhibit R-1, and order the parties to comply with the terms thereof;

DECLARE that the Settlement Agreement is fair and reasonable;

APPROVE the form and content of the Notices of Final Judgment to be communicated to the members according to the terms set forth in the Settlement Agreement (Exhibit R-5 *en liasse*);

DECLARE that the deadline for members of the Class to file a Proof of Claim is 150 days from the latter of (a) date of last publication of the Notices of Final Judgment (Exhibit R-5), (b) the date of the establishment of the Class Member's Determined Damages, as defined in the Settlement Agreement, and (c) the date the Defendant sends the letter to unitholders (Exhibit R-3);

AUTHORIZE the Plaintiff to enter into and grant the release set forth in the Settlement Agreement to the Defendant in his quality as designated representative of the members of the Class who have not opted out of the class action;

DECLARE that the Defendant is released in accordance with the terms of the Settlement Agreement;

APPROVE the form and content of the letter to members of the Class advising of the Final Judgment (Exhibit R-3);

APPROVE the form and content of the Proof of Claim to be filed by members of the Class to benefit from the Settlement Agreement (Exhibit R-4);

APPROVE the payment to Class Counsel of fees from the \$20 million settlement amount in accordance with their statement of account (Exhibit R-6);

DESIGNATE Crawford Expertises Canada (Crawford Class Action Services division) as the Claims Administrator, and **ORDER** the Claims Administrator to comply with the terms of the Settlement Agreement;

APPROVE the procedure stipulated in the Settlement Agreement for the payment of the Settlement Proceeds;

REMAIN seized with issues that may arise within the present class action;

MAKE ANY other orders that this Honourable Court deems just;

THE WHOLE without costs.

MONTREAL, December 11, 2007

(s) Stein & Stein Inc. / (s) Kugler Kandestin LLP

**STEIN & STEIN INC. / KUGLER
KANDESTIN, L.L.P**
Attorneys for Plaintiff

AFFIDAVIT

I, the undersigned, **NEIL H. STEIN**, Advocate, of the Province of Quebec, City and District of Montreal, and therein practicing at 4101, Sherbrooke Street West, in the City of Montreal, Province of Quebec, H3Z 1A7, do hereby solemnly declare:

1. THAT I am one of the attorneys representing the Plaintiff in the present instance;
2. THAT all of the facts alleged in the foregoing Motion are true and correct.

AND I HAVE SIGNED:

(S) Neil H. Stein

NEIL H. STEIN

SOLEMNLY DECLARED
before me at Montreal,
this 12th day of December 2007

(S) Nicole Stevenson (149,044)

Commissioner of Oaths for the
District of Montreal

AFFIDAVIT

I, the undersigned, **MARK RABINOVITCH**, residing and domiciled at 288, Marsh Street, City of Pointe-Claire, Province of Quebec, H9R 5S5, do hereby solemnly declare:

3. THAT I am the Plaintiff and Class representative in the present instance;
4. THAT all of the facts alleged in the foregoing Motion are true and correct.

AND I HAVE SIGNED:

(S) Mark Rabinovitch

MARK RABINOVITCH

SOLEMNLY DECLARED
before me at Montreal,
this 12th day of December 2007

(S) Nicole Stevenson (149,044)

Commissioner of Oaths for the
District of Montreal

NOTICE OF PRESENTATION

TO: **Me Marc-André Coulombe**
STIKEMAN ELLIOTT, s.e.n.c.r.l.
1155 René-Lévesque Boulevard West
Suite 4000
Montreal, Quebec
H3B 3V2

FONDS D'AIDE AUX RECOURS COLLECTIFS
1 Notre-Dame Street East
Suite 10.30
Montreal, Quebec
H2Y 1B6

TAKE NOTICE of the foregoing **Motion to Approve a Class Action Settlement Agreement and Transaction** and that same shall be presented for adjudication before the Honourable Mr. Justice Pierre Jounet, on **Monday, December 17, 2007, at 9:00 a.m., in Room 16.12**, or so soon thereafter as counsel may be heard, and do govern yourselves accordingly.

MONTREAL, December 11, 2007

(s) Stein & Stein Inc. / (s) Kugler Kandestin LLP

**STEIN & STEIN INC. / KUGLER
KANDESTIN, L.L.P.**
Attorneys for Plaintiff