

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

ANTHONY WHITEHOUSE,
CARRIE COUCH and JASON COUCH

Plaintiffs

and

BDO CANADA LLP

Defendant

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

PLAINTIFFS' REPLY CERTIFICATION FACTUM

December 5, 2019

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I. The Class Action is the Preferable Procedure

1. The preferable procedure analysis rests on “the proposed representative Plaintiff bear[ing]the onus of showing that there is some basis in fact that a class proceeding would be preferable to any other reasonably available means **of resolving the Class Members’ claims**”.¹

2. The only action in which unitholders have asserted claims is the proposed class action. The Receiver’s Action is not an action that will resolve the Class Members’ claims. Instead, the Receiver asserts claims on behalf of Crystal Wealth. Nonetheless, BDO asserts that the Receiver’s Action is the preferable procedure for adjudicating the unitholders’ claims because the unitholders are the beneficiaries of the Receiver’s claims.

3. The Receiver’s Action cannot be the preferable procedure for resolving class members’ claims when the unitholders’ claims cannot, and will not, be adjudicated in that proceeding. Indeed, the Court of Appeal for Ontario explained in *SFC Litigation Trust v. Chan*:

[T]he separate and distinct cause of action of the corporation does not become one and the same as the stakeholders’ cause of action even if the corporation’s intention is to benefit its stakeholders with any recovery. Blair J.A. explained why an argument to the contrary must be rejected, observing ... that:

It impermissibly conflates damages sustained by the corporation with the distribution of those damages, once recovered, to creditors and other stakeholders, as part of the assets of the corporation, in the course of the proceeding under the [CCAA]. ... To conflate them is to disregard the long-recognized principle of corporate law that a corporation is a legal entity separate and apart from its shareholders and stakeholders, and that a corporation alone has the

¹ *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, 2014 ONSC 4118, at para. 195, **Book of Authorities of the Plaintiff (“PBOA”)**, Tab 13.

right to sue for wrongs done to it. [Citations omitted].²

4. BDO's position on preferable procedure runs directly contrary to binding jurisprudence from the Court of Appeal and, in the words of the Court of Appeal, "must be rejected". The Court's decision in *SFC Litigation Trust v. Chan* is dispositive of BDO's preferable procedure argument.

5. Moreover, there is no novelty to there being two proceedings against the same defendant: one on behalf of the corporation and a class action on behalf of investors.

6. The Court of Appeal for Ontario in *SFC Litigation Trust* recognized that claims of a corporation could be asserted by a litigation trust at the same time that claims arising from the same or similar facts were being pursued in class actions by persons who acquired securities in the corporation.³ The Court held that the causes of actions that belonged to the corporation were separate and distinct from those in the class actions, and that was not undermined by the factual overlap or the fact that certain beneficiaries of the litigation trust were also members of the plaintiff classes.⁴ The Court recognized that the same or similar facts may give rise to a cause of action by shareholders (asserted in a class action) *and* one by the corporation, and that both proceedings should be allowed to proceed at the same time, even if class members may benefit from any relief obtained in the corporate claim.⁵

7. The same is true in this case. The unitholders have viable direct claims against BDO, which claims exist irrespective of any proceeding that is available to the Receiver (who is standing in the shoes of Crystal Wealth and the Funds).

² *SFC Litigation Trust v. Chan*, 2019 ONCA 525, at para. 88, citing to *Livent Inc. v. Deloitte & Touche*, 2016 ONCA 11, at para. 57, rev'd in part on other grounds, 2017 SCC 63 (emphasis added), **Supplemental Book of Authorities of the Plaintiffs**, Tab 1.

³ *SFC Litigation Trust*, at para. 86.

⁴ *SFC Litigation Trust*, at para. 85.

⁵ *SFC Litigation Trust*, at paras. 86-90.

8. The proposed class action satisfies the preferable procedure requirement irrespective of whether it proceeds together with or apart from the Receiver's Action. This is because it, and it alone, resolves the class members' claims

9. There are additional problems with BDO's position that the Receiver's Action is the preferable procedure. Most importantly, there are defences that BDO has asserted in the Receiver's Action that (i) may severely restrict the damages that the Receiver can recover, and (ii) BDO cannot assert against the unitholders' claims.

10. In the Receiver's Action, BDO relies on its engagement letters with Crystal Wealth to limit its liability to the Receiver. Those letters are by and between Crystal Wealth and BDO. They have no applicability to the class action. The letters have a "limitation on liability" section, which purports to preclude (i) punitive or aggravated damages, and (ii) joint liability.

11. The engagement letters also purport to cap damages at "no more than the higher of: three times the fees paid by you to BDO in the twelve months preceding the incident giving rise to the claim; and \$25,000."⁶

12. The class members' claims are not subject to those terms. And the fact that BDO may be able to limit its exposure in the Receiver's Action confirms that it is not the preferable procedure for adjudicating investors' claims.

II. It is Not Plain and Obvious That There is No Duty

13. BDO takes the position that it "is settled law that there is no viable cause of action based on either alleged duty of care" advanced by the Class because the alleged duties fall into established

⁶ BDO Engagement Letter, dated December 21, 2016, Exhibit "A" to the Affidavit of Erin Tucker, **Reply Motion Record of the Plaintiffs**, Tab 1A, pp. 1-12.

categories for which it has already been determined that a duty of care does not exist.⁷ In making that submission, BDO ignores the recent caution from the Supreme Court of Canada in *Livent* that “courts should avoid identifying established categories in an overly broad manner”, and that courts “should be attentive to the particular factors which justified recognizing [a previously established category of proximity]”.⁸

14. BDO also ignores the Supreme Court of Canada’s statement in *Hercules Managements Ltd. v. Ernst & Young* that a duty may exist “where the defendant knows the identity of the plaintiff (or of a class of plaintiffs) and where the defendant’s statements are used for the specific purpose of the transaction for which they were made”.⁹

15. Those are the exact facts that the Class has pled here.

16. The Statement of Claim pleads specifically that “BDO had access to the individual names and number of units held by each investor” and that its services were provided to “allow investors in the Funds ... to make investment decisions.” The Statement of Claim also pleads that the financial statements in this case were specifically addressed to the unitholders and that BDO knew the Class would rely on its audit reports in making investment decisions.¹⁰

III. There Is No Conflict

17. BDO asserts that both Class Counsel and one of the representative plaintiffs, Mr. Whitehouse, have conflicts of interest that disqualify them from being involved in the class action.

⁷ Responding Factum of the Defendant, at paras. 53-54.

⁸ *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, at paras. 28, 52, **PBOA**, Tab 11.

⁹ *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 37, **Defendant’s Book of Authorities (“DBA”)**, Tab 14.

¹⁰ Amended Statement of Claim, amended November 13, 2019, at paras. 62-64, 67, **Amended Motion Record of the Plaintiff (“AMR”)**, Vol. 1, Tab 3.

18. BDO relies entirely on case law that holds that class counsel cannot act for a representative plaintiff while simultaneously acting for putative class members who have opted out of the class action.¹¹ That case law has no application to this case.

19. Adair Goldblatt Bieber LLP (“**AGB**”) does not represent any parties that intend to opt out of the class action in the event it is certified. The alleged conflicts arise from Class Counsel’s role as (a) litigation counsel in the Receiver’s Action, and (b) counsel to Mr. Whitehouse (and others) in an individual action that does not involve BDO (the “**Media House Action**”). Both are addressed below.

a) The Receiver’s Action does not give rise to a conflict

20. This Court has already approved AGB as both (a) counsel to the Class, and (b) litigation counsel in the Receiver’s Action. That decision was made more than a year ago, on notice to BDO. BDO did not object at that time, or indeed at any time before it delivered its Responding Factum on this certification motion.

21. There is no conflict resulting from the Class Counsel’s role as litigation counsel to the Receiver in the Receiver’s Action. The Receiver, as an officer of the Court with the benefit of independent legal advice from Aird & Berlis LLP (“**Aird & Berlis**”), retained AGB as its litigation counsel in the Receiver’s Action precisely because AGB is Class Counsel.

22. In its Fourth Report to the Court, the Receiver recommended that the Court approve the retainer of AGB as litigation counsel in the Receiver’s Action because of the benefits of using Class Counsel. The Receiver stated, among other things, that: (a) “the Proposed Class Action and the Receiver’s Action have questions of law and fact in common, and both claim relief arising out

¹¹ *Persaud v. Talon International Inc.*, 2018 ONSC 5377 at para. 166, **DBA**, Tab 22.

of the same transactions”; and (b) “AGB LLP is already counsel to Whitehouse in the Proposed Class Action, and accordingly, can minimize the current legal costs to the estate of the Company and Crystal Wealth Funds”.¹² In other words, it was precisely because of the commonality of the two proceedings that the Court approved AGB acting in both proceedings.

23. BDO was served with the Fourth Report and raised no objection or concern to the Receiver’s proposed retainer of AGB.

24. The Honourable Madam Justice Conway approved the retainer of AGB as litigation counsel in the Receiver’s Action with an Order dated August 20, 2018.¹³

25. No conflict arises because of the intention for the Receiver’s Action to proceed together with the class action. To the contrary, that was one of the bases on which the Receiver sought to retain – and the Court approved – AGB as litigation counsel in the Receiver’s Action.

26. Rather than object after being served with the Fourth Report and before the Court approved AGB’s retainer by the Receiver, BDO elected to wait more than a year to raise the issue of conflict for the first time in its responding certification Factum. BDO’s argument is a collateral attack on the Order of Madam Justice Conway, and it should be refused on that basis alone. Having not contested AGB’s involvement in the proceedings before Madam Justice Conway, it is far too late for BDO to do so now, in effect, suggesting that there was some error in the Court’s prior determination.

¹² Receiver’s Fourth Report, at para. 331, Exhibit “I” to the Affidavit of Nigel Meakin, **Responding Motion Record of BDO**, Vol. 2, Tab 1I, p. 434.

¹³ Order of The Honourable Madam Justice Conway dated August 20, 2018 (CV-17-11779-00CL), at para. 8, Exhibit “M” to the Affidavit of Nigel Meakin, **Responding Motion Record of BDO**, Vol. 2, Tab 1M, pp. 518-523; Endorsement of The Honourable Madam Justice Conway dated August 20, 2018 (CV-17-11779-00CL), **Supplemental Book of Authorities of the Plaintiffs**, Tab 2.

27. In addition, there is simply no conflict. The lack of a conflict is evidenced in BDO's own Factum. It states in its argument on preferable procedure that the "Receiver has repeatedly noted in its communications with unitholders that it views the protection and enhancement of their interests as its central objective and mandate."¹⁴

28. BDO cannot point to any conflict between the interests of the Receiver and the Class Members, because none exists. The only "conflict" that BDO can point to is a potential conflict with the interests of creditors of Crystal Wealth "to the extent that the class action could impede creditors from recovering their claims".¹⁵ However, that submission again inappropriately conflates the interests of creditors with the interests of Crystal Wealth (and the Receiver standing in the shoes of Crystal Wealth).¹⁶ This does not create a conflict between the Receiver and the Class (or a conflict for AGB in acting for both in litigation against BDO).

29. Moreover, BDO ignores that in terms of the ongoing receivership, the Receiver continues to be represented by Aird & Berlis. AGB is only litigation counsel to the Receiver in the Receiver's Action. To the extent the Receiver needs advice on the treatment of creditor claims inside of the Receivership, it is Aird & Berlis that will provide that advice (not AGB).

30. Lastly, AGB's retainers are structured in such a way that it does not have an incentive to prefer one proceeding over the other. Its recovery is capped at a percentage of the combined recovery in both actions.¹⁷ Even still, the Court would always retain supervisory jurisdiction to limit class counsel fees were this an actual, not hypothetical problem.

¹⁴ Responding Factum of the Defendant, at para. 77.

¹⁵ Responding Factum of the Defendant, at paras. 9(a)(i), 124.

¹⁶ *Livent*, at para. 71.

¹⁷ Email from Mark van Zandvoort to Andrea Laing, Exhibit "C" to the Affidavit of Linc Rogers, **Responding Motion Record of BDO**, Vol. 2, Tab 2C, p. 651.

31. This Court has already approved a retainer arrangement that permits AGB to act in the Receiver's Action, and has in fact ordered that AGB can act as both Class Counsel and litigation counsel in the Receiver's Action. That decision cannot be disturbed, and ought not to be re-litigated.

b) The Media House Action does not give rise to a conflict

32. BDO alleges that a conflict arises from Mr. Whitehouse's pursuit of the Media House Action and AGB's role as counsel in that action. In the Media House Action, Mr. Whitehouse and others are bringing a claim against parties associated with the administration of the Media Loans. BDO is not a party to the Media House Action.

33. In *Vaeth v. North American Palladium Ltd.* and *Persaud v. Tallon International Inc.* (the cases relied upon by BDO), this Court held that "Class Counsel cannot act for a representative plaintiff and also act for putative Class Members who have opted out of the class action."¹⁸

34. The primary concern in those cases was that class counsel may receive conflicting instructions from the opt-outs and the class in respect of tactics and strategy for the pursuit of the same defendant, and that the opt-outs may obtain a more favourable settlement than the class from the same defendant because of the defendants' limits on funds available to satisfy claims.¹⁹

35. Those concerns do not exist in this case, and the Media House Action does not give rise to any conflict of interest. It is completely independent of the class action, and there is no overlap in defendants. Any settlement or judgment in the Media House Action will not in any way limit the funds that BDO has available to settle the class action. Nor is there any possibility that there will be

¹⁸ *Persaud*, at para. 166.

¹⁹ *Vaeth v. North American Palladium Ltd.*, 2016 ONSC 5015, at paras. 68-73, **DBA**, Tab 29; *Persaud*, at paras. 179-181.

any conflict in instructions in respect of tactics and strategy, since there is no overlap in defendants between the two actions.

36. BDO alleges that there is a purported conflict because Mr. Whitehouse has made an “admission” in the Statement of Claim in the Media House Action that Smith and defendants in the Media House Action colluded to hide the alleged fraud. First, this is not an admission that binds Mr. Whitehouse or the Class in the class action.²⁰ Second, and more importantly, the purported conflict is entirely imagined. The claim against BDO is, in effect, that it failed to detect the fraud when it should have, not that there was no fraud. The claim in the class action pleads specifically that Smith was engaged in fraud,²¹ and Smith admitted in his settlement with the OSC that he provided false information to BDO.²² BDO acknowledges in its Factum that “the fact that a fraud was committed by Mr. Smith is common ground between the parties”.²³ That the Media House Action pleading alleges that there was an attempt to hide the fraud from BDO does not in any way detract from the assertion in this claim that BDO was nevertheless negligent by not detecting it.

37. In addition, BDO alleges that there is a conflict of interest because the Media House Action “should have been i) pursued on behalf of the class and ii) pursued by the Receiver.”²⁴ Again, as with its submission in respect of preferable procedure, it is not for BDO to tell the class who it should sue, and how. There are a myriad of reasons why claims are or are not advanced. A representative plaintiff cannot have a certification motion denied because he or she determined to

²⁰ Rule 51.06(2) provides that an admission in a pleading may be used “in the same proceeding”. This contrasts with Rule 51.06(1), which provides that an admission made in other contexts, i.e., not a pleading, may be used in “the same or another proceeding”.

²¹ Amended Statement of Claim, amended November 13, 2019, at paras. 6 and 54, AMR, Vol. 1, Tab 2.

²² Settlement Agreement between the Ontario Securities Commission and Clayton Smith, Exhibit “A” to the Supplementary Affidavit of Marlie Patterson-Earle, AMR, Vol. 20, Tab 6A, pp. 6602 and 6605.

²³ Responding Factum of the Defendant, at para. 18.

²⁴ Responding Factum of the Defendant, at para. 9(b).

pursue one defendant in a class action and not others. The decision not to sue everyone does not give rise to a conflict of interest.

38. Finally, BDO alleges that there is a conflict because one of the proposed plaintiffs in the Media House Action, Gary Froats, was an investment advisor to the proposed representative plaintiffs, the Couches, before they invested in Crystal Wealth. In support of that alleged conflict, BDO has attempted to concoct a claim between the Couches and Mr. Froats where none has been made. If such a claim were made, AGB acknowledges that it could not act for either the Couches or Mr. Froats in that claim. The potential claim concocted by BDO does not, however, give rise to any conflict in this proceeding. Indeed, the interests of the Couches and Mr. Froats (as a unitholder in the Funds) are completely aligned in respect of the class action: both benefit from maximizing the recovery from BDO.

c) In the alternative, the alleged conflicts are not a bar to certification

39. If the Court finds that Class Counsel does have a conflict, it is not a bar to certification. In the event the Court finds that there is a conflict, it should grant a temporary stay in order to permit the representative plaintiffs and Class Counsel to resolve the conflicts.²⁵ The Class should not be prejudiced and have certification denied on the basis of an issue with regard to Class Counsel. To the extent that the Court finds any conflict with respect to Mr. Whitehouse serving as a representative plaintiff, there are no allegations of conflict against the Couches, and that cannot be a bar to certification.

²⁵ *Vaeth*, at paras. 83-84.

IV. The Class Action is Not a Collateral Attack on the Receivership

40. BDO asserts that the class action is a collateral attack on the decision of Mr. Justice Hainey, who denied a request to appoint representative counsel for the unitholders *in the receivership*.²⁶

41. The narrow issue before Mr. Justice Hainey was whether representative counsel ought to be appointed for the investors in the context of the *receivership*. His Honour found that the Receiver would adequately protect investors' rights *in the receivership*. Indeed, Mr. Justice Hainey's decision specifically states that the motion was for representative counsel "in the receivership of Crystal Wealth".²⁷

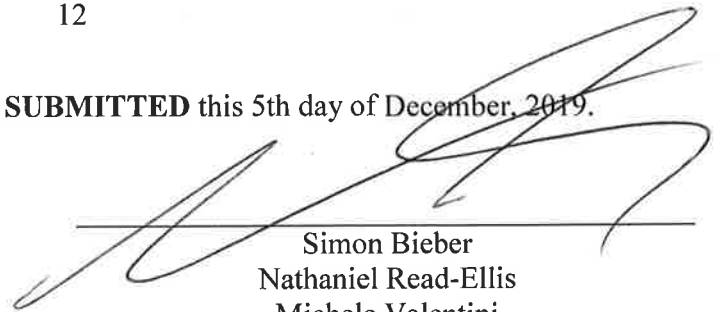
42. Mr. Justice Hainey's decision did not in any way bar unitholders from taking steps or engaging counsel to enforce their rights outside of the receivership, including through a class action. Indeed, that issue was not before the Court.

43. The only time the issue of a retainer involving Class Counsel was raised in the receivership was when Madam Justice Conway specifically approved the Receiver's engagement of AGB, in part, because AGB was already Class Counsel.

²⁶ The Honourable Mr. Justice Hainey's Decision dated July 5, 2017 (2017 ONSC 4160), at para. 8, Exhibit "P" to the Affidavit of Nigel Meakin, **Responding Motion Record of BDO**, Vol. 2, Tab 1P, p. 548.

²⁷ The Honourable Mr. Justice Hainey's Decision dated July 5, 2017 (2017 ONSC 4160), at para. 1.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of December, 2019.



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SCHEDULE "A"

LIST OF AUTHORITIES

Tab

- 1 *SFC Litigation Trust v. Chan*, 2019 ONCA 525, 2019 CarswellOnt 10809
- 2 Order and Endorsment of Justice Conway, dated August 20, 2018
- 3 *Abdulrahim v. Air France*, 2010 ONSC 5542, 2010 CarswellOnt 8324

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

A. *Rules of Civil Procedure, R.R.O. 1990, Reg. 194*

RULE 6 CONSOLIDATION OR HEARING TOGETHER

WHERE ORDER MAY BE MADE

6.01 (1) Where two or more proceedings are pending in the court and it appears to the court that,

- (a) they have a question of law or fact in common;
- (b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or
- (c) for any other reason an order ought to be made under this rule,

the court may order that,

- (d) the proceedings be consolidated, or heard at the same time or one immediately after the other; or
- (e) any of the proceedings be,
 - (i) stayed until after the determination of any other of them, or
 - (ii) asserted by way of counterclaim in any other of them. R.R.O. 1990, Reg. 194, r. 6.01 (1).

(2) In the order, the court may give such directions as are just to avoid unnecessary costs or delay and, for that purpose, the court may dispense with service of a notice of listing for trial and abridge the time for placing an action on the trial list.

...

RULE 51 ADMISSIONS

ORDER BASED ON ADMISSION OF FACT OR DOCUMENT

Motion

51.06 (1) Where an admission of the truth of a fact or the authenticity of a document is made,

- (a) in an affidavit filed by a party;
- (b) in the examination for discovery of a party or a person examined for discovery on behalf of a party; or
- (c) by a party on any other examination under oath or affirmation in or out of court,

any party may make a motion to a judge in the same or another proceeding for such order as the party may be entitled to on the admission without waiting for the determination of any other question between the parties, and the judge may make such order as is just.

(2) Where an admission of the truth of a fact or the authenticity of a document is made by a party in a pleading or is made or deemed to be made by a party in response to a request to admit, any party may make a motion in the same proceeding to a judge for such order as the party may be entitled to on the admission without waiting for the determination of any question between the parties, and the judge may make such order as is just.

Exception: Deemed Undertaking

(3) If Rule 30.1 applies to the admission, its use in another proceeding is subject to Rule 30.1 (deemed undertaking).

ANTHONY WHITEHOUSE, et al.
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-and-

BDO CANADA LLP
Defendant

Court File No. CV-17-579357-00CP

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