

Federal Court



Cour fédérale

Date: 20190207

Docket: T-809-18

Ottawa, Ontario, February 7, 2019

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

CHELSEA JENSEN and LAURENT ABESDRIS

Plaintiffs

and

**SAMSUNG ELECTRONICS CO. LTD., SAMSUNG SEMICONDUCTOR INC.,
SAMSUNG ELECTRONICS CANADA, INC., SK HYNIX INC., SK HYNIX AMERICA,
INC., MICRON TECHNOLOGY, INC., and MICRON SEMICONDUCTOR PRODUCTS,
INC.**

Defendants

ORDER

UPON a notice of motion of the Plaintiffs dated January 15, 2019, requesting an Order approving, in the context of this proposed class proceeding, a Litigation Funding Agreement [Agreement] negotiated and entered into between the Plaintiffs, a private third-party litigation funder named Vannin Capital LLC [Vannin], and class counsel [Counsel], and permitting the Plaintiffs to serve and file their motion record with the terms relating to the maximum amount of

litigation funding that Vannin will provide under the Agreement redacted, and to file with the Court an unredacted copy of the Agreement under seal;

AND UPON reading the Plaintiffs' motion record as well as the Defendants' motion record in response;

AND UPON reviewing the affidavits of each Plaintiff and of independent legal counsel filed in support of the motion;

AND UPON reviewing the unredacted version of the Agreement filed with the Court further to an Order issued on January 24, 2019 allowing such filing under seal;

AND UPON being advised that no Defendant opposes the form of this Order and that the form and content of a draft Order sent by counsel for the Plaintiffs by letter dated January 24, 2019 has been agreed to by all parties;

AND UPON noting that, further to the Court's direction of January 30, 2019, all parties agree that no oral hearing will be necessary for this motion and that the Court can dispose of the motion on the basis of the written materials filed by the parties;

AND UPON considering the following factual background:

1. The Agreement provides that Vannin will pay for disbursements incurred by the Plaintiffs (such as Court fees, experts' fees as well as document and discovery management and administration fees), up to a prescribed maximum amount, in exchange for a scaled commission on any recovery. More specifically, in exchange for this funding, Vannin will be reimbursed for all payments advanced in respect of

disbursements and will receive a scaled percentage of the remaining litigation proceeds allocated to the class after the deduction of disbursements, lawyers' fees and taxes and administration expenses;

2. The funding terms provided for in the Agreement are comparable with those set out in the Ontario Class Proceedings Fund. The Class Proceedings Fund, however, cannot fund a case in this Court, and in any event, it likely lacks the means to provide the amount of funding required to prosecute this case;
3. Counsel has determined that funding of several millions of dollars in disbursements would be required to prosecute this case through trial, and that the Plaintiffs would not be able to pay these disbursements;
4. Counsel received funding proposals from two different internationally recognized litigation funders and determined that Vannin's proposal was in the best interest of the class;
5. Vannin is a large and experienced professional litigation funding enterprise that carries on business in several countries around the globe;
6. The Agreement provides that the Plaintiffs remain in control of the litigation and of instructing Counsel, but that Vannin may terminate the Agreement if it ceases to be satisfied of the merits of the action or of its commercial viability. For these and other purposes, the Agreement contemplates that Vannin will have access to all documents produced in the litigation, but be subject to the same confidentiality or implied undertaking obligations as the Plaintiffs; and

7. The Agreement is made conditional upon Court approval;

AND UPON finding that:

1. The procedural, technical and evidentiary requirements to enable the Court to scrutinize the Agreement are satisfied;
2. The Agreement is necessary to facilitate access to justice for the Plaintiffs and class members and to discourage wrongdoing by the Defendants;
3. Through the Agreement, Vannin would make a meaningful contribution to access to justice or behaviour modification;
4. The Agreement is fair and reasonable to the class, does not overcompensate Vannin for assuming the risks of an adverse costs award and protects the interests of the Defendants; and
5. The Agreement does not impair or compromise the lawyer-client relationship, the lawyers' duties of loyalty and confidentiality or the lawyers' professional judgment and carriage of the litigation on behalf of the Plaintiffs and the class;

AND UPON observing that this Court only has jurisdiction to grant remedies and make final determinations of rights in disputes and matters over which it has been granted jurisdiction by statute and in accordance with the requirements set out in *ITO – Int'l Terminal Operators v Miida Electronics*, [1986] 1 SCR 752 and reaffirmed in *Windsor (City) v Canadian Transit Co*, 2016 SCC 54;

AND UPON further noting that the powers of this Court include those which are “necessarily implied in the grant of power to function as a court of law”, such as the powers needed to control its own proceedings and to fully and effectively exercise its jurisdiction (*R v Cunningham*, 2010 SCC 10 at para 19; *Lee v Canada (Correctional Service)*, 2017 FCA 228 at para 12; *Barkley v Canada*, 2018 FC 227 at para 18);

AND UPON being satisfied that this Court may approve third-party funding agreements in advance of a certification motion pursuant to these broad plenary powers conferred upon it to control and manage its own processes and proceedings in matters falling within its jurisdiction, that its power to approve third-party funding agreements is ancillary and necessary to the Court’s jurisdiction to hear class proceedings, and that it has the jurisdiction to exercise its discretion and to make a declaratory order pursuant to section 53 of the *Federal Courts Rules*, SOR/98-106 [Rules];

AND UPON noting that, although contract law is normally under provincial jurisdiction, this Court has jurisdiction “when the contract law issue before the Court is part and parcel of a matter over which the [Court] has statutory jurisdiction, there is federal law essential to the determination of the matter, and that federal law is valid under the constitutional division of powers” (*Apotex Inc v Allergan, Inc*, 2016 FCA 155 at para 13);

AND UPON considering that this Court has its own class proceeding rules, including provisions giving it oversight of agreements respecting solicitors’ fees and disbursement (i.e., Rules 334.1 and subsequent), and that the Court’s “jurisdiction to consider, and even to give prior approval to [a Funding Agreement] in the context of class proceedings would hardly be in doubt as an exercise of the Court’s plenary power to control its own process in matters falling

within its jurisdiction” (*Seedling Life Science Ventures LLC v Pfizer Canada Inc*, 2017 FC 826 [Seedling] at para 15;

AND UPON being further satisfied that approving the Agreement in the context of a class proceeding is not merely a matter of ensuring that the Agreement is not contrary to public policy as champertous, but also a matter of ensuring the protection of the interests of class members against unreasonable agreements, as well as protecting courts against potential abuses specific to class proceeding. As stated by the Court in *Seedling*, “[c]lass action legislation is designed to foster access to justice by overcoming economic barriers to litigating mass wrongdoing, increasing judicial economy by permitting courts to adjudicate numerous claims fairly and efficiently, and ensuring means for wrongdoers to be brought to account” (*Seedling* at para 14);

AND UPON concluding that, in the circumstances, it is in the interests of justice to grant the Plaintiffs’ motion;

THIS COURT ORDERS that:

1. The Litigation Funding Agreement executed by third-party litigation funder Vannin Capital LLC [Vannin], the Plaintiffs Chelsea Jensen and Laurent Abesdris, and class counsel Affleck Greene McMurtry LLP and Koskie Minsky LLP, dated January 3, 2019, a redacted copy of which is attached hereto as Exhibit “A” [Agreement], is hereby approved, subject to the following:
 - a. To the extent that any documents or information disclosed to or used by Vannin pursuant to the Agreement are governed by a confidentiality order issued by the Court, Vannin shall be bound by the terms of such order;

- b. Notwithstanding anything in the Agreement, Vannin shall maintain the confidentiality of such documents and information strictly in accordance with the terms of any such confidentiality order; and
 - c. To the extent Vannin provides such documents to its corporate affiliates, insurers or legal advisors, those recipients shall similarly be bound by any such confidentiality order issued by the Court.
2. The unredacted copy of the Agreement, filed herein, shall remain in the Court file in a sealed envelope, marked “Confidential Documents sealed by Court Order dated January 24, 2019, not to be opened without further court order or consent of the Plaintiffs”.
3. No costs shall be awarded.

"Denis Gascon"

Judge

EXHIBIT "A"

VANNIN CAPITAL

LITIGATION FUNDING AGREEMENT

BETWEEN

VANNIN CAPITAL LLC

AND

CHELSEA JENSEN

AND

LAURENT ABESDRIS

AND

AFFLECK GREENE MCMURTRY LLP

AND

KOSKIE MINSKY LLP

Agreement Date

January 3, 2019

1 Parties and Subject Matter

- 1.1 The parties (the **Parties**) to this Agreement are as follows:
- (1) Chelsea Jensen and Laurent Abesdris, as representative plaintiffs and members of a Class to be certified in this Action (the **Claimants**);
 - (2) Affleck Greene McMurtry LLP of 365 Bay Street, Suite 200, Toronto, Ontario M5H 2V1, and all legal successors and assigns (**AGM**);
 - (3) Koskie Minsky LLP of 20 Queen Street W, Suite 900, Toronto, Ontario M5H 3R3, and all legal successors and assigns (**Koskie Minsky**, with AGM, the **Class Counsel**); and
 - (4) **Vannin Capital LLC**, a limited liability company organized under the laws of the State of Delaware, of 1313 North Market Street, Suite 5100, Wilmington, Delaware 19801 (with its Affiliates, the **Funders**).
- 1.2 The subject matter of this Agreement is as follows:
- (1) The claim to which this Agreement relates is a claim that Defendants (as defined below), violated the Canadian *Competition Act*, as set forth in the Amended Statement of Claim filed with the Federal Court of Canada on August 9, 2018 by the Claimants (with any subsequent amendments thereto, the **Claim**, any proceedings advancing the Claim being the **Action**); and
 - (2) The defendants in the Action are Samsung Electronics Co., Ltd.; Samsung Semiconductor, Inc.; Samsung Electronics Canada Inc.; SK Hynix, Inc.; SK Hynix America, Inc.; Micron Technology, Inc.; and Micron Semiconductor Products, Inc. and any party adverse to the Claimants subsequently joined to the Action (the **Defendants**).

2 Recitals

- 2.1 Whereas:
- (1) Claimants seek to enforce their Claims and those of the proposed Class against the Defendants and wish to pursue the Action to enforce the Claims.
 - (2) Claimants have agreed, subject to any certification order, to act as the representative plaintiffs in the Action, which has been commenced on their own behalf and on behalf of the Class against the Defendants in respect of the Claims.
 - (3) Vannin Capital LLC is a limited liability corporation incorporated under the laws of Delaware with its principal place of business in New York, New York, and is a wholly owned subsidiary of Vannin Capital PCC of 13-14 Esplanade, St Helier, Jersey, JE1 1BD, a Jersey Protected Cell Company registered in accordance with The Companies (Jersey) Law 1991 with Incorporation Number 119327.
 - (4) Claimants, in their capacity as the proposed representative plaintiffs in the Action, have requested funding from the Funders to assist with paying up to CAN\$ [REDACTED] in Disbursements in connection with the Action, subject to the provisions of this Agreement.
 - (5) Claimants have not requested that the Funders fund any award of costs ordered by the Court, and Class Counsel have agreed to pay any such award from their own funds.

- (6) Claimants in their capacity as the proposed representative plaintiffs are required to obtain Court approval of this Agreement, such Court approval to be binding on all current and future Claimants and all persons that are or become members of the Class in the Action.
- (7) In exchange for the obligations undertaken by the Funders in this Agreement, Claimants wish to assign to the Funders a share of the Litigation Proceeds from this Action (if any), in accordance with this Agreement and any Litigation Funding Agreement Approval Order that the Court may issue.
- (8) Before entering into discussions with the Funders for the purposes of this Agreement, Claimants had already engaged Class Counsel. The Claimants and Class Counsel anticipated obtaining third party funding in connection with the Action and have elected to seek funding from the Funders.
- (9) The Funders' Funding Premium reflects the following factors: (i) the fact that if the Claimants Lose, the Funders will not make any return on their investment and may lose part or all of the funds invested; (ii) the fact that Funders have not sought the protection of a Funding Premium based on a minimum multiple of the Distributed Fund, reflecting the time value of money; (iii) the fact that if the Funders had invested elsewhere, they could have made a return on that investment; (iv) the fact that the Funders have incurred costs setting up and maintaining the investment; (v) the fact that even if the Claimants Win, the Funders may not be paid the whole of the Distributed Fund or the Funding Premium; and (vi) the fact that while the Funding Premium is uncapped, the Funders' share of the Net Proceeds diminishes incrementally as the value of the Net Proceeds increase.
- (10) This Agreement is necessary to provide the Claimants and the Class with access to justice in this Action with respect to the Claims.

In consideration of the obligations set forth in this Agreement, the Parties agree:

Key Terms

3 Definition of words used

- 3.1 Capitalized terms used in this Agreement will have the meanings ascribed to them in the General Terms and Conditions attached as Exhibit 1 or as otherwise may be defined in the remainder of this Agreement.
- 3.2 References in this Agreement to Paragraphs refer to the Paragraphs in these Key Terms and the preceding paragraphs. References in this Agreement to Sections refer to the sections in the General Terms and Conditions appearing in Exhibit 1.

4 Funding commitment

- 4.1 Fund Limit. Vannin's entire commitment to fund Disbursements in connection with this Action is limited to CAN [REDACTED] (the **Fund Limit**), that commitment being subject to the terms of this Agreement.
- 4.2 Costs. Responsibility for payment of Costs shall be borne exclusively by Class Counsel and neither Vannin nor the Claimants shall be responsible for any such payments.

- 4.3 Unfunded Disbursements. Any payments made by Class Counsel that are not funded by the Funders (the **Unfunded Disbursements**) will be the sole responsibility of the Class Counsel, and the Class Counsel will be compensated for any Unfunded Disbursements as set out in Paragraph 5.3 of this Agreement.

5 Returns and payment priority

- 5.1 Funding Premium. Subject to the Order of Priority detailed in Paragraph 5.3 of this Agreement, Vannin shall receive from the Litigation Proceeds an amount between 2.5% and 15% of each dollar (the **Funding Premium**) of the Net Proceeds, as set forth in Section 2.1.
- 5.2 Class Counsel's Fees. Subject to the order of priority detailed in Paragraph 5.3 of this Agreement, Class Counsel shall receive from the Litigation Proceeds, an amount equal to the Class Counsel's court approved contingency fee due and owing to the Class Counsel, which shall not exceed 25% of the value of the Litigation Proceeds less the value of the Distributed Fund.
- 5.3 Order of Priority. Subject to Court order and the General Terms and Conditions, any Litigation Proceeds will be distributed in the following manner, subject to the provisions of Sections 5 and 6:
- (1) First, to the Funders, an amount equal to the Distributed Fund;
 - (2) Second, to Class Counsel, an amount up to [REDACTED] in Unfunded Disbursements;
 - (3) Third, any Administrative Expenses;
 - (4) Fourth, on a pro rata and pari passu basis:
 - (a) To Class Counsel, Class Counsel's Fees; and
 - (b) To the Funders, the Funding Premium.
 - (5) Fifth, to Class Counsel, an amount equal to the Unfunded Disbursements in excess of [REDACTED]; and
 - (6) Sixth, the remainder of the Litigation Proceeds to the Claimants and/or the Class.

All payments made under this Paragraph 5.3 will be made without reduction, set-off or counterclaim, except as specifically provided in the General Terms and Conditions. Vannin's sole recourse for the Funding Premium shall be the Litigation Proceeds. Class Counsel's sole recourse for Class Counsel's Fees will be from the Litigation Proceeds.

- 5.4 Litigation Proceeds. As further specified in Section 5, and unless otherwise agreed by the Parties to this Agreement and the Court, all Litigation Proceeds recovered in connection with this Action will be received by, or sent to, Class Counsel and will remain in the Claimant Account pending the deadline for appeal. If an appeal is filed within the prescribed time for doing so, the Litigation Proceeds will remain in the Claimant Account pending the outcome of the appeal and the prescribed time for appealing any order made on the appeal. The Litigation Proceeds will then be disbursed in accordance with the Court's settlement approval order and in accordance with Paragraph 5.3.

6 Engagement Letters, Class Counsel and the Action

- 6.1 Class Counsel's Engagement Letters. Class Counsel have been retained by Claimants pursuant to the Engagement Letters, as defined in Section 1.23. Class Counsel are to be instructed by, and owe their obligations to, the Claimants. A copy of any amended Engagement Letters will be provided to the

Funders. Class Counsel represent, warrant and covenant that at all times, the Engagement Letters between Class Counsel and Claimants are, and will be, in accordance with and comply with all applicable laws, including the *Solicitors Act* (Ontario), in effect from time to time and with all applicable Rules of Professional Conduct issued by the Law Society of Ontario or other applicable governing body.

- 6.2 Termination of Engagement Letters. If any of the Claimants terminate their engagement of Class Counsel, then this Agreement shall also terminate, subject to the provisions of Section 17, and Funders, in their discretion, may enter into a new funding agreement with any or all of the Claimants and their new lawyers on such terms as the parties thereto may agree and to be approved by the Court. Funders shall be under no obligation to enter into a new funding agreement with any such new lawyers.
- 6.3 Court Approval. This Agreement is subject to and conditional upon the Court making a Litigation Funding Agreement Approval Order. In the event a Litigation Funding Agreement Approval Order is not made by the Court, this Agreement will automatically terminate. Submission of the Agreement to the Court for approval is not and will not be a waiver of any applicable privilege insofar as this Agreement contains information regarding litigation strategy or budget, which parts shall be redacted when provided to the Defendants, but provided to the Court in an unredacted form, under seal.
- 6.4 Independent Legal Advice. Each of the Claimants represent and warrant that competent counsel has reviewed the Agreement on its behalf and Claimants have received independent legal advice regarding the terms of the Agreement and the execution and delivery of the Agreement by each Claimant and its performance of its obligations hereunder.
- 6.5 Amendments to Claim or Change in Counsel. The Parties agree that the terms of this Agreement may need to be renegotiated if a material change occurs, including by way of example, if there was a material change or amendment to the Claim (including if an additional defendant is added or new causes of action are pleaded), if additional lawyers are sought to be added as part of the consortium of lawyers prosecuting the Action. However, should the Class Counsel retain lawyers to provide specialized expertise and advice to them in respect of any issue in the Action, that shall not constitute a material change.
- 6.6 Attornment. The Funders attorn to the jurisdiction of the Court, including with respect to the implied undertaking of confidentiality and agree to comply with any protective orders made by the Court. The Funders shall be deemed to be a party to the Action for the purpose of Rule 30.1.01 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, or its applicable equivalents in any court where this Action is proceeding.
- 6.7 Execution. This Agreement may be executed in any number of counterparts, and this has the same effect as if the signatures on the counterparts were on a single copy of this Agreement.

[signatures on following page]

CHELSEA JENSEN

Date:



LAURENT ABESDRIS

Date: 03/01/19


AFFLECK GREENE MCMURTRY LLP

Name:

Title:

Date:

KOSKIE MINSKY LLP



Name: James Sayre

Title: Counsel

Date: 07/01/19

VANNIN CAPITAL LLC

Name:

Title:

Date:

Exhibit 1

General Terms and Conditions

The following General Terms and Conditions form part of the Litigation Funding agreement to which this Exhibit 1 is attached.

1 Definitions of words used

1.1 Action

The action described in Paragraph 1.2(1).

1.2 Additional Law Firm

Shall mean any law firm or counsel instructed by the Class Counsel to assist in relation with the Action, including a law firm or counsel with expertise in a specific jurisdiction or field.

1.3 Administrative Expenses

All fees, disbursements, expenses, costs, taxes and other amounts incurred or payable relating to implementation and administration of a Conclusion of the Action, including the costs of publishing and delivering notices, the fees, disbursements, and taxes paid to the administrator, and any other associated expenses approved by the Court as being payable from the Litigation Proceeds.

1.4 Affiliate

Shall mean, with respect to a Party, any other person that directly or indirectly controls or is controlled by or is under common control with that person. A person shall have "control" of another person if it directly or indirectly possesses the power to direct the management or policies of that person, whether through the exercise of voting rights, contractually or otherwise.

1.5 Agreement

Shall mean this document and any exhibits, schedules, and attachments.

1.6 Budget Plan

Shall mean the budgeted costs and timeline set out at Schedule 1 for each stage of the Action and for each category of expense and as accepted by the Class Counsel at the commencement of this Agreement, together with any variations thereto which may subsequently be prepared by the Class Counsel and which are accepted and agreed between the Claimants and the Funders in writing, such agreement not to be unreasonably withheld.

1.7 Capped Incurred Disbursements

Shall mean the Disbursements incurred by the Class Counsel in relation to the Claim and Action prior to the satisfaction of the Funding Conditions set forth in Schedule 2, capped at CAN [REDACTED] and subject to the Budget Plan.

1.8 Claim

Shall mean the claim referred to in Paragraph 1.2.

1.9 Claimants

Shall mean the person(s) referred to in Paragraph 1.1.

1.10 Claimant Account

Shall mean a separate trust account established by and in the name of the Class Counsel as a 'trust account' of the type envisaged at section 7 of By-law 9

of the Law Society of Ontario (or envisaged by a substantially similar provision of the rules of professional conduct of another jurisdiction where the Action may be proceeding).

1.11 Class

Shall mean the class referred to above and any alternative or sub-classes certified in relation to the Claim and/or the Action (see Paragraph 1.2(1)).

1.12 Class Counsel

Shall mean the firms of lawyers described as such above (see Paragraph 1.1(2) & (3)) or replacement or supplemental lawyers as the Claimants may from time to time engage as counsel for the Class in connection with the Action and/or Claim (subject to the provisions of Paragraph 6).

1.13 Class Counsel Fees

Shall mean the fees described in Paragraph 5.2.

1.14 Claimants

Shall mean the claimants referred to above (see Paragraph 1.1), including any replacement or additional class representatives who may from time to time be so designated by the Court or operation of other rules applicable to the Action and/or Claim.

1.15 Concluded

Shall mean the Claim (or relevant part thereof) has been Won or Lost, or the Claim (or, where appropriate, part of it) has come to an end in some other way which can properly be said to be final.

'Conclusion' shall mean the state of the Claim being Concluded.

1.16 Costs

Shall mean any legal costs (including profit costs, disbursements, additional liabilities, interest on costs and associated taxes) or security for costs, whether deposited in the Action, recovered in the Action or payable to another party in the Action.

1.17 Counterclaim

Shall mean a claim that a Defendant makes or considers making against the Claimant in response to the Claim.

1.18 Court

Shall mean the Federal Court of Canada and any court having appellate jurisdiction thereof.

1.19 Defendant

Shall mean the persons or entities referred to in Paragraph 1.2(2)).

1.20 Disbursements

Shall mean expenses or payments the Class Counsel makes on behalf of the Claimants and/or Class in connection with the Action, such as (but not limited to):

- Court or tribunal fees;
- Experts' fees;
- Mediation fees;

- Document and discovery management and administration fees;
- Additional Law Firm fees; and
- Administrative costs including but not limited to copying fees, service fees, research expenses, and travelling expenses, provided such costs are allowed under the applicable Engagement Letter, but not including any settlement or distribution administrative costs.

1.21 Distributed Fund

Shall mean that part of the Fund that has been provided to Class Counsel pursuant to Section 9.

1.22 Effective Date

Shall have the meaning given in Section 2.4.

1.23 Engagement Letter

Shall mean the engagement letters or contracts of retainers signed between the Class Counsel and Class Representatives on January 3, 2019 and April 30, 2018

1.24 Fund

Shall mean monies which the Funders place or cause to be placed at the Claimants' disposal for the purposes of funding Disbursements and any other Permitted Use; the word 'Fund' may apply to the whole of those monies or to any part or aspect of those monies, depending on the context.

1.25 Funding Conditions

Shall mean the conditions set forth in Schedule 2, each of which is required to be satisfied in order for the Funders' funding obligations under this Agreement to take effect.

1.26 Funding Fraction

Shall mean a percentage set in Section 2.1 and used to calculate the Funding Premium on different portions of the Net Recovery.

1.27 Fund Limit

Shall mean the maximum Fund that the Funders will place at the Claimants' disposal; it is set in Section 2.1 and is the Funders' anticipated expenditure in funding the provision of the Disbursements.

1.28 Funding Premium

Shall mean an amount calculated as a portion of the Net Proceeds; numerically it is the sum of the products of each Funding Fraction as it is applied to the designated portion of the Net Proceeds.

For the avoidance of doubt, the Funding Premium will never exceed the Net Proceeds.

1.29 Interim Trial

Shall mean any trial or hearing that is not final (in the sense that it will not lead to the Action being Concluded).

1.30 Legal Privilege

Shall mean attorney-client privilege, work product protection and/or any other applicable privilege or protection against disclosure, as well as the Class Counsel's obligations of confidentiality to the Claimants;

1.31 Litigation Funding Agreement Approval Order

The Federal Court of Canada order approving this Agreement and declaring that the agreement is binding on Class Members and/or Claimants, as required under Paragraph 6.3.

1.32 Lose

Shall mean that the Claimants have not Won in any respect.

Loses, Lost and Loss have corresponding meanings.

1.33 Litigation Proceeds

Shall mean the sum of the Recovered Damages and the Recovered Costs.

1.34 Net Proceeds

Shall mean the Litigation Proceeds after the deduction of (a) the amounts specified in Paragraph 5.3(1) – (3) (i.e., the value of the Distributed Fund, the Unfunded Distributions, and the Administrative Costs) and (b) the deduction of any Class Counsel fees and any taxes or other withholdings required by applicable law in relation to those fees. In the event that the Court awards fees to the Class Counsel that exceed cumulatively 25% of the Litigation Proceeds (less the amounts specified in Paragraph 5.3(1) – (3)), Net Proceeds shall be calculated without regard to any excess amount (or the taxes associated therewith)).

1.35 Permitted Uses

Shall mean those uses for which monies may be drawn down from the Undistributed Fund to fund Disbursements, as provided under Section 2.1.

1.36 Professional Conduct

Shall mean the professional ethical, legal rules and mandates, including the applicable law society rules.

1.37 Recovered Costs

Recovered Costs are those monies recovered in Costs from any Defendant. Where the Claimants both pay Costs and receive Costs, Recovered Costs shall be the net amount recovered.

1.38 Recovered Damages

Shall mean any of the items described in (a) and (b) below that have been, as a result of a Win, agreed, recovered or received at any Stage in the Claim by (i) the Class Counsel on behalf of any Claimant or any Affiliate of any Claimant, or (ii) by any Claimants or any Affiliates of any Claimants:

- (a) the amount of damages, penalties, debt and/or any other monies; and/or
- (b) the value of any property, shares, securities, goods, services or benefits, or any forbearance to sue or any waiver of legal claims (including the present value of any goods, services or benefits to be paid in the future and the present value of any new commercial arrangements entered into with, or at the direction of, the Claimant or any Affiliate of the Claimant or otherwise).

The items described in (a) and (b) above shall (i) include any due and payable interest and shall be the gross amount prior to any set-off or counterclaim exercised by any Defendant and prior to any deduction for Taxes, but (ii) shall exclude any Recovered Costs.

For the avoidance of doubt, the items described in (a) and (b) above shall include the cash equivalent of any Settlement on the basis of something other than money.

1.39 Settlement

Shall mean any compromise, discontinuance, waiver, payment, release or other form of settlement whatsoever where value passes from or on behalf of any Defendant to or for the benefit of any Claimant in circumstances in which the Claim is Concluded as a result of or in connection with the passing of that value; and **Settle**, **Settles** and **Settled** have corresponding meanings.

1.40 Stages

Shall mean the stages of the Claim, as follows: (i) the time from the beginning of the Action to a final decision on class certification; (ii) the time from a decision on class certification to the close of discovery; (iii) the time from the close of discovery to the beginning of trial; and (iv) the time from the beginning of trial through any appeals to the Conclusion.

1.41 Tax

Shall mean all present and future taxes, duties, levies, Imposts, deductions, charges, stamps, transaction and other tax and withholdings (together with any related interest, penalties, fines and expenses) whatsoever and wheresoever imposed.

1.42 Trial

Shall mean the final contested trial or hearing or the contested trial or hearing of any Issue to be tried separately; any reference to a claim concluding at trial includes a claim settled after the trial has commenced or a judgment.

1.43 Undistributed Fund

Shall mean that part of the Fund that has not been used to pay for Disbursements or for any other Permitted Use.

1.44 Unfunded Disbursements

Shall have the meaning given in Paragraph 4.3.

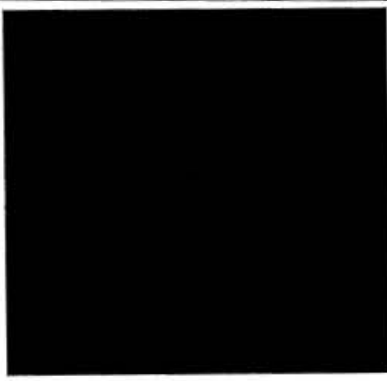
1.45 Win

Shall mean any final judgment, award, Settlement, third-party agreement, or compromise arising out of or related to the Claim that is concluded in favour of the Claimants in that the Claimants are able to recover or are awarded any Recovered Damages or any Recovered Costs.

2 Parameters of the Agreement

2.1 The following parameters will govern the Agreement:

Parameter	Value
Fund Limit	CAN [REDACTED]
Funding Fraction	
(i) If (1) the Claim concludes [REDACTED] [REDACTED]	[REDACTED] of Net Proceeds between CAN [REDACTED] [REDACTED] of Net Proceeds between CAN [REDACTED] [REDACTED] of Net Proceeds in excess of CAN [REDACTED]
(ii) If the Claim concludes under any other circumstances:	[REDACTED] of Net Proceeds between CAN [REDACTED] [REDACTED] of Net Proceeds between CAN [REDACTED] [REDACTED] of Net Proceeds between CAN [REDACTED] [REDACTED] of Net Proceeds between CAN [REDACTED]

	<p>██████ of Net Proceeds in excess of CAN \$ ██████</p>
<p>Permitted Uses</p>	

- 2.2 The aforesaid Funding Fraction applies in a cumulative manner until the Action is Concluded in relation to all Defendants. In the event that one Defendant settles before the other Defendants, and there are subsequent settlements, the value of the Funding Fraction shall continue to be calculated in the same manner.
- 2.3 The aforesaid parameters may be changed by agreement in writing of all Parties at any time and for any reason, such agreement to be submitted to the Court and to become effective within ten (10) days of the Court's approval thereof.
- 2.4 This Agreement is conditional upon each of the Funding Conditions set forth in Schedule 2 being satisfied. Once the Funding Conditions are satisfied, the Agreement becomes unconditional and the Parties' obligations set out herein become binding (the **Effective Date**).

3 Scope of this Agreement

- 3.1 Unless it is agreed otherwise this Agreement will cover the following components of the Action:
- 3.1.1 The Claim;
 - 3.1.2 Any appeal relating to the Claim;
 - 3.1.3 Any applications relating to the Claim;
 - 3.1.4 Any work ancillary to the Claim, such as attending relevant proceedings before tribunals or courts;
 - 3.1.5 ADR (including mediation) relating to the Claim; and
 - 3.1.6 Negotiations about and/or a Court assessment of the Costs of the Claim.

- 3.2 Unless it is agreed otherwise in writing, this Agreement does not cover the following:
- 3.2.1 The defense of any Counterclaims against the Claimants.
 - 3.2.2 The liability of any Claimants concerning any Counterclaims.
 - 3.2.3 Awards of Costs.

4 Use of Budget Plan

- 4.1 The Budget Plan is attached hereto.
- 4.2 It is recorded that the Budget Plan is in respect of the entire Action up to and including the handing down of a final judgment and any appeals.
- 4.3 The amounts paid by the Funder to Class Counsel for each stage of the Claim shall not exceed the budgeted costs set out in the Budget Plan for that stage, except when agreed by the Funders, such agreement not to be unreasonable withheld, or as provided in Section 4.4. In addition, the aggregate budgeted costs set out in the Budget Plan for all the stages of the Claim shall not exceed the Fund Limit.
- 4.4 Where an amount was not drawn down in relation to any largely completed or concluded stage of the Budget Plan, it may be utilised in relation to any future stage. In addition, any amount of the Budget Plan not applied to any particular item or category of any part of any stage may be applied to any other item or category of any part of such stage.
- 4.5 The Budget Plan shall contain a quarterly forecast of the drawdowns under this Agreement for a period of 1 year as from the start of this Agreement.

5 Payments from the Litigation Proceeds

- 5.1 Upon the recovery of Litigation Proceeds by the Claimants in respect of the Claim, the Claimants shall cause and hereby irrevocably direct Class Counsel to (1) receive any Litigation Proceeds and to immediately deposit all Litigation Proceeds into the Claimant Account, (2) not to permit the funds in the Claimant Account to be mixed with any other funds that are not Litigation Proceeds or Distributed Funds, (3) not to disburse the funds in the Claimant Account except in accordance with this Agreement and an order from the Court, and (4) to pay out of the Claimant Account to Vannin, all amounts to which Vannin is entitled as its Funding Premium.
- 5.2 To the extent any Litigation Proceeds have been paid into the Claimant Account, Class Counsel shall pay (or cause to be paid) from the Litigation Proceeds within seven (7) days of both receipt of the Litigation Proceeds and Court approval of Class Counsel's fees and/or Court approval of settlement, including favourable resolution of any appeals of such approval:
 - 5.2.1 To the Funders, the amount due under Paragraph 5.3(1) & 5.3(b)5.3(b), being an amount equal to the sum of the Distributed Fund and the Funding Premium;
 - 5.2.2 To the Funders, interest on the sum provided for in Section 5.2.1 above (i) at the judgment rate applying as from the judgment's date until the date of receipt of the Litigation Proceeds by the Claimants (but only to the extent such interest has been paid by any Defendant and received by the Claimants) and (ii) at 8% above the Bank of England Base Rate from the period starting at the 8th day after the date of both receipt of

the Litigation Proceeds and Court approval of Class Counsel's fees and/or Court approval of settlement, including favourable resolution of any appeals of such approval, until payment is made by the Claimants to the Funders;

- 5.2.3 To the Class Counsel, the amount due under Paragraph 5.3(2), 5.3(3), 5.3(a), & 5.3(5) being an amount equal to any Unfunded Disbursements and any fees approved by the Court. In the event and only to the extent such fees exceed cumulatively 25% of the Litigation Proceeds, less the value of the Distributed Fund, the Unfunded Disbursements, and the Administrative Costs, Class Counsel shall not withdraw such fees that exceed such percentage from the Claimant Account and such amounts shall be distributed pursuant to Sections 5.2.1 and 5.2.2, with any remainder being distributed to the Claimants.

For the avoidance of doubt, any sums payable to the Funders under Section 5.2 will not in any circumstances exceed the Litigation Proceeds.

- 5.3 The Claimants and the Class Counsel agree that they will take all reasonable actions to cause the Proceeds to be received in cash.
- 5.4 In case of a termination of this Agreement or Conclusion of the Action, the Claimants hereby irrevocably instruct the Class Counsel to repay to the Funders (or cause to be repaid) within seven (7) days of the termination or Conclusion of the Claim, the Undistributed Fund (after payment of or provision for any outstanding Disbursements), to the extent such Undistributed Fund is held by the Class Counsel.
- 5.5 For the avoidance of doubt, this Section 5 shall survive termination of this Agreement.

6 Waterfall

- 6.1 Where the Proceeds consisting of cash are not sufficient to pay the amounts provided for in Paragraph 5 and Section 5 in full, payments from the Litigation Proceeds shall be made in a manner consistent with Paragraph 5 (Order of Priority) hereof.
- 6.2 Upon Conclusion of the Claim in any circumstances or upon termination of the Agreement for whatever reason, the Undistributed Fund will be dealt with in accordance with Section 5.4.
- 6.3 For the avoidance of doubt, this Section 6 shall survive termination of the Agreement.

7 Tax Withholding

- 7.1 All payments to the Funders under this Agreement shall be made without any deduction or withholding for or on account of any Tax. Funders shall indemnify the Claimants and Class Counsel from any direct liability that may arise as a result of making payment without such withholding.
- 7.2 If Claimants or Class Counsel come to believe that applicable laws require such deduction or withholding of Tax, the Class Representatives and/or Class Counsel shall promptly notify the Funders upon coming to believe that they must make such a deduction or withholding.

8 The Fund and the Undistributed Fund

- 8.1 Subject to the satisfaction of the Funding Conditions, the Fund (up to the Fund Limit) will be made available to the Class Counsel, which will hold any amounts received from it separate and apart from its own assets for use solely in accordance with this Agreement.
- 8.2 The Undistributed Fund will be part of the Fund not yet paid to the Class Counsel in accordance with Section 9.1.
- 8.3 Monies distributed in accordance with the provisions in Section 9 below will cease to be in the Undistributed Fund and will instead form part of the Distributed Fund.
- 8.4 In the event such monies are returned to Class Counsel (e.g., refunded by a vendor) such monies shall remain part of the Distributed Fund and shall be applied by Class Counsel to any liabilities within the Permitted Uses, pursuant to the provisions of Section 4.4.

9 Distributed Fund and Drawdown Requests

- 9.1 Monies may be drawn down from the Fund only for Permitted Uses and in accordance with the Budget Plan. Once drawn, such monies shall become part of the Distributed Fund.
- 9.2 Unless Funders agree otherwise, such payments will be made:
 - 9.2.1 Upon service on the Funders by the Class Counsel of a drawdown request in the form set out in Schedule 3 for:
 - (a) Amounts already incurred and invoiced to Class Counsel; and
 - (b) Amounts not yet incurred but invoiced in advance to Class Counsel, subject to the consent of the Funders, such consent not to be unreasonably withheld;
 - 9.2.2 No more than once per calendar month.
- 9.3 The Funders will pay Class Counsel within thirty days (30) days of service of a drawdown request in the form set out in Schedule 3.
- 9.4 If there is a dispute as to what is payable, that dispute will be resolved in accordance with the Disputes Procedure at Section 20 herein.

10 Indemnification

- 10.1 This Agreement shall not give rise to any liability on the part of the Funders to pay any part of the Defendants' fees, costs, expenses or awards, nor shall the Funders be otherwise liable in tort or contract for any obligations of the Claimants to any Defendant in respect of the Claim (or any part of it).

11 Engagement Letters

- 11.1 The Funders have reviewed the Engagement Letters entered into by the Class Counsel with the Claimants. The terms of those Engagement Letters are material to the Funders' decision to enter into this Agreement. The Class Counsel must not seek payment in respect of the Claim and/or Action under any other engagement letter, retainer or other arrangement, whether contractual or otherwise. For the avoidance of doubt, nothing in this Section 11 or elsewhere in this Agreement has the effect of limiting or in any other way altering the Class Counsel's obligations to the Claimants under the rules of Professional Conduct applicable to the Class Counsel or the Class Representatives obligations to the Class.

12 The Funders' Responsibilities

- 12.1 The Funders must not in any way interfere with, meddle in, or try to influence the Claim in any way.
- 12.2 The Funders will observe the confidentiality of all information and documentation relating to the Claim to the extent that the law permits, and subject to the terms of any confidentiality or non-disclosure agreement agreed between the Funders and the Class Representatives or between the Funders and the Class Counsel. For avoidance of doubt, the Funders shall comply with the deemed undertaking envisioned in Rule 30.1.01(3) of the Ontario Rules of Civil Procedure (or envisaged by a substantially similar provision of the rules of professional conduct of another jurisdiction where the Action may be proceeding).
- 12.3 The Funders will not take any steps that cause or are likely to cause the Class Counsel (or any other legal representative instructed by the Claimants) or the Claimants themselves to act in breach of their professional duties and/or duties to the Claimants or Class.
- 12.4 The Funders will not seek to influence the Class Counsel (or any other legal representative instructed by the Claimants) or the Claimants themselves to cede control or conduct of the dispute to the Funders.

13 Claimants' responsibilities, representations and warranties

- 13.1 Conduct of Action and Right to Settle. Subject to the provisions of Section 13.2, Claimants will have the sole and exclusive right to direct the conduct of the Action and to settle the Claims.
- 13.2 Co-operation of Claimants. At all times through the Conclusion of the Action and distribution of the Litigation Proceeds, Claimants will:
- 13.2.1 Co-operate with the Funders including by being reasonably available at the Funders' reasonable request to discuss the operation of the Agreement by phone or email or in person;
- 13.2.2 Use best efforts to prevail in and pursue the Action.
- 13.3 Ongoing Truth and Completeness of Representations and Warranties. Claimants' representations and warranties to the Funders, set out in Section 13.4 below, shall remain true, correct and complete at all times during the term of the Agreement.
- 13.4 Claimants' Representations and Warranties. On the date hereof, each of the Claimants represents and warrants to and covenants in favour of the Funders that:
- 13.4.1 The Claimants have not engaged and will not engage in any acts or conduct or make any material omissions, agreements or arrangements that would jeopardize the Funders' right to receive the Funding Premium in respect of the Action or the Litigation Proceeds;
- 13.4.2 The Claimants will inform the Funders if they are subject to any proceeding in respect of voluntary or involuntary bankruptcy, winding-up, dissolution, liquidation, arrangement or compromise with creditors, or appointment of any Person with powers similar to a receiver;
- 13.4.3 The Claimants believe that the Claims are meritorious;
- 13.4.4 The Claimants have the full capacity to bring the Claims, pursue the Action and direct the Class Counsel; and

13.4.5 The Recitals stated in Paragraph 2 are true and correct.

- 13.5 Not a Solicitor Client Relationship. Nothing herein will create a solicitor-client relationship between Class Counsel and the Funders, and it is understood that Class Counsel's professional obligations are owed exclusively to Claimants.
- 13.6 For the avoidance of doubt, this Section 13 shall survive termination of this Agreement.

14 Class Counsel's responsibilities

- 14.1 Communication of Settlement Offers. Class Counsel will communicate to Funders the amount and terms of any Settlement offers within one (1) business day following receipt of the offer, and advise Funders of all Settlement offers proposed to be made by Claimants.
- 14.2 Co-operation of Class Counsel. At all times through the conclusion of the Action and distribution of all Litigation Proceeds, Class Counsel shall:
- 14.2.1 Maintain a record of all funding provided by the Funders of which they are aware under the Agreement.
- 14.2.2 Unless the Class Counsel obtain court approval to be removed as solicitors of record, such approval to be sought on notice to the Funders, continue to act for Claimants even if the Fund Limit has been reached. If the Litigation Funding Amount is exceeded as specified herein, Lawyers are responsible for all Unfunded Disbursements, which shall be repaid on Conclusion of the Action in accordance with Paragraph 4.3 and Sections 5 & 6.
- 14.2.3 Provide Funders, as and when requested by Funders, with access to a copy of any material document or filing made or obtained in the Action by way of discovery, subpoena or any other lawful means, subject to: (a) Funders' confidentiality obligations under the Agreement, including the deemed undertaking of confidentiality applicable to the Funders pursuant to Section 15 this Agreement, (b) Class Counsel's reasonable judgment with respect to preservation of all legal privileges of Claimants; and (c) compliance with court orders or other legal restrictions on the sharing of information.
- 14.2.4 Keep Funders fully and continually informed of all material developments with respect to the Claim and the Action, no less often than once per month by telephone and once per quarter in writing, unless waived by Funders, subject to the Class Counsel's reasonable judgment with respect to preservation of all legal privileges of Claimants, including:
- (a) Informing Funders of any information, circumstance or change in circumstance likely to affect the Claims or any issue in the Action relating to the viability of the Claims, Action or recoverability of the Litigation Proceeds;
- (b) Providing Funders' advance notice of any applications made to the Court regarding settlement approval; and
- (c) In accordance with Section 14.1 above, informing Funders and the Claimants of all Settlement offers or offers to engage in an alternative dispute resolution process received from any Defendant.
- 14.2.5 Receive all Litigation Proceeds into the Claimant Account and comply with Paragraph 5.4 and Sections 5 & 6.

- 14.3 Class Counsel represents and warrants that as of the date of this Agreement, they have incurred no more than [REDACTED] of Capped Incurred Disbursements in connection with the Claim and/or Action.
- 14.4 For the avoidance of doubt, this Section 14 shall survive termination of this Agreement.

15 Privilege

- 15.1 The Funders agree to take all reasonable steps in respect of any information received from the Claimants or Class Counsel to:
- 15.1.1 Maintain its confidentiality;
 - 15.1.2 Protect and not waive any privilege attaching to it; and
 - 15.1.3 Keep it secure and safe.
- 15.2 The Parties acknowledge and agree that in accordance with Paragraph 6.6, the Funders will be subject to the implied undertaking of confidentiality imposed upon the parties to the Action with respect to any documents or information about the Claims and the Action and the parties to the Action that The Funders may receive as a result of its rights under the Agreement. The Funders will be relieved of the implied undertaking of confidentiality in the same manner and at the same time as Claimants.
- 15.3 The Claimants do not waive or lose any legal professional privilege, without prejudice privilege, attorney-client privilege, attorney work-product doctrine or other privilege or protection attaching to any information provided to the Funders (whether provided by the Class Representatives or by the Class Counsel);
- 15.4 The Claimants, the Class Counsel and the Funders share a common purpose and interest in sharing confidential information for the purpose of pursuing the Claim; and
- 15.5 It is in the mutual interest of the Claimants, the Class Counsel and the Funders that they share information, including confidential information and/or work product subject always to the protection of legal professional privilege, litigation privilege, common interest privilege, without prejudice privilege, attorney-client privilege, attorney work-product doctrine or other privilege or protection attaching to any information they share.

16 Further funding

- 16.1 Class Counsel hereby grant to the Funders the exclusive right of first refusal to provide any additional funding (on appropriate new terms to be agreed in a separate agreement which will include a Funding Premium at least pro rata to the additional funding and on terms no less favourable to the Funders than those set out in this Agreement) that the Claimants may require with respect to the Claim. For avoidance of doubt, this provision shall apply in the event the Court certifies separate classes and requires the appointment of additional, independent legal counsel.
- 16.2 In the event Class Counsel seeks additional funding:
- 16.2.1 Class Counsel must present a request for additional funding in writing to the Funders. Such writing must specify the terms on which such funding is requested.

- 16.2.2 Funders shall have thirty (30) business days to consider such request and inform Class Counsel whether additional funding is approved or rejected. Such approval or rejection shall be communicated in writing.
- 16.3 If Funders reject a request for additional funding that complies with Sections 16.1 & 16.2:
- 16.3.1 Class Counsel may present the terms offered pursuant to Section 16.2 to other funders.
- 16.3.2 Class Counsel shall present the final terms of any agreement regarding other funding to the Funders five (5) business days before such agreement is executed and/or submitted to the Court for approval, whichever comes first.
- 16.3.3 Any additional funders shall sit below the Funder in the distributions specified in Paragraph 5 and Sections 5 & 6, and the Funders' Funding Premium shall be paid in its entirety before any premium is paid to the additional funders.
- 16.4 The foregoing shall not be deemed to impose an obligation on the Funders to provide any additional funding. The Parties agree that the Funders may assign the right of first refusal to provide additional funding to any of their Affiliates.
- 16.5 For the avoidance of doubt, Class Counsel are not permitted to offer to, or accept from, another funder more favourable terms than those offered to the Funders, nor shall Class Counsel accept funding indirectly in a manner that would be prohibited by this section if accepted directly.

17 Termination of this Agreement prior to the Claim Concluding

- 17.1 Grounds for Termination by the Funders. Subject to (i) court approval, such court approval to be sought at an ex parte hearing with the Funders, Class Counsel and the Claimants in attendance, but without the knowledge or attendance of the Defendants, and (ii) Section 17.2, the Funders shall have the right to terminate the Agreement upon ten (10) days' written notice to Claimants from and after the occurrence of any of the following events, so long as such event is continuing at the end of the ten (10) day period:
- 17.1.1 Any breach by Claimants or Counsel of a material provision in the Agreement;
- 17.1.2 The Class Counsel seek to withdraw or do withdraw from the Action;
- 17.1.3 The Class Counsel enter into new engagement letters with the Claimants that increases the contingency fee by any material amount;
- 17.1.4 Any of the Claimants becomes insolvent or becomes subject to any proceeding in respect of voluntary or involuntary bankruptcy, winding-up, dissolution, liquidation, arrangement or compromise with creditors, or appointment of any Person with powers similar to a receiver, and the Court does not grant an order permitting the Claimants to continue in their capacity as representative plaintiffs, or the Court does not grant an order replacing the Claimants with another representative plaintiff;
- 17.1.5 The Funders reasonably consider that the Action is no longer meritorious or commercially viable.
- 17.2 Prerequisites for Termination by the Funders. If the Funders seek to terminate in accordance with Section 17.1:

17.2.1 Prior to the certification decision (including the decision on any appeals therefrom), the consent of Class Counsel shall also be required, unless the grounds for termination arises from the action or inaction of Class Counsel pursuant to Sections 17.1.1 through 17.1.3; and

~~17.2.2~~ If the Funders seek to terminate in accordance with 17.1.5 after the certification decision (including the decision on any appeals therefrom), the Funders must provide Class Counsel and the Claimants with three (3) months' months' written notice, unless the Trial or an Interim Trial is scheduled to start within three (3) months, in which case the Funders must provide written notice no later than sixty (60) days before the start of the Interim Trial or Trial.

17.3 Grounds and Process for Termination by Claimants. Claimants will have the right, in their sole discretion, to terminate the Agreement upon ten (10) days' written notice to The Funders from and after a failure by The Funders to pay any amount due under this Agreement in accordance with the terms of this Agreement, so long as such failure is continuing at the end of the ten (10) day period and such failure to fulfil payment is not the subject of a continuing dispute undertaken by The Funders in good faith in accordance with the provisions of Section 8.

17.4 Consequences of Termination.

17.4.1 If (i) The Funders terminates the Agreement pursuant to any of Sections 17.1.1 to 17.1.3 above, or (ii) If the Agreement is terminated pursuant to Paragraph 6.2 of the Key Terms and no new funding agreement is entered into with Claimants' new lawyers, then the Funders will continue to be entitled to be paid an amount equal to the Distributed Fund and the Funders Premium out of any Litigation Proceeds recovered by Claimants, paid in the order of priority provided for in Paragraph 5 of the Key Terms.

17.4.2 If (i) The Funders, with the requisite consent or consents, terminates the Agreement pursuant to Section 17.1.4, or (ii) if Claimants terminate the Agreement pursuant to Section 17.3, then the Funders will not be entitled to the Funding Premium but will be entitled to be paid an amount equal to the Distributed Fund out of any Litigation Proceeds recovered by Claimants, paid in the order of priority provided for in Paragraph 5 of the Key Terms.

17.4.3 All obligations of the Funders under the Agreement will cease on the date the Termination becomes effective, other than obligations accrued prior to that date. Such accrued obligations include:

- (a) Payment of any outstanding Disbursements payable by the Funders pursuant to the Agreement incurred up to the date the Termination becomes effective; and
- (b) Upon any Termination, the Funders will be entitled, in order to protect its own interest in relation to the Agreement, to keep copies of confidential information provided to it pursuant to the Agreement, subject to the Funders's ongoing obligations pursuant to Section 15.

17.5 Continued Performance. Unless and until the Agreement is terminated under this Section 17, each Party will continue to perform its obligations under the Agreement notwithstanding the existence of any dispute among the Parties.

18 Insolvency

- 18.1 In the event of the Claimant becoming insolvent or bankrupt, the legal rights and obligations accrued under this Agreement may be assigned by the Claimant in whole but not in part to a third party, but only if the Funders consent in writing, such consent not to be unreasonably withheld.

19 Taxes

- 19.1 Each Party will be responsible for the payment of Taxes arising from its receipt of its share of the Litigation Proceeds. Payment to The Funders and the Lawyers will not be reduced by payment of any Taxes owed by any other Party or Person.

20 Disputes Procedure

- 20.1 If there is a dispute between the Parties as to how this Agreement should be applied or construed, then the following procedure will apply.
- 20.2 This Agreement shall be construed in accordance with, and this Agreement and all matters arising out of or relating in any way whatsoever to this Agreement (whether in contract, tort or otherwise) shall be governed by, the law of Ontario. The Parties Irrevocably and unconditionally waive any objection to the venue of any action, suit or proceeding arising out of or relating to this Agreement and the transactions contemplated hereby in the courts of Ontario and hereby further Irrevocably and unconditionally waive and agree not to plead or claim in any such court that any such action, suit or proceeding brought in such court has been brought in an inconvenient forum. Conflict of laws rules that would require the application of the law of any other jurisdiction shall not apply.
- 20.3 Any dispute, controversy or claim arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, except to the extent required to be raised to the Court presiding over the Claim, shall be referred to and finally resolved by arbitration under the ICDR Canada - Canadian Dispute Resolution Procedures (the **ICDR Rules**), which rules are deemed to be incorporated by reference into this Section:
- 20.3.1 The number of arbitrators shall be one;
- 20.3.2 The place of arbitration shall be Toronto;
- 20.3.3 The language to be used in the arbitral proceedings shall be English;
- 20.3.4 Either Party may request an expedited constitution of the arbitral tribunal pursuant to the ICDR Rules; and
- 20.3.5 Any party may present to the tribunal a request for expedited proceedings and the tribunal will have the authority to rule on the opportunity and timetable of such expedited proceedings; and
- 20.3.6 The party invoking this Section shall bear all reasonable and proper costs incurred including the legal fees and disbursements and the arbitrator's fees, unless the dispute is resolved in that party's favor. In the event such costs are assessed to the Claimants, repayment shall be made from the Litigation Proceeds prior to any other distributions.

21 Confidentiality and announcements

Except to the extent required by law or any legal or regulatory authority of competent jurisdiction:

- 21.1 The Parties shall not at any time disclose to any person (other than their professional advisers) the terms of this Agreement or any trade secret or other confidential information relating to the Funders, or make any use of such information other than to the extent necessary for the purpose of exercising or performing their rights and obligations under this Agreement; and
- 21.2 No Party shall make, or permit any person to make, any public announcement, communication or circular concerning this Agreement without the prior written consent of the other Party.
- 21.3 For avoidance of doubt, nothing in this Section 21 shall prevent the Parties from disclosing this agreement to the Court, provided they seek all available protections from further disclosure.
- 21.4 For the avoidance of doubt, this Section shall survive termination of this Agreement.

22 Miscellaneous

- 22.1 In the event that any term or condition or provision of this Agreement is held to be a violation of any applicable law or statute or regulation, the same shall be deemed to be modified as to comply with applicable law or statute or regulation or deleted from this Agreement entirely if necessary, and shall be of no force and effect and this Agreement shall remain in full force and effect as if such term and condition or provision had not originally been contained in this Agreement.
- 22.2 The provisions set out in this Agreement must be read in a common-sense way which is not overly restrictive.
- 22.3 To be effective (and unless the Court orders otherwise), any variation of or supplement to this Agreement must be made in writing by all Parties.
- 22.4 Each Party shall do or cause to be done all acts and things (including obtaining consents and agreements from other persons or each other) and execute, or cause to be executed, all documents as may reasonably be required to give full effect to this Agreement.
- 22.5 Where appropriate, each Party will give, or cause to be given, such notice of the matters set out in this Agreement that the law may require be given to other persons, including, without limitation, the Court, any competent Tribunal and/or the Defendants.
- 22.6 Other than where the contrary is provided for below, this Agreement (along with any exhibits, appendices, addendums, schedules, and amendments hereto) encompasses the entire agreement of the Parties. Subject to what is set out below, it supersedes all previous understandings and agreements between the Parties, whether oral or written. The Parties hereby acknowledge and represent that in making this Agreement they have not relied on any representation, assertion, guarantee, warranty, collateral contract or other assurance, other than those set out in this Agreement; this includes such representation made by or on behalf of any party or any other person or entity whatsoever. This provision relates solely to this Agreement and does not have a bearing on the

professional relationship between the Parties, nor does it limit the points which may be raised on a detailed assessment concerning the reasonableness (or otherwise) of any Costs incurred, nor does it limit the effect of legislation, delegated legislation, or practice direction.

23 Relationship of the Parties

- 23.1 The Parties agree that this Agreement is not intended to create and does not create any joint-venture, partnership or any other type of affiliation between the Parties, and does not create a joint interest in the Claim.
- 23.2 The Parties agree that neither this Agreement nor any other agreement between or among them is intended to create a partnership between any of the Parties for U.S. federal income tax purposes, and agree not to take any position inconsistent with this agreement unless required to do so by applicable law.

SCHEDULE 1
Budget Plan

SCHEDULE 2
Funding Conditions

- 1) The Class Representatives and Class Counsel will obtain and disclose to the Funder:
 - a. A Litigation Funding Agreement Approval order from the Federal Court of Canada approving this Agreement as executed and making it binding on all Claimants, unless they exercise their rights to "opt out" of a class.
 - b. an original copy of this Agreement duly executed by all Parties.
 - c. The Budget Plan in a final form agreed by the Funders; and
 - d. Executed copies of the Engagement Letters.

SCHEDULE 3
Form of Drawdown Request

VANNIN CAPITAL LLC
295 Madison Avenue, Suite 1215
New York, New York 10017

[DATE]

Dear Sirs

Facility Agreement dated [DATE] (the "**Funding Agreement**")

1 We wish to draw down sums under the Funding Agreement in accordance with Sections 8 and 9 on the following terms:

Proposed Utilisation Date: [DATE]
Total Amount: CAD \$[AMOUNT]

2 The amounts claimed in this Drawdown Request are comprised of the following:

[To be updated with final categories of disbursements]

-
-
-
-
-
-

Total Amount: \$[•]

3 The Total Amount should be credited to:

[ACCOUNT NAME]

[BANK NAME]

[ADDRESS]

[IBAN NUMBER]

Reference: [DESCRIPTION]

4 This Drawdown Request is irrevocable.

Yours faithfully

.....

[NAME]