

## NOTICE OF PROPOSED SETTLEMENT

**TO: ALL CLASS MEMBERS IN *FANTL v IVARI* – CAN-AM FUND REPLICATION CLASS ACTION  
COURT FILE NO.: 06-CV-306061-CP**

This Notice is directed to all Class Members in this certified class proceeding who have not opted-out of the class action. The Plaintiff and the Defendant, ivari, formerly Transamerica Life Canada (together, the “Parties”) have agreed to settle this class action for the all-inclusive amount of \$7 million CAD. The settlement was reached following years of litigation and subsequent negotiations between the parties with the assistance of a retired judge (mediator).

This Notice is published by Order of the Ontario Superior Court of Justice and explains the proposed settlement and how Class Members may comment (in support of or, in opposition to) the proposed settlement. The agreement to settle this matter does not imply any liability, wrongdoing, or fault on the part of ivari, none of the allegations against ivari have been proven and ivari expressly denies any liability, wrongdoing, or fault.

### **History of this Class Proceeding**

The Plaintiff’s Statement of Claim alleges that the Defendant made commitments or representations related to the Can-Am Fund replicating the performance of the S&P 500 Total Return Index on a best efforts basis. The Can-Am fund was available as an investment option through a number of different insurance policies offered by the Defendant. The alleged commitments and representations were either: i) express contractual commitments in the Class Members’ written insurance contracts or (“Contract Class Members”); or ii) representations (not contractual promises) contained in the “summary information folders” that were provided to Class Members in connection with their application for their insurance contract (Class Members with for whom the alleged commitments and representations are found only in the summary information folders are “Misrepresentation Class Members”). The text of the court-ordered class definition is available for review at: [www.canamfundclassaction.ca](http://www.canamfundclassaction.ca).

Following a series of court decisions and appeals issued between 2013 and 2017 this action was certified (or approved to proceed) as a class action with Joseph Fantl as the representative plaintiff.

The Class was notified of the certification of this class action in 2019 and given the opportunity to exclude themselves (opt-out) from this class action. Anyone remaining in this class action following the close of the opt-out period agreed to be bound by any decision at trial or court-approved settlement in this action.

Following several years of additional litigation, including an extensive discovery process and a mediation before a retired judge, the Parties reached the proposed settlement summarized below.

## **The Proposed Settlement**

Under the proposed Settlement, the Defendant ivari has agreed to make an all-inclusive settlement payment of CAD \$7 million. Compensation to Class Members (the “Net Settlement Fund”) will be paid from the net amount of the \$7 million sum remaining after payment of Class Counsel’s legal fees and incurred expenses, settlement administration expenses, and payments owing the Class Proceeding Fund (including the Fund’s 10% statutory levy).

In exchange for its \$7 million payment, ivari will receive a full release of all claims and any potential claims that the more than 71,000 Class Members may have against it relating to their investments in the Can-Am Fund. The Net Settlement Fund will be distributed among the Class Members pursuant to the Distribution Protocol (defined below). If approved, this settlement will be binding on all Class Members who have not opted out of this class action, regardless of whether or not that Class Member received any share of the Net Settlement Fund pursuant to the Distribution Protocol.

Subject to the Court’s approval, the Parties have agreed to the following protocol (“Distribution Protocol”) to distribute the Net Settlement Fund. If this settlement is approved:

1. No Class Member shall be required to make a claim or provide evidence regarding their individual allocation. Instead, each relative share of the Net Settlement Fund allocated to a qualifying Class Member shall be calculated on the basis of that Class Member’s Can-Am Fund transaction data that is already in the possession of the Defendant;
2. An outside financial services and consulting firm has been retained to calculate each Class Member’s individual share of the Net Settlement Fund;
3. Individual Class Member allocations are based on a comparison of the returns of their investments in the Can-Am Fund to the returns of the S&P 500 Total Return Index between June 1, 2000 through July 31, 2019. Individuals who divested from the Can-Am Fund prior to June 1, 2000 or invested after July 31, 2019 will not be entitled to a share of the Net Settlement Fund;
4. The difference between a Class Member’s Can-Am Fund returns and the S&P 500 Total Return Index within that time period is used to generate a notional amount specific to that Class Member;
5. The statutory pre-judgement interest of 3.3% is then added to this notional amount for each Class Member from the time of their divestment from the Can-Am Fund or July 31, 2019 (whichever is earlier) to May 3, 2023;
6. Class Members whose insurance contracts did not contain express best efforts language (i.e. Misrepresentation Class Members) will have their notional amount reduced by 50% to account for the greater risks and lower likelihood of recovery on the misrepresentation claims if the case had proceeded forward on the merits. The misrepresentation claims and damages resulting therefrom would arguably have been more difficult to establish than the claims and damages based on the breach of contract claims;
7. Class Members whose insurance contracts contained express best efforts language (i.e. Contract Class Members) will not have their notional amount reduced;
8. The notional amount of each Class Member as calculated and potentially reduced as per above will in turn be expressed as a percentage of the sum of all notional amounts and

then multiplied by the Net Settlement Fund to determine the initial allocation of each Class Member.

9. Class Members whose initial allocation amounts to \$50 or less shall not receive any compensation from the Net Settlement Fund, and \$50 or less amounts otherwise allocated to those Class Members shall be distributed to the balance of the Class on the basis of their proportionate share;
10. It is anticipated that approximately 17,000 Class Members will have an initial allocation of more than \$50 and will receive a payment. For those Class Members whose initial allocation pursuant to the Distribution Protocol is greater than \$50, the estimated median payout amount is approximately \$130.
11. The Funds from any uncashed compensation cheques will be pooled and, 13 months following the first distribution of settlement funds, will be paid out in a second distribution to those Class Members who cashed cheques during the first distribution, with each such Class Member receiving a proportionate percentage of the uncashed compensation calculated by dividing the value of their cashed cheque from the initial distribution by the sum total value of all cashed cheques from the initial distribution; and,
12. Any Settlement Funds remaining following the second distribution will not be returned to ivari but will be donated to charity.

The complete text of the proposed Distribution Protocol can be reviewed at: [www.canamfundclassaction.ca](http://www.canamfundclassaction.ca).

The Representative Plaintiff and Class Counsel strongly recommend the settlement. In their opinion, when viewed against the alternative of continued litigation and the delay and uncertain outcome of same, the Settlement is fair, reasonable and in the best interests of the class. The Plaintiff's full submissions in support of the settlement will be set out in materials to be filed with the Court and made available for your review through a posting or link on [www.royoconnor.ca](http://www.royoconnor.ca) in advance of the settlement approving hearing (as described below). A full copy of the Settlement Agreement is available now for your review through the same posting or link.

### **Motion for Settlement Approval**

The settlement is subject to the approval of the Court, which will decide whether the settlement is fair, reasonable, and in the best interests of Class Members. The Court will hold a hearing, via Zoom, to decide whether to approve the settlement on December 11, 2023.

The Court will decide whether to approve or reject the Settlement as proposed. It does not have the authority to unilaterally change the material terms of the Settlement. If the Court does not approve the Settlement, the lawsuit will continue. If the lawsuit continues, it may take several more years to complete the pre-trial procedures, trial, and possible appeals. The Class may or may not be successful at trial and, even if successful, the trial of the common issues would not result in payments of any compensation to Class Members. Any compensation available to Class Members would need to be decided in a subsequent individual issues phase of this proceeding after the common issues trial. Any compensation awarded to Class Members following the

individual issues phase would not necessarily be greater than, and might possibly be less than, the compensation available under this proposed Settlement.

### **How to Comment on the Proposed Settlement**

Class Members may, but are not required to, attend the Settlement Approval hearing. Please contact Class Counsel as set out below for instructions on how to access the Zoom hearing.

Class Members are also entitled, but not obligated, to express their opinions about the settlement and whether it should be approved. If you wish to make a submission to the Court supporting or objecting to the proposed Settlement, you must send the submissions in writing (by mail or email) to Class Counsel, at the address below, and ensure that they are received no later than November 30, 2023. Please note that Class Counsel will provide all submissions to the Court and the Defendant in advance of the hearing, and the submissions may be referred to publicly. The written submissions should include:

1. Your name, address, telephone number, and e-mail address;
2. A brief statement of the reasons that you support or oppose the proposed settlement terms; and,
3. Whether you plan to attend the virtual (Zoom) settlement approval hearing.

### **Updating Class Member Contact Information**

In order to communicate with you better and, in the event this Settlement is approved, and to assist in the mail-out of cheques, Class Members are requested to confirm or update their contact information by sending an email to the proposed settlement administrator Epiq Class Action Services Canada, Inc. at [info@canamfundclassaction.ca](mailto:info@canamfundclassaction.ca) or through the change of address link or portal at [www.canamfundclassaction.ca](http://www.canamfundclassaction.ca).

### **Class Counsel's Motion for Fee Approval**

The law firm of **Roy O'Connor LLP** is Class Counsel and has represented the members of this Class in this action for the last 11 years of the litigation. Roy O'Connor LLP can be reached as set out below.

Class members will not have to personally pay for the legal work done or for the associated expenses incurred over the years since this case began. The contingency fee agreement with Class Counsel sets out that Class Counsel will ask the Court to approve legal fees of 30% of any settlement funds, plus their disbursements and applicable taxes.

Approval of the Settlement Agreement will not be contingent upon the court approval of legal fees.

For clarity, as explained above, any approved legal fees and disbursements (and related taxes) will be paid out of the \$7 million settlement fund.

In this case, the Plaintiff has received financial support from the Class Proceedings Fund (the "Fund"), which is a body created by statute and designed to allow access to the courts through

class actions in Ontario. The Fund agreed to reimburse the Plaintiff for some expenses incurred in pursuing this action. The Fund would also have been responsible for costs that may have been awarded against the Plaintiff in this case. In exchange, the Fund is entitled to recover, from any court award or settlement in favour of the Class Members, the amounts it has reimbursed the Plaintiff for expenses as well as 10% of any amounts payable to Class Members.

### **Interpretation**

This notice only contains a general summary of some of the terms of the Settlement Agreement. As stated above, a full copy of the Settlement Agreement can be found at [www.canamfundclassaction.ca](http://www.canamfundclassaction.ca). If there is a conflict between the provisions of this notice and the Settlement Agreement, the terms of the Settlement Agreement shall prevail.

### **More Information**

For more information about the class proceeding lawsuit, you may contact:

**ROY O'CONNOR LLP**

Barristers

Attn: James Katsuras

1920 Yonge Street Suite 300

Toronto, Ontario

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Email: [info@royoconnor.ca](mailto:info@royoconnor.ca)

Tel: (416) 362-1989

Web: [www.canamfundclassaction.ca](http://www.canamfundclassaction.ca)

**PLEASE DO NOT CALL IVARI, THE COURTHOUSE, OR THE REGISTRAR OF THE COURT ABOUT THIS ACTION. THEY WILL NOT BE ABLE TO ANSWER YOUR QUESTIONS ABOUT THE LAWSUIT OR SETTLEMENT.**

This notice is published pursuant to the *Ontario Class Proceedings Act* and was approved by the Court.