Court File No. 07-CV-334113-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

DARA FRESCO

Plaintiff

and

CANADIAN IMPERIAL BANK OF COMMERCE

Defendant

Proceeding under the *Class Proceedings Act, 1992*

PLAINTIFF'S FACTUM

(Settlement Approval)
(returnable March 3, 2023)

February 24, 2023

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PLAINTIFF'S FACTUM
(SETTLEMENT APPROVAL)

PART I - OVERVIEW

1. This is a motion for an order approving the settlement reached between the Plaintiff, Dara Fresco ("**Fresco**") and the Defendant, Canadian Imperial Bank of Commerce ("**CIBC**") dated December 28, 2022 (the "**Settlement Agreement**"). The aggregate amount of the settlement is $153 million and provides for compensation to more than 31,000 current and former "front-line" CIBC employees who were employed by CIBC in Canada from 1993-2009. The distribution process proposed, which is the subject of a separate motion, is a simplified and user-friendly process that will only require Class Members to confirm some basic information (such as social insurance number and tenure) to receive their share of the settlement. The settlement funds will be distributed *pro rata* according to a formula. There is no reversion to CIBC.

2. If approved by the Court, the Settlement Agreement will resolve over 15 years of litigation and avoid the future risks and delays of a contested damages hearing, potential individual issues, and inevitable appeals.

3. The test for settlement approval is whether the settlement is fair, reasonable, and in the best interests of the class. In making this determination, courts look at the result achieved for the class and determine whether it falls within the "zone of reasonableness." This involves measuring the settlement against the risk, delay and potential return of going forward in a contested process. Other relevant factors include, but are not limited to, the amount of investigation or discovery obtained prior to settlement, the experience of Class Counsel, the process that led to the settlement, and the objections, if any, of Class Members.

4. Class Counsel respectfully submit that, on each of these bases, this settlement clearly passes the test. The settlement was reached after more than 15 years of active litigation. It follows a heavily-contested certification process; the creation of new procedural and substantive law in systemic breach of employment contract cases; exhaustive factual investigation and discovery in respect of both liability and damages; several merits decisions in favour of the Plaintiff; numerous appeals; extensive expert analysis of electronic time-stamped data in the context of aggregate damages calculations; a multi-day mediation before a deeply experienced mediator with labour and employment expertise, and intense arms'-length settlement negotiations between Class Counsel and Defendant's Counsel.

5. The settlement provides significant compensation to Class Members today, rather than years from now following a contested damages process. In Class Counsel's opinion, the quantum of this settlement is an excellent result that avoids the risks and delays of continued litigation, proposes a simple administration process that will obviate the need for contested individual claims, and enables claims to be made by all Class Members, even those whose claims might otherwise be barred by limitations in a contested proceeding.

6. The Plaintiff respectfully requests that the Court approve the settlement agreement.

PART II - FACTS

7. To appreciate the depth of understanding of this case that underlies Class Counsel's recommendation that this settlement be approved, it is helpful to set out the history and progression of this case from its initiation in the spring of 2007 to the signing of the Settlement Agreement in late 2022.

A. Case Investigation

8. Ms. Fresco, a CIBC employee, contacted Sack Goldblatt Mitchell LLP ("SGM"), the predecessor firm to Goldblatt Partners LLP, to discuss her experience of uncompensated overtime at CIBC.[1]

9. SGM met with Ms. Fresco and began investigating her allegations. As part of the investigation, SGM reviewed CIBC's overtime policy and related documents. SGM also spoke with other potential witnesses and formed the opinion that the case had sufficient factual and legal merit to warrant proceeding further. At the conclusion of their research, SGM estimated that the case could be very large, and that the class would consist of at least 10,000 persons who worked at more than 1,000 branches in every province and territory in Canada.[2]

10. SGM concluded that the case had merit, but also determined that the case would be extremely risky and challenging. SGM decided to partner with another firm that specialized in class actions – the predecessor to Roy O'Connor LLP. Subsequently, in May of 2013, Mr. Sokolov joined Sotos LLP, where he continued his role and contributions as one of the co-counsel for the Class.[3]

[1] Affidavit of Jody Brown, affirmed February 23, 2023, ("**Brown Affidavit**"), para. 6.
[2] Brown Affidavit, para. 7.
[3] Brown Affidavit, paras. 8-12.

B. Commencement of the Action

11. In June 2007, the claim was commenced on behalf of all current and former CIBC front-line employees at retail branches who worked unpaid overtime. Ms. Fresco agreed to act as Representative Plaintiff. At the time, Ms. Fresco was still an employee of CIBC.[4]

12. The Statement of Claim alleged systemic breaches of the *Canada Labour Code* by failing to pay overtime to many "front-line" employees. The claim sought some $600 million in general, punitive, aggravated, and exemplary damages.[5]

13. A companion action was also started in the Superior Court of Quebec in June 2007 (*Sarah Gaudet v. Canadian Imperial Bank of Commerce*). All putative Class Members in *Gaudet* are also Class Members in this action. The Quebec action has not progressed past the pleading stage and has been stayed since October 2007 pending resolution of this action. Periodic updates on the progress of this action were provided to the Quebec court. If this Court approves the settlement agreement, the parties will seek an order from the Quebec Court recognizing the settlement and discontinuing the Quebec action. Alternatively, if required by the Quebec Court, a separate settlement approval motion will be brought in that case.[6]

C. Certification of the Action

14. Class Counsel served a certification record in November 2007, consisting of 12 affidavits from Class Members across the country, in addition to Ms. Fresco.[7] These affidavits described Class Members' experiences of uncompensated overtime and identified alleged systemic breaches relating to overtime compensation at the branch level. The Plaintiff's record also included expert evidence regarding (i) uncompensated overtime in the financial services sector, (ii) deficiencies in adjudicating

[4] Brown Affidavit, paras. 13-15.
[5] *Fresco v. Canadian Imperial Bank of Commerce,* 2009 CanLII 31177 (ON SC).
[6] Brown Affidavit, para. 15.
[7] *Fresco v. Canadian Imperial Bank of Commerce*, 2010 ONSC 1036, para. 4.

individual employment claims under the *Canada Labour Code*, and (iii) a proposed methodology for calculating aggregate damages.[8]

15. CIBC delivered its responding record in May 2008, consisting of some 56 factual witnesses who, in detailed affidavits, disputed that unpaid overtime occurred and the alleged commonality of the overtime practices. In addition, CIBC engaged expert witnesses who filed extensive reports disputing the Plaintiff's expert evidence.[9]

16. Following the Plaintiff's delivery of reply materials, dozens of cross-examinations took place throughout Canada and in the U.S.[10]

17. The final certification record of the parties totalled thousands of pages. A five-day certification hearing occurred in December 2008 before Justice Lax. In June 2009, the Plaintiff's certification motion was dismissed. Justice Lax concluded that (a) it was plain and obvious that CIBC's overtime policy and its pre-approval requirement were lawful, and (b) there was no evidence of the existence of the alleged systemic breaches. Rather, Lax J. found that any instances of uncompensated overtime were hopelessly individualistic.[11]

18. In Justice Lax's subsequent decision awarding costs to CIBC, she dismissed submissions that the matter was one of public interest. Justice Lax found that, because of the scope and breadth of the case, CIBC was required to investigate the facts and circumstances at a large number of branches across Canada. Her Honour also noted that the allegations against CIBC "attracted widespread media attention … [and] raised significant reputational and financial issues for the bank that required a fulsome response." As a result, and in order to respond to the nature of the Plaintiff's case, CIBC incurred fees on the certification motion of more than $3.9 million, exclusive of GST. Class Counsel's

[8] Brown Affidavit, para. 17,
[9] Brown Affidavit, para. 18.
[10] Brown Affidavit, para. 18.
[11] Brown Affidavit, paras. 19-20.

docketed time for the same period was approximately $3.4 million. These fees related to only the first year and a half of a lawsuit that would continue for another 14 years.[12]

D. Appeals of certification

19. The Plaintiff's appeal as of right to the Divisional Court was dismissed by a majority of the Court in September 2010 (Justice Sachs dissenting).[13]

20. The Plaintiff sought and obtained leave to appeal to the Ontario Court of Appeal. The appeal was heard along with the appeals in *Fulawka v. Bank of Nova Scotia*, a similar case in which the Court certified a claim alleging unpaid overtime, and another proposed class action brought by employees regulated under the *Canada Labour Code* relating to allegations of unpaid overtime and employee misclassification, *McCracken v. Canadian National Railway*. The appeals were heard over three days at the end of November and beginning of December 2011. The *McCracken* appeal was decided against the plaintiff; the *Fresco* and *Fulawka* appeals were decided substantially in favour of the plaintiffs,[14] but with one important exception. While the Court of Appeal certified eight common issues, it rejected the plaintiffs' request to certify aggregate damages as a common issue.[15]

21. The refusal to certify an aggregate damages common issue created a very serious hurdle for the Class going forward. It meant that, even if the Plaintiff were to be successful on the certified issues relating to liability (Common Issues 1-5), the case could become ensnared in individual assessments. In such a process, the participation rate would likely be low: many, if not most Class Members would be reluctant to participate in and recovery would therefore be modest. Moreover, the Court of Appeal held that limitations defences, which the Bank could assert, would have to be addressed at the individual issues stage of the proceeding.[16]

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[12] Brown Affidavit, para. 21.
[13] Brown Affidavit, paras. 22-23; *Fresco v. Canadian Imperial Bank of Commerce*, 2010 ONSC 4274 (CanLII).
[14] *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444; *Fulawka v. Bank of Nova Scotia,* 2012 ONCA 443.
[15] Brown Affidavit, paras. 24-25, 27.
[16] Brown Affidavit, paras. 28-29.

22. Notwithstanding these hurdles, the Plaintiff and Class Counsel were not deterred and pressed forward vigorously with the case. CIBC applied for leave to appeal to the Supreme Court of Canada. The Plaintiff made a conditional application for leave to cross appeal on the issue of aggregate damages. The Supreme Court of Canada dismissed both applications in March 2013.[17]

E. Documentary Production

23. On February 27, 2014, CIBC delivered its Statement of Defence.[18]

24. Thereafter, CIBC delivered its productions starting in February 2014. The parties disagreed about the appropriate scope of production and whether CIBC had produced all documents that were relevant to the certified common issues. In June 2015, the Plaintiff brought the first of several production motions. The motion sought a sworn affidavit of documents and a detailed Schedule "B". As described below, the document production disputes that followed were protracted, and would not fully be resolved until 2019.[19]

F. Plaintiff's Summary Judgment Motion

25. By July 2015, CIBC's position was that it had produced all non-privileged documents relevant to the certified common issues. CIBC indicated in a June 17, 2014 memorandum, provided to Class Counsel, that it engaged in a three-tiered document collection, review and production process, including: (a) a nation-wide branch level review for potentially relevant hard-copy documents within the branches or electronic copies of documents stored on branch computers; (b) a search for potentially-relevant hard-copy and electronic documents located at CIBC's head office; and (c) a search of various key custodians' potentially-relevant email records, based on search terms identified in the memorandum.[20]

[17] Brown Affidavit, paras. 30-31.
[18] Brown Affidavit, para. 32.
[19] Brown Affidavit, paras. 33-34.
[20] Brown Affidavit, para. 35.

26. Class counsel carefully reviewed CIBC's productions and concluded that a summary judgment motion could potentially be an effective and appropriate means to resolve the issues, given the systemic issues and basis for the claim. The Plaintiff served a notice of motion for summary judgment on all the common issues in October 2015.[21]

27. Even though the Court of Appeal had refused to certify aggregate damages as a common issue, Class Counsel continued to press the issue and sought an order to certify aggregate damages based on a newly proposed expert methodology involving analyzing time-stamped electronic data generated by various computer applications used by CIBC employees. At that time, the proposed methodology had never been considered, let alone accepted, by any court in Canada. There was further risk on this point because the Court of Appeal had originally refused to certify aggregate damages, leading to the potential for a *res judicata* argument (which was indeed ultimately advanced by CIBC).[22]

28. The parties disagreed about whether and how a summary judgment motion could properly be brought prior to oral discoveries, and whether it ought to be heard by the case management judge. At a subsequent case management conference, the Court agreed to schedule a summary judgment hearing for September 2017.[23]

29. The Plaintiff served her initial five-volume summary judgment motion record in July 2016. The record included CIBC's internal and systemic documents and two lengthy expert reports.[24]

30. In April 2017, a few days before it was due to deliver its responding motion record, CIBC produced additional documents relating to its employee engagement surveys. These documents included excerpts from the company-wide employee engagement surveys that contained the anonymous employee responses to an open-ended prompt question at the end of the survey that

[21] Brown Affidavit, para. 36.
[22] Brown Affidavit, para. 37.
[23] Brown Affidavit, para. 38.
[24] Brown Affidavit, para. 39.

included the word "overtime" or the French equivalent. CIBC subsequently explained that, because neither these surveys (nor the open-ended prompt question), were directed to issues of hours of work or overtime, and because the documents were maintained by a custodian who had no involvement in hours of work or overtime issues, the documents had not been identified for production.[25]

31. CIBC's responding record on summary judgment was eight volumes. It included affidavits from dozens of fact witnesses disputing the Plaintiff's allegations of systemic overtime issues and providing what CIBC asserted was context for the documents contained in the Plaintiff's motion record, as well as expert evidence in response to the Plaintiff's experts. Also included in CIBC's record was evidence disclosing that certain records containing time-stamped data had been inadvertently lost.[26]

G. Adjournment of the Summary Judgment Motion and Documentary Production Motions

32. As a result of these developments, the Plaintiff sought to adjourn the summary judgment motion.[27] As noted above, a series of document production motions were then fought, which ultimately resulted in the production of hundreds of additional documents. The details of these motions are described below:

(a) In May, 2017, the Plaintiff served a notice of motion seeking production of additional documents and related relief. CIBC subsequently delivered hundreds of additional documents relating to the employment engagement surveys, including all anonymous employee comments made in response to the open-ended prompt question in the enterprise-wide surveys. Prior to this time, CIBC had delivered the comments that referred to overtime or the French equivalent of the term. The further documents also included documents that referred to "themes" from the employee engagement surveys conducted in 2001, 2002 and 2007.[28]

[25] Brown Affidavit, para. 40.
[26] Brown Affidavit, para. 41.
[27] Brown Affidavit, para. 42.
[28] Brown Affidavit, paras. 43-44.

(b) The Plaintiff then renewed its production motion and sought, among other things, a further and better affidavit of documents and leave to cross-examine CIBC on its affidavit of documents.[29]

(c) The parties appeared before Justice Glustein to argue this motion and it was resolved without any further document production being made by CIBC. CIBC agreed to permit cross-examination on its affidavit of documents, which occurred in January 2018, giving rise to numerous undertakings and refusals.[30]

(d) Subsequently, CIBC advised that the 2007 theme documents it had produced were subject to a claim of privilege. A contested motion was argued in May 2019, at which time the privilege claims were rejected. CIBC did not appeal the privilege decision.[31]

33. In August 2019, CIBC served its own cross-motion for summary judgment, seeking an order that the Common Issues relating to liability be resolved in its favour by way of summary judgment.[32]

H. Summary Judgment Record

34. The record filed on the summary judgment motion consisted of more than 8,000 pages of evidence. All experts and many lay affiants were cross-examined. The record contained 21 transcripts from cross-examinations conducted for the certification motion.[33]

35. The parties filed extensive factums. The Plaintiff's factums consisted of 122 pages, and CIBC's factum consisted of 177 pages plus 167 pages of appendices. CIBC's position was that the Plaintiff could not establish CIBC's liability for Common Issues 1-5 on a balance of probabilities and that the Plaintiff was not entitled to any of the remedies she sought.[34]

[29] Brown Affidavit, para. 45.
[30] Brown Affidavit, para. 45.
[31] Brown Affidavit, para. 46.
[32] Brown Affidavit, para. 48.
[33] Brown Affidavit, para. 49.
[34] Brown Affidavit, para. 50.

I. Summary Judgment Hearing – Phase 1

36. The summary judgment hearing occurred in December 2019. This Court released its decision on the liability issues (Common Issues 1-5) in March 2020, finding in favour of the Plaintiff.[35] This Court found that, among other things:

(a) CIBC's overtime policies contravened the *Code* and its approval requirement was unlawful;

(b) CIBC breached its duty to record actual hours worked;

(c) the *Canada Labour Code* imposed a duty on CIBC to "prevent" unpaid overtime and CIBC's overtime policies breached this duty;

(d) some Class Members had worked uncompensated overtime hours during the 16-year class period of *February* 1, 1993 to June 18, 2009; and

(e) the Bank had breached its employment contracts with the Class but had not breached its contractual duty of good faith and did not lie or knowingly mislead Class Members.[36]

J. Summary Judgment Hearing – Phase 2

37. A subsequent hearing was held to address common issues on remedies (Common Issues 6-8). The parties filed additional submissions: 51 pages by the plaintiff and 35 pages by CIBC. The Court decided these issues in August 2020.[37] The Court dismissed the Plaintiff's claims for punitive damages, restitution and unjust enrichment, finding that the remedies available to the Plaintiff included declarations that CIBC's policies were unlawful and that CIBC breached its employment contracts with Class Members, as well as damages for breach of contract. The Court also certified the issue of

[35] *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 75 (CanLII) ["**Liability Decision**"].
[36] Brown Affidavit, para. 52.
[37] *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 4288 (CanLII) ["**Remedies Decision**"].

whether damages could be determined in the aggregate as an additional common issue (Common Issue 9).[38]

38. While the certification of aggregate damages was a very significant victory, particularly since the Court of Appeal had denied certification of aggregate damages in 2012, there was no guarantee that any request for aggregate damages would be successful on the merits. As this Court noted, CIBC would have "ample opportunity" to challenge any aspect of the plaintiff's execution of the proposed time-stamped data methodology:[39]

> [44] To repeat, the defendant bank will have ample opportunity to challenge the reliability of the "time-stamped data" approach, and if there are evidentiary gaps, to contest the statistical integrity of the suggested "extrapolation" techniques or the legality of random sampling. These arguments can be made at the so-called "second step" – when the aggregate damages question is answered on the merits, the proposed methodology is actually applied to the gathered evidence and overall reliability and fairness is fully considered.

39. In its Liability Decision, this Court had also observed that, even if liability was established, the Plaintiff will still face "significant challenges" with respect to remedies and damages.[40]

K. Summary Judgment Motion – Phase 3

40. In the last phase of the summary judgment motion, the Court adjudicated CIBC's further motion seeking a class-wide order regarding its limitations defence and a constitutional declaration with respect to extra-territorial tolling of the *Class Proceedings Act*. This motion was also separately briefed, including the filing of 40 additional pages of factums by CIBC and 40 pages by the Plaintiff.[41]

41. In reasons dated October 21, 2020,[42] this Court refused to grant a class-wide order limiting damages for all Class Members to the provincial presumptive limitation period. This Court held that, while the Class Members would have known if they had been paid for overtime when they received their bi-weekly pay, there was insufficient evidence on the record to address questions of individual

[38] Brown Affidavit, paras. 53-54.
[39] Brown Affidavit, para. 55.
[40] Brown Affidavit, para. 56; Liability Decision, para. 11.
[41] Brown Affidavit, para. 56.
[42] *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 6098 (CanLII) ["**Limitations Decision**"]

discoverability. This Court also held that CIBC's request for the constitutional declaration was premature and dismissed the Plaintiff's request for a class-wide order that all application limitation periods be suspended. In the result, this Court held that CIBC's limitations defences had to be determined on an individual basis.[43]

42. While the Plaintiff was largely successful on summary judgment, it was unclear what damages, if any, would ultimately be awarded. In particular, the judgments of the Court were clear that:

(a) damages related to the presumptively statute-barred period would be subject to limitations defences that would have to be determined individually;

(b) the Plaintiff's claim for aggregate damages would have to be proven and determined on its merits at a subsequent hearing;

(c) the Bank's defence to aggregate damages (including its position that the methodology was not reliable because the time-stamped data was not a reliable proxy for hours worked) would be considered at that time; and

(d) the Bank's motion for a constitutional declaration could be brought again at the individual issues stage of the proceeding.[44]

L. CIBC's Appeals

43. CIBC appealed the three summary judgment decisions to the Court of Appeal.[45]

44. The Plaintiff brought a preliminary motion to quash pertaining to limitations and aggregate damages on the basis that the appeals relating to these issues were interlocutory, not final orders, which required leave from the Divisional Court. The motion was dismissed.[46]

[43] Brown Affidavit, para. 58.
[44] Brown Affidavit, para. 59.
[45] Brown Affidavit, para. 61.
[46] Brown Affidavit, para. 62; *Fresco v. Canadian Imperial Bank of Commerce*, 2021 ONCA 46 (CanLII).

45. The Court of Appeal authorized long factums and the parties each filed 65-page appeal factums. CIBC's three appeals were heard concurrently by the Court of Appeal over two days in September 2021. In February 2022, the Court of Appeal dismissed the appeals.[47] This meant that, subject to a potential application for leave to appeal to the Supreme Court of Canada by CIBC, the liability issues were finally decided in the Plaintiff's favour, and the Plaintiff was permitted to proceed to a hearing on aggregate damages.

46. The Court of Appeal agreed with this Court that CIBC's limitations defences needed to be determined in the context of individual assessments. However, unlike this Court, which held that there could be a basis to suspend limitation periods on the basis of fear of reprisals as well as alleged misrepresentations by CIBC, the Court of Appeal set a narrower path to contest limitations defences. The Court of Appeal rejected the argument that fear of reprisal could support contesting a limitations defence but preserved the potential for individual Class Members to rely on alleged misrepresentations. This narrowing was concerning because the representations in the 1993 overtime policy (which was the policy essentially applicable to the presumptively time-barred periods) were less explicit on compliance with the law than those in the subsequent 2006 policy.[48]

47. Further, while the Court of Appeal affirmed the decision to certify aggregate damages, it also held open CIBC's right to rely on the Court of Appeal's 2012 ruling on the unavailability of aggregate damages as a common issue and, in particular, held open a challenge to the Plaintiff's proposed methodology on the basis that gaps in the time-stamped data would require sampling or extrapolation and that the Court of Appeal in *Fulawka* held that random sampling of class members cannot be used

[47] *Fresco v. Canadian Imperial Bank of Commerce*, 2022 ONCA 115 (CanLII) ["**CA Decision**"]
[48] Brown Affidavit, para. 73.

to determine aggregate damages.[49]The Court of Appeal also affirmed CIBC's right to assert its constitutional argument in the future.[50]

48. In summary: after 15 years of litigation, the liability issues were determined in favour of the Plaintiff. However, there remained significant challenges on the horizon. Most notably, there was the possibility the Plaintiff's proposed aggregate damages model would be rejected or drastically limited, and the potential for thousands of contested individual hearings to deal with damages and/or limitation period issues .

M. Plaintiff's Expert Report on Damages

49. While the summary judgment decisions of this Court were on appeal to the Court of Appeal, the Plaintiff pressed forward with the task of securing and finalizing an expert analysis calculating aggregate damages. Class counsel did not want to delay the case further, even with the risk that the Court of Appeal could subsequently reverse this Court's summary judgment decisions.[51]

50. This involved significant and detailed work over several months by counsel and their expert, Stefan Boedeker of Berkeley Research Group ("BRG"), involving analysis of time-stamped data generated by various computer applications used by CIBC employees. These time-stamped records would be analyzed and then used as a proxy for time sheets or other records that CIBC had not maintained. By way of illustration, Mr. Boedeker proposed that, if a teller logged in to their computer terminal at 8:45 a.m. and logged out at 5:15 p.m., the data could be used to draw inferences about hours of work. However, this simple example does not fully capture the complexity of the task undertaken and the variables encountered, and the criticisms of the methodology.[52]

51. Unlike the simple example above, the time-stamped data did not contain exact proxies for actual time worked. Data from multiple systems of varying applications and IT systems had to be

[49] Brown Affidavit, paras. 76-77.
[50] Brown Affidavit, para. 77.
[51] Brown Affidavit, para. 63.
[52] Brown Affidavit, paras. 64-66.

stitched together to carry out the analysis. Further, the data was often in "raw" format, housed on hard drives containing seemingly random letters and numbers. The Plaintiff's expert spent an enormous amount of time cleaning up the data to put it in a format that could be analyzed and from which conclusions could be drawn.[53]

52. There were additional challenges with the sheer size of the data. For example, one volume of data comprised more than 100 terabytes. This is equivalent to the amount of data consumed by streaming 4K high quality Netflix continuously for almost two years. Changing certain variables in the damage models required significant analysis, review and computational time.[54]

53. A further problem was that the data did not cover the entire class period. Although the class period reached as far back as 1993, subject to CIBC's limitation arguments, there was only data available for the period 2003-2009. Even within those years, there were significant gaps in the data.[55]

54. Moreover, the Plaintiff faced CIBC's arguments that that time-stamp data was not a valid proxy for hours worked. These arguments included but were not limited to, the presence of time-stamped data during times when employees were not working (such as bank holidays or vacations); the argument that Class Members used their computers for non-working activities; evidence that some Class Members shared computer workstations; evidence of long gaps in time-stamp data; evidence that some Class Members' actual working hours did not perfectly correlate with branch opening and closing times or Class Members' computer log-on and log-off times; and evidence that certain computer programs would auto-generate timestamps or automatically log users off.[56]

55. Thus, by definition, the Plaintiff's expert was required to make numerous assumptions, with input from Class counsel, in predicting or substituting the gaps and the missing time periods and to

[53] Brown Affidavit, para. 71.
[54] Brown Affidavit, para. 71.
[55] Brown Affidavit, para. 67.
[56] Brown Affidavit, para. 98.

assume that the time stamps could be proxies for hours of work. These assumptions and predictions would be the subject of particular scrutiny and criticism by CIBC's expert,[57] and are precisely the type of argument that the Court of Appeal confirmed CIBC would be entitled to raise in the hearing to determine the quantum of aggregate damages.

56. The Plaintiff's expert provided three separate models for calculating damages:

(a) the first model (Model 1) took the observations from the time-stamped data and used them to calculate average "book-ends" (the first timestamp for work at the beginning of the workday, and the final/last time stamps for the workday) for Class Members' days to estimate their hours of work and, when compared with hours that were actually paid, their uncompensated overtime. This model, like the others, was premised on numerous assumptions and extrapolation of data to account for missing data.

(b) The second model (Model 2) contained additional assumptions. Premised on the fact that the data was incomplete and significant gaps were apparent for specific Class Members, this model relied on trends that BRG had identified in the data to assume that Class Members whose first timestamp was within 27 minutes after the branch opening time must have in fact started work when the branch opened. It similarly assumed that Class Members, whose last time stamp was prior to but within 25 minutes of the branch closing time, had in fact worked until the Bank closed. These assumptions and adjustments increased the total estimated overtime or hours of work. Model 2 therefore assumed that Class Members worked a longer day than the data demonstrated on its face.

(c) The third model (Model 3) similarly relied on trends in the data, however it assumed that any Class Member whose first timestamp was within 27 minutes of the branch opening time, in fact started 20 minutes before the branch opened (to allow time to prepare to be able to start work right when the branch opened). It further assumed Class Members, whose last time stamp was within 25 minutes of the branch closing time, in fact worked until 14 minutes

[57] Brown Affidavit, paras. 84, 98-100.

after the branch closed. Model 3 therefore assumed that Class Members worked a longer day than the data demonstrated on its face or Model 2 assumed.[58]

57. The Plaintiff's expert was also instructed to apply pre-judgment interest to each model, using both simple and compound interest calculations.[59]

58. Counsel believed that there was a basis to argue that Model 2 or Model 3 should be adopted by the Court on a contested hearing. As set out above, these additional assumptions were based on trends in data observed by the Plaintiff's expert. These assumptions and adjustments under Model 3 increased the total estimated overtime or hours of work beyond those in Model 2. However, Class Counsel recognized that there were strong arguments in favour of rejecting Models 2 and 3. For example, CIBC argued that evidence that some branches were staffed with staggered shifts and that not all staff would attend or leave (or be scheduled to attend or leave) at the same time undermined the core assumption in Models 2 and 3, and thus unfairly overstated CIBC's aggregate liability to Class. Overall, Class Counsel concluded that, in the event the Court were to accept that damages could be calculated on an aggregate basis, it was likely that the Court would apply Model 1, or some variation of it, as the basis to award damages.[60]

N. Mediation

59. At the beginning of April, 2022, the parties commenced settlement negotiations and agreed on terms for a mediation. These included the appointment of William Kaplan, an experienced arbitrator and mediator with particular expertise in complicated and high-stakes Labour and Employment matters, and an agreement to adjourn the motion for summary judgment in respect of Common Issue 9 from September, 2022 to February 2023 to permit the parties to focus on preparing for and attending the mediation.[61]

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[58] Brown Affidavit, paras. 89-91.
[59] Brown Affidavit, para. 94.
[60] Brown Affidavit, paras. 92-93.
[61] Brown Affidavit, para. 80.

60. In addition, CIBC agreed it would not pursue an application for leave to appeal to the Supreme Court of Canada in respect of the summary judgment decisions.[62]

61. Finally, the parties agreed that mediation would take place over three days during the week of August 22, 2022.[63]

62. In preparation for the mediation, CIBC retained Ankura Consulting LLP ("**Ankura**") to prepare a without prejudice report in response to the BRG report of January 12, 2022.[64] Ankura raised a preliminary objection to the use of the time-stamped data as a reliable proxy for hours of work. It noted that it was nevertheless asked by counsel for CIBC to estimate damages using the time-stamped data.[65]

63. Ankura's report included detailed criticisms of both the assumptions underlying the BRG report and the models applied by BRG in their calculations of damages. Among the many significant criticisms were BRG's assumptions that went into Models 2 and 3, and the lunch gap analysis assumption that excluded gaps longer than 60 minutes. Ankura adjusted for the BRG assumptions and methodologies that Ankura viewed as unreasonable and in conflict with the record, and instead applied its own set of assumptions. to its damages estimates, resulting in dramatically lower projected damages than those estimated by BRG.[66] The Plaintiff's expert prepared a detailed reply.[67]

64. Collectively, the parties' expert reports confirmed that there was an enormous gulf between the parties, backed by each of their experts' respective analysis of the data and calculations. There can be no doubt that the Plaintiff faced a serious battle on the request for an aggregate damages award, with the quantum of any such award being hotly contested.

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[62] Brown Affidavit, para. 80.
[63] Brown Affidavit, para. 82.
[64] Brown Affidavit, para. 83.
[65] Brown Affidavit, para. 97.
[66] Brown Affidavit, paras. 98-100.
[67] Brown Affidavit, para. 85.

65. In her Notice of Motion for summary judgment on Common Issue 9 (aggregate damages), the Plaintiff posited Model 3 as being her proposed or favoured model as set out below in Figure 1.[68]

Figure 1 – Model 3 Estimates

Period	**Damages** (With Simple Interest)
1. From Presumptive Limitation Period until June 18, 2009	$120,000,000
2. From February 1, 1993 (Beginning of Class Period) until Presumptive Limitation Period	$201,000,000
3. From June 19, 2009 (End of the Class Member Eligibility Period) until the Present	$130,000,000

66. During the mediation, Class Counsel internally made reference to, and consistently considered, the damage estimates under Model 1, and simple interest. These estimates, which were more conservative, are set out in Figure 2, below.[69]

Figure 2 – Model 1 Estimates

Period	**Damages** (With Simple Interest)
1. From Presumptive Limitation Period until June 18, 2009	$102,000,000
2. From February 1, 1993 (Beginning of Class Period) until Presumptive Limitation Period	$172,000,000
3. From June 19, 2009 (End of the Class Member Eligibility Period) until the Present	$111,000,000

67. Ankura's preliminary objection to the use of the time-stamped data as a reliable proxy for hours of work. Class Counsel expected CIBC to argue, supported with their expert evidence, that the

[68] Brown Affidavit, para. 95.
[69] Brown Affidavit, para. 96.

proposed methodology did not meet the thresholds for a reliable aggregate damages methodology set out in *Ramdath v. George Brown*.[70]

68. Ankura adjusted for the BRG assumptions and methodologies that Ankura viewed as unreasonable and/or in conflict with the record, and instead applied its own set of assumptions. These included removing longer gaps in the data (more than four hours without any time-stamped data), adjusting start and end times to remove what it viewed as outlier time-stamps, and assuming that longer lunch periods and breaks were taken by Class Members on the basis of testimonial evidence from some witnesses tendered by CIBC and its analysis of the data (as discussed further below).On this basis, CIBC's expert estimated that the damages for Period 1, with simple interest, ranged between $12.5 million and $33.1 million, depending upon which variables were applied. These figures assumed that CIBC's constitutional argument would not succeed and included simple interest (if the constitutional argument were successful, Ankura estimated that damages for Period 1 damages with simple interest would range from $11.5 million to $28.2 million). CIBC's expert did not specifically break out Period 2 estimates. Class Counsel concluded that it would be similarly dramatically lower than the Period 2 estimates in the Plaintiff's expert report. Ankura did not present an estimate for Period 3 (after June 18, 2009).[71]

69. Class Counsel recognized that their expert and their related assumptions would likely not all be accepted by the Court. For example, one such assumption involved the lunch gap analysis, which resulted in an average lunch gap of 30 minutes. The Plaintiff tested the Defendant's criticism in this regard by broadening the gaps considered from 60 minutes to 75 minutes. Under this approach, the average lunch expanded to 38.3 minutes. The Plaintiff's expert calculated that this 8.3-minute increase would translate into an approximate 23.2% reduction in the estimated damages, assuming the Plaintiff

[70] Brown Affidavit, para. 97.
[71] Brown Affidavit, paras. 98-100.

was successful in defendant all other challenges to the assumptions and methodology in the plaintiff's expert's report. There were other assumptions in both parties' expert reports that, if rejected, may have led to relatively significant upward adjustments to damages. For example, BRG's damages estimates for Periods 1 and 2 assumed an overtime threshold of 8 hours a day consistent with the daily overtime threshold in CIBC's overtime policies, which had been found to be incorporated into class members' contracts of employment. However, BRG also estimated in a supplementary report that damages would have been higher using an overtime threshold of 7.5 hours a day (based on a possible plaintiff argument that overtime should have been paid after Class Members' standard hours of work being 7.5 hours per day).[72]

70. The mediation progressed slowly, with each side predictably advocating through the mediator for the strengths of its positions and the weaknesses of the positions of the other party. It was clear from the outset and throughout the negotiations that any settlement was going to be a compromise on the various positions staked by each side.[73]

71. Class Counsel was not confident that any damages would be awarded for Period 3, in light of the previous explicit findings of this Court and the Court of Appeal that the class period ended on June 18, 2009.[74]

72. By the end of day two of the three days reserved for mediation, the parties agreed to end the mediation without having reached a resolution.[75]

73. Following the conclusion of the mediation, settlement discussions were renewed in late September 2022 and the mediator facilitated those discussions. An agreement in principle was reached on October 3, 2022 to settle the action for $153 million, all-inclusive.[76]

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[72] Brown Affidavit, para. 116(d).
[73] Brown Affidavit, para. 101.
[74] Brown Affidavit, para. 104.
[75] Brown Affidavit, para. 105.
[76] Brown Affidavit, paras. 106-107.

74. The parties executed formal minutes of settlement in mid-November and executed a comprehensive Settlement Agreement on December 28, 2022.[77]

O. Settlement Agreement

75. The key terms of the Settlement Agreement include:

(a) An all-inclusive, non-reversionary, settlement fund of $153,000,000 (the "**Settlement Amount**"), to be paid to Class Counsel in trust, to hold in escrow pending settlement approval. This payment has been made;

(b) To facilitate notice, CIBC will provide a list of Class Members and contact information (which has been done) and will answer questions about the list;

(c) If the settlement is approved, this action will be dismissed;

(d) If this order is recognized by the Quebec Court in *Gaudet*, that action will be discontinued. Alternatively, a separate settlement approval motion will be brought in Quebec if required by the Quebec Court;

(e) Separate motions for approval of the proposed distribution protocol and approval of Class Counsel fees will be brought; and

(f) All claims for the certified class period, excluding opt-outs, will be released.[78]

P. Administration of the Settlement

76. The claims will be distributed to Class Members who were employed between 1993-2009 on the basis of Class Members completing a form. The simplified form will ask them to confirm contact information, their tenure, and to confirm that they worked unpaid overtime without the need for additional proof of such unpaid hours. A formula will be used to calculate the class member's entitlement to the net settlement funds based on length of tenure, position(s) held, and average wages.

[77] Brown Affidavit, para. 108.
[78] Brown Affidavit, para. 109.

An extensive notice program is planned, with CIBC agreeing to provide information to facilitate direct notice.

77. The approval of the proposed distribution protocol is the subject of a separate motion, to be heard following this motion. In brief, the protocol proposes to allocate settlement funds to the entire class period on a *pro rata* claims-made basis, but to discount claims for the potentially time-barred periods by 50%. The rationale for this discount is to recognize that the probability of any Class member overcoming the presumptive time-bar for these periods based on potential reliance on representations in the 1993 Policy were 50/50 (or arguably less). This 50% reduction is also consistent with similar reductions in some other cases.[79]

Q. Benefits of the Settlement

78. In addition to the risks described above, the Plaintiff and Class Counsel submit that the proposed settlement represents an excellent resolution of the claims of unpaid overtime for the Class, and should be approved for the following reasons:

(a) The quantum of the settlement is a very significant benefit to the Class of retail bank employees. As discussed in detail in the settlement approval affidavit, Class Counsel believe that the $153 total quantum is as good as the recovery that could likely have been expected, both after a contested hearing on Common Issue 9 (which would likely only have resulted in an aggregate damages award for Period 1), and what could be the "modest at best" recovery resulting from the possible years of contested individual assessments for Period 2 claims. In this way, the $153 million settlement quantum is in and of itself a factor weighing heavily in favour of this settlement.[80]

(b) The proposed distribution will allocate settlement funds to every Class Member who fills out a simple form. That form will not require any proof to establish the claim, nor will there be any ability of CIBC to dispute any claim. As explained in the settlement approval affidavit, Class Counsel believe that in an individual issues process, which would likely have

[79] See Affidavit of Jody Brown, affirmed February 23, 2023, in support of the Distribution Motion.
[80] Brown Affidavit, para. 110.

been required to establish Period 2 damages, less than 20% of Class Members would have actually come forward to advance an individual claim for this and that those that did would face serious barriers to success.[81]

(c) The settlement of the action eliminates delays inherent in litigation. The aggregate damages award could be appealed by either party to the Supreme Court of Canada. This would have delayed payment of any such award until 2026 or beyond. If individualized proceedings were confirmed, these would take years more to complete. After sixteen years, obtaining settlement funds today is a significant reason to approve this settlement.[82]

79. A detailed explanation of counsel's candid weighing, assessment and synthesis of the numerous litigation strengths and risks at stake in the mediation is provided at paragraphs 102-104, 110, and 115-116 of the settlement approval affidavit. In short, even after many years of litigation with many question marks along the way, there were many hurdles remaining with respect to the assessment of damages.

R. Notice and Response by Settlement Class Members

80. This Court approved the notice of settlement hearing and plan of dissemination. The notice of settlement hearing has since been published in accordance with the plan approved by the Court.[83]

81. The notice of settlement hearing advised Class Members of their right to comment on or to object to the Settlement Agreement. The deadline for commenting was February 20, 2023. At the time of the filing of this Factum, 148 Class Members have commented in support of the settlement, and no Class Members have objected.[84]

[81] Brown Affidavit, paras. 111-112.
[82] Brown Affidavit, para. 113.
[83] Brown Affidavit, para. 121.
[84] Brown Affidavit, paras. 121.

PART III - ISSUES AND THE LAW

A. General Principles

82. To approve a settlement, the Court must find that it is fair, reasonable, and in the best interests of the class.[85] A settlement must fall within a "zone of reasonableness." Reasonableness allows for a range of possible resolutions. It is an objective standard that allows for variation depending on the subject-matter of the litigation and the nature of the damages.[86]

83. The principles guiding settlement approval are well-established. The criteria include: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation.[87]

84. The relevant criteria are applied below.

B. Application to this case

i. The amount and nature of discovery, evidence or investigation

85. There was an extensive investigation of the overtime claims through tens of thousands of pages of documentary productions, numerous contested documentary production motions to elicit additional relevant evidence, and dozens of cross-examinations. The parties' experts proposed and critiqued methodologies for analyzing time-stamped data in order to calculate unpaid overtime hours.

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[85] *Dabbs v Sun Life Assurance Co. of Canada*, 1998 CanLII 14588 (Ont Gen Div) [*Dabbs*], aff'd (1998) 1998 CanLII 7165 (Ont CA), leave to appeal to SCC refused.
[86] *Mancinelli v. Royal Bank of Canada*, 2017 ONSC 2324 at para. 39.
[87] *Mancinelli v. Royal Bank of Canada*, 2017 ONSC 2324 at para. 37.

After over 15 years of litigation, and millions of dollars of expert analysis, the value and merits of the case have been exhaustively analyzed.

ii. The proposed settlement terms and conditions

86. Pursuant to the Settlement Agreement, CIBC will pay $153 million. There will be no reversion to CIBC. To facilitate notice, CIBC has provided a list of Class Members and contact information. A simplified process is contemplated, in which no claim need be proven, nor subject to challenge by CIBC. If the settlement is approved, all claims during the class period will be released, subject to opt-outs.

iii. The recommendation and experience of counsel

87. The recommendation of Class Counsel is an important factor to consider in evaluating the appropriateness of a settlement. Class Counsel has a duty to the entire Class and must keep this duty in mind in evaluating and recommending a settlement. Class Counsel also has a duty to the court, including a duty to identify any limitations in a settlement. Class Counsel is required, and uniquely situated, to assess the risks and benefits of the case and the terms and advantages of a settlement.[88]

88. Class Counsel recommend the settlement as excellent, for the Class, particularly in light of the total quantum, the simple administration process, the fact that aggregate damages for both Periods 1 and 2 will be available now, and the timeliness and certainty of the settlement (including avoiding the risks of proceeding on a contested basis, relying on a novel and contested aggregate damages methodology, and the delays that would be caused by subsequent appeals).

89. Under the proposed settlement, the recovery for the Class is as good as could likely have been expected, both after a contested hearing on Common Issue 9 (which would likely only have resulted in an aggregate damages award for Period 1), and what could be the "modest at best" recovery resulting from the possible years of contested individual assessments for Period 2 claims. On this basis, Class

[88] *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643, para. 45.

Counsel recommend the Settlement Agreement as fair, reasonable and in the best interest of the Class, and submit that is should be approved.

iv. Likelihood of recovery or likelihood of success.

90. Although liability issues were resolved in favour of the class, there were still substantial risks remaining. There were a myriad of variables, scenarios and assumptions that could have influenced the quantum recoverable for the Class had the litigation continued, some of which would have increased the total compensation available, while others would have reduced it. The Plaintiff's aggregate damages theory involved numerous assumptions and inferences, which were challenged by CIBC's expert, due to the limited period for which time-stamped data was available and CIBC's position that that time-stamped data is not a proxy for hours worked. The rejection or adjustment of the Plaintiff's expert's assumptions would dramatically cut the Plaintiff's damages claims. Although counsel believed that some form of aggregate award would be made to the period 1 group (non time-barred), claims for the period 2 group (presumptively time-barred) very likely faced an individual claims process, with likely small take-up rates by Class Members, no costs support by the CPF, and limitation period challenges by the Bank. An individual claims process could take many years.

v. The future expense and likely duration of the litigation

91. Either party could have appealed any aggregate damages determination, with a further appeal potentially to the Supreme Court of Canada. This would have delayed the resolution of the litigation until at least 2026, or later. If an individual claims process was required, this likely would have involved several years of further claims to determine CIBC's limitation defences on a Class member by Class member basis. By law, there would be no funding by the CPF for any Class member brave enough to advance such an individual claim.

vi. Objections and the nature of communications with Class Members

92. Ms. Fresco supports the settlement and has instructed Class Counsel to seek approval of them.[89] A detailed notice of the settlement approval campaign occurred involving direct notice, newspaper advertisements and social media posts.

93. No Class Members have objected to this settlement.[90]

vii. The presence of good faith, arm's-length bargaining and the absence of collusion

94. As described above, the settlement was the result of arm's-length negotiation by lawyers highly experienced in class actions and with extensive knowledge of the case. Detailed mediation briefs and expert reports were exchanged. The negotiations were difficult and at times appeared unlikely to succeed.

95. Overall, the proposed settlement is well within the "zone of reasonableness". It is fair, reasonable and in the best interest of the Class. Class Counsel and the Plaintiff respectfully submit that it should be approved.

PART IV - ORDER REQUESTED

96. The plaintiff requests that the Settlement Agreement be approved pursuant to s. 29 of the CPA.

[89] Affidavit of Dara Fresco, affirmed February 23, 2023.
[90] Brown Affidavit, para. 122.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of February, 2023.

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SCHEDULE "A"
LIST OF AUTHORITIES

TABS	AUTHORITIES
1.	*Dabbs v Sun Life Assurance Co. of Canada*, 1988 CanLII 14855 (Ont Gen Div) [Dab*bs*], aff'd (1998) 1998 CanLII 7165 (Ont CA), leave to appeal to SCC refused.
2.	*Fresco v. Canadian Imperial Bank of Commerce,* 2009 CanLII 31177 (ON SC)
3.	*Fresco v. Canadian Imperial Bank of Commerce*, 2010 ONSC 1036
4.	*Fresco v. Canadian Imperial Bank of Commerce,* 2010 ONSC 4274 (CanLII)
5.	*Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444
6.	*Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 75 (CanLII)
7.	*Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 4288 (CanLII)
8.	*Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 6098 (CanLII)
9.	*Fresco v. Canadian Imperial Bank of Commerce*, 2021 ONCA 46 (CanLII)
10.	*Fresco v. Canadian Imperial Bank of Commerce,* 2022 ONCA 115 (CanLII)
11.	*Fulawka v. Bank of Nova Scotia,* 2012 ONCA 443
12.	*Mancinelli v. Royal Bank of Canada,* 2017 ONSC 2324
13.	*Osmun v. Cadbury Adams Canada Inc.,* 2010 ONSC 2643

SCHEDULE "B"
TEXT OF STATUTES, REGULATIONS & BY - LAWS

Class Proceedings Act, 1992, SO 1992, c 6

Discontinuance, abandonment and settlement

29 (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate. 1992, c. 6, s. 29 (1).

Settlement without court approval not binding

(2) A settlement of a class proceeding is not binding unless approved by the court. 1992, c. 6, s. 29 (2).

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court binds all class members. 1992, c. 6, s. 29 (3).

Notice: dismissal, discontinuance, abandonment or settlement

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

(a) an account of the conduct of the proceeding;

(b) a statement of the result of the proceeding; and

(c) a description of any plan for distributing settlement funds. 1992, c. 6, s. 29 (4).

DARA FRESCO
Plaintiff

-and-

CANADIAN IMPERIAL BANK OF COMMERCE
Defendant

Court File No. 07-CV-334113-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE PLAINTIFF
(Settlement Approval)

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