

## **NOTICE OF SETTLEMENTS (PRIOR AND PROPOSED) WHICH AFFECT THE HMS INVESTOR CLASS**

**This Notice may affect your rights. Please read it carefully.**

### **PURPOSE OF THIS NOTICE**

On June 2, 2005, an action was commenced against a number of Defendants surrounding the operation of an investment scheme commonly known as “HMS”. It is alleged that the HMS investment scheme was not a legitimate investment activity and in fact constituted an illegal fraudulent investment scheme.

This action was certified as a class action in 2009. The Opt-Out period expired in August 2009.

Agreements for settlement with twelve of the defendants were approved by the Alberta Court of Queen’s Bench, prior to certification of this action as a class action.

Settlement with five of the remaining defendants is currently proposed and Class Counsel will be seeking approval from the Alberta Court of Queen’s Bench for these settlements.

Settlement in relation to funds received through litigation which occurred in Indiana has also been approved by the Alberta Court of Queen’s Bench.

These settlements will not conclude the action in its entirety and the action will continue as against the remaining defendants.

### **PRIOR SETTLEMENTS**

Prior to certification of this action as a class proceeding, Class Counsel received instructions from the Proposed Representative Plaintiffs including Heike Enticknap and current Representative Plaintiffs, Douglas Alexander for Alberta residents and William Barrett for non-Alberta Residents. Pursuant to instructions from the Proposed Representative Plaintiffs, Class Counsel obtained Court approval for settlement against the following Defendants:

- a. First National Bank of San Diego (“**First National**”) – Order approving settlement filed December 8, 2006. The action was settled by dismissing the action as against First National, in exchange for First National’s co-operation in attempting to retrieve the approximately **\$5,000,000** in HMS investor funds seized in San Diego.

- b. McCarthy Tetrault LLP – Order approving settlement filed April 6, 2007. This action was settled against this law firm by dismissing the action after McCarthy Tertault demonstrated that there had been no wrongdoing by Garth Bailey (“**Bailey**”) while Bailey worked with that firm.
- c. Peter Manousos, Merchant Law Group and Johnny’s Own Ltd (collectively the “**Manousos Defendants**”). Order approving settlement filed June 26, 2008. This action was settled against the Manousos Defendants by dismissing the action after a review of the Manousos Defendants’ records revealed no reasonable legal basis upon which to continue the action as against these defendants.
- d. Richard E. Fowlks, Fowlks & Synder and The Law Office of Richard E. Fowlks (collectively the “**Fowlks Defendants**”). Order approving settlement filed September 17, 2008. This action was settled against the Fowlks Defendants by dismissing the action in exchange for payment of \$50,000 USD (**\$50, 840.00 CAD**), after a review of the available information did not reveal any documentation which suggested that the Fowlks Defendants were directly involved in the HMS Scheme or had knowledge of the HMS Scheme.
- e. Garth S. Bailey (“**Bailey**”), Garth S. Bailey Professional Corporation (“**Bailey PC**”), Katherine Rodrigue-Bailey (“**Rodrigue-Bailey**”) and Kirby Audit Services (“**Kirby**”). Order approving settlement filed February 25, 2008. The action was discontinued as Katherine Rodrigue-Bailey and Kirby in exchange for the payment of **\$25,000 plus \$2,504 USD**. The available information did not show significant involvement by Rodrigue-Bailey and Kirby in the HMS Scheme. Judgment was entered against Bailey and Bailey PC in an amount to be determined at a future application. Execution upon this judgment was stayed, in exchange for the full cooperation of Bailey as it was represented that Bailey and Bailey PC did not have any significant exigible assets.

Since certification of this action as a class proceeding, Class Counsel receives instructions from the Court-appointed Representative Plaintiffs, Douglas Alexander for Alberta residents and William Barrett for non-Alberta residents. Pursuant to instructions from the Representative Plaintiffs, Class Counsel also obtained Court approval to participate in a settlement of proceedings commenced in Indiana. The Order approving settlement was filed July 15, 2010. This settlement concluded any further involvement of the Class in the litigation commenced in Indiana in exchange for \$50,000.

These settlements are binding on all Class members.

## **PROPOSED SETTLEMENTS**

### HSBC, Mountain View Credit Union and Community Credit Union

This Class Action was originally certified as against financial institutions, including HSBC Bank Canada (“**HSBC**”), Mountain View Credit Union Limited (“**MVU**”), Community Credit Union

Ltd. (“CCU”) and the Canadian Imperial Bank of Commerce (“CIBC”). The allegations against these financial institutions are that they facilitated the operation of the fraudulent HMS Scheme. The total claims, if ultimately successful, against these financial institutions would be approximately \$20,000,000.

The law requires that the Plaintiffs prove that these financial institutions knew about a fraudulent breach of trust and, with that knowledge, participated in this fraudulent breach of trust. The assessment of Class Counsel is that this would be very difficult to prove as against HSBC, MVU and CCU, based on the available information. Class Counsel assess the Plaintiffs’ chance of succeeding against HSBC, MVU and CCU to be very low. Accordingly, the Representative Plaintiffs have instructed Class Counsel to accept settlements with HSBC of **\$200,000**, MVU of **\$175,000**, and CCU of **\$175,000**.

Based on the available information, Class Counsel assess the chance of success as against CIBC as being better than as against the other financial institutions, and the Representative Plaintiffs have instructed Class Counsel to continue the action as against CIBC.

Stanley DeFreitas and DeFreitas & Associates

This Class Action was also certified as against Stanley DeFreitas and DeFreitas & Associates, an accountant and related accounting firm (collectively the “**DeFreitas Defendants**”). The allegations against the DeFreitas Defendants are that they facilitated the operation of the fraudulent HMS Scheme.

A review of the available information by Class Counsel revealed that, although the DeFreitas Defendants, or related entities being Stanton DeFreitas and 1367682 Ontario Limited (collectively the “**Potential DeFreitas Defendants**”) acted as escrow agents with respect to some HMS investor funds, there is no documentation which suggested that the DeFreitas Defendants or the Potential DeFreitas Defendants were directly involved in the HMS Scheme or had knowledge of the HMS Scheme.

Accordingly, the Representative Plaintiffs have instructed Class Counsel to accept a settlement with the DeFreitas Defendants and the Potential DeFreitas Defendants in the amount of **\$12,500** in addition to the full co-operation of the DeFreitas Defendants and the Potential DeFreitas Defendants.

## **APPLICATION TO APPROVE PROPOSED SETTLEMENTS**

Class Counsel will be making an application to Associate Chief Justice Rooke of the Court of Queen's Bench to approve the settlements with HSBC, MVU, CCU and the DeFreitas Defendants and Potential DeFreitas Defendants on **November 15, 2010** at 10:00 a.m. MT, at the Calgary Court Centre, located at 601 – 5 Street SW T2P 5P7 in Calgary, Alberta.

**Class Members who do not object to the settlements need not appear** at the hearing of this application or take any other steps at this time.

**Class Members who object to the settlements must appear in person or by counsel** at the above-noted application. **Class Members who object should provide the following to Class Counsel in written form at least 7 days prior to the date of the application:**

**Name, Address, Telephone Number, Fax Number and Email Address;**

**A brief statement outlining the nature of the objection and the reason for the objection;**

**Whether the person intends to appear in person or by counsel, and, if by counsel, the contact information for counsel.**

### **ADDITIONAL INFORMATION**

To obtain additional information concerning the settlements, visit the website  
[www.cuminggillespie.com](http://www.cuminggillespie.com).

or contact

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