

**CITATION:** Wintercorn v. Global Learning Group Inc., 2024 ONSC 6071  
**COURT FILE NO.:** CV-17-583573-00CP  
**DATE:** 20241031

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** LYNN WINTERCORN, PETER NEWMAN, EMILY FLAMMINI and ALEX KEPIC, Plaintiffs

**AND:**

GLOBAL LEARNING GROUP INC., GLOBAL LEARNING TRUST SERVICES INC. as TRUSTEE OF GLOBAL LEARNING TRUST (2004), ROBERT LEWIS, IDI STRATEGIES INC., JDS CORPORATION, ESCROWAGENT INC., JAMES PENTURN, RICHARD E. GLATT, DENIS JOBIN, ALLAN BEACH, MORRIS KEPES & WINTERS LLP, FASKEN MARTINEAU DUMOULIN LLP, CASSELS BROCK & BLACKWELL LLP, WISE, BLACKMAN LLP, and EVANS & EVANS INC., Defendants

**BEFORE:** Justice Glustein

**COUNSEL:** *Jonathan Schachter*, for the plaintiffs

*Sean Dewart*, for the defendant Graham Turner

*Gannon Beaulne*, for the defendants Fasken Martineau DuMoulin LLP and Allan Beach

*Paul-Erik Veel*, for the defendant Cassels Brock & Blackwell LLP

*Caroline Smith*, for the defendant Evans & Evans Inc.

**HEARD:** October 31, 2024

**REASONS FOR DECISION**

*Nature of motions and overview*

- [1] The plaintiffs bring two motions. In the first motion, the plaintiffs seek:
- (i) an order approving the settlement agreement between the plaintiffs and Graham Turner LLP (“Turner”) dated June 9, 2024 as amended on October 2, 2024 (the “Settlement Agreement”),
  - (ii) a declaration that notice of this hearing was not required under s. 19 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6,

- (iii) an order that notice of approval of the Settlement Agreement be given to class members in accordance with the plaintiffs' proposed notice plan, and
- (iv) an order granting leave to remove Emily Flammini ("Flammini") as a plaintiff and representative plaintiff, and to amend the title of the proceeding accordingly.

[2] In the second motion, the plaintiffs seek:

- (i) an order approving payment of Class Counsel's legal fees in the amount of \$67,800 inclusive of HST, from the settlement proceeds,
- (ii) an order approving payment from the settlement fund of the Class Proceedings Fund (the "CPF")'s 10% levy on the net settlement fund (\$13,220), and
- (iii) an order that the balance of the settlement fund, after payment to the CPF and Class Counsel, be held by Class Counsel in an interest-bearing trust account for the benefit of the class, and granting Class Counsel leave to apply the balance of the settlement fund towards the payment of ongoing disbursements incurred in the prosecution of the action.

[3] Turner consents to the first motion and takes no position on the second motion. The remaining defendants (the "non-settling defendants") take no position on either of the motions.

### *Facts*

[4] I have set out the background facts about the "Gift Program"<sup>1</sup> in my reasons for decision on the refusals motion brought in this action: 2022 ONSC 4576, at paras. 6 and 7.

### The claim against Turner

[5] Turner was added as a defendant by my decision dated March 4, 2020, with leave for him to plead a limitations defence. The action was certified against Turner on October 21, 2020.

[6] The plaintiffs allege that Turner (i) acted as counsel for GLGI, (ii) knew or ought to have known that the Gift Program was a sham, (iii) knew or ought to have known that the Gift Program was created for the enrichment of its creators and thus that all funds received by Escrowagent were impressed with a constructive or resulting trust in favour of the plaintiffs and the class, (iv) ought to have known that information provided to class members was false, deceptive, misleading and omitted material information about the Gift Program, (v) failed to take steps to halt the distribution of the allegedly misleading material and (vi) knew that Escrowagent failed to perform any of the

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<sup>1</sup> Unless otherwise stated, all defined terms are as set out in the refusals reasons.

escrow functions it was supposed to perform, such that the escrow funds received by Escrowagent were impressed with a constructive or resulting trust in favour of the class.

[7] Turner pleads in his defence that (i) there was no lawyer-client relationship between him and the class, (ii) class members were sufficiently sophisticated to accept (and did accept) the risks associated with the Gift Program, (iii) none of the class members were aware of his involvement or relied upon him, (iv) he advised GLGI in accordance with the applicable standard of care, (v) he was not involved in designing, marketing or promoting the Gift Program, (vi) Escrowagent did provide services of value to the Gift Program participants and (vii) the claim against him is statute-barred.

[8] Turner carried run-off insurance with LawPRO with coverage of a maximum of \$250,000 per claim brought against him. This coverage has eroded as he incurred defence costs. Only approximately \$90,000 of coverage remains on the policy.

### The Settlement Agreement

[9] The Settlement Agreement was the result of good faith, arm's length negotiations. The settlements discussions took place over a three-year period and the Settlement Agreement was executed on June 9, 2024.

[10] The key terms of the Settlement Agreement are:

- (i) It was conditional on Turner providing a sworn statutory declaration setting out his exigible assets to satisfy class counsel acting reasonably that those assets had a value of less than \$500,000. This provision has been satisfied.
- (ii) Turner will pay to the plaintiffs the all-inclusive amount of \$200,000.
- (iii) Turner will attend as a witness at the trial of common issues without formal summons.<sup>2</sup>
- (iv) Turner has entered into a Pierringer agreement in favour of the non-settling defendants, excluding them from liability for any portion of Turner's proportionate share of liability to the class, as well as a bar order.

### Facts relevant to fee approval

[11] Under the retainer agreement dated May 17, 2017 as amended August 10, 2018 (the "Retainer Agreement"), Class Counsel will be paid 30% of the total amount recovered by the class

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<sup>2</sup> Turner also agreed with the non-settling defendants to attend for examination under oath if requested, which has been incorporated into the order approving the Settlement Agreement.

under any judgment or settlement, plus applicable taxes, as well as repayment of all disbursements incurred, subject to approval of the court.

[12] The representative plaintiffs agreed that a 30% contingency fee was reasonable in the circumstances. The representative plaintiffs were not willing or able to pay the legal costs and disbursements associated with litigating the action.

[13] The court approved the Retainer Agreement as fair and reasonable by order dated August 19, 2020.

[14] The plaintiffs obtained funding from the CPF in March 2018. Disbursements not covered by the CPF were paid by Class Counsel. The court granted leave for Class Counsel to use the balance of settlement funds from two prior settlements to pay for disbursements. Those funds are rapidly depleting given the high costs associated with the document management of this matter, the extensive scope of examinations for discovery, and the need to retain experts in multiple specialties to provide opinions at trial.

[15] The plaintiffs agree with and support Class Counsel's fee request. Class Counsel has expended over \$4 million in time prosecuting this class action.

#### Facts relevant to removal of Flammini as a representative plaintiff

[16] Flammini is no longer willing to act as a representative plaintiff because her memories of the relevant events have faded and because the prospects of further examinations and cross-examinations caused her anxiety.

#### *Analysis*

#### Motion 1: Approval of the Settlement Agreement, notice issues, and removal of Flammini as representative plaintiff

##### (i) Approval of the Settlement Agreement

[17] The settlement falls within the zone of reasonableness which recognizes that a number of settlement possibilities may be in the best interests of the class as compared to the unpredictable alternative of costly and protracted litigation. I approve the Settlement Agreement based on the following factors:

- (i) There was a reasonable risk that the plaintiffs would not have recovered any funds from Turner even if successful on the litigation, as his LawPRO policy could have been entirely dissipated by defence costs and he may not have had any assets available based on the statutory declaration he provided. The settlement provides for the class to receive the remaining insurance coverage and a significant portion of Turner's remaining exigible assets.
- (ii) There was a risk that Turner's limitation defence could have been successful.

- (iii) The settlement was reached after arms-length negotiations.
- (iv) The Settlement Agreement is recommended by Class Counsel and the representative plaintiffs, and is not opposed by the non-settling defendants.
- (v) The plaintiffs obtain the benefit of the cooperative participation of Turner at trial and at examinations under oath if requested by the non-settling defendants.
- (vi) The non-settling defendants are not prejudiced given the Pierringer agreement which excludes them from liability for any portion of Turner's liability. There is also a bar order so that the non-settling defendants will only be liable for their combined proportionate share of the class's losses, such that the non-settling defendants' liability will be reduced by the proportionate share of liability attached to the non-settling defendants by the court.
- (vii) The Settlement Agreement will assist Class Counsel to fund the claims against the non-settling defendants.
- (viii) The Settlement Agreement is in substantially the same form as the two prior settlements previously approved by the court.

[18] For the above reasons, I approve the Settlement Agreement as fair and reasonable.

- (ii) Notice issues

[19] Given the small amount of the settlement fund relative to the size of the class, the balance of the settlement fund (as noted above) is to be used by Class Counsel to fund disbursements of the litigation, some of which are not covered by the CPF. Consequently, there is no need for notice of this hearing to the class and I order that such notice to the class of the hearing for approval of the Settlement Agreement is not required.

[20] The proposed notice plan is reasonable and cost effective. Through earlier productions, the plaintiff has the email addresses (and if email is not available, last known addresses) for a significant proportion of the class members. Consequently, the notice plan provides for direct notice, which is preferable to indirect notice. The notice plan also provides for indirect notice to be posted on Class Counsel's websites and to LinkedIn and Twitter. For these reasons, I find that the notice plan maximizes the likelihood that class members will receive the notice.

[21] Consequently, I approve the notice plan attached to the Settlement Agreement and order the payment of notice costs from the settlement fund.

- (iii) Removal of Flammini as representative plaintiff

[22] On the above evidence, there is no basis to compel Flammini to remain as a representative plaintiff. The remaining three representative plaintiffs will continue to fairly and adequately represent the interests of the class in Flammini's absence.

Motion 2: Approval of Class Counsel fees, payment to the CPF, and use of remaining funds

(i) Approval of Class Counsel fees

[23] The Retainer Agreement provides for a 30% contingency fee and as such is presumptively valid. Legal fees in the amount of \$60,000 for fees plus \$7,800 for HST are not excessive and well below the significant costs incurred to date to progress the action on behalf of the class, and the significant steps that have been incurred in the litigation.

[24] The court already approved the Retainer Agreement as fair and reasonable by order dated August 19, 2020, and the representative plaintiffs understood the agreement before signing it and agree that a 30% retainer is reasonable in the circumstances. The representative plaintiffs were not willing or able to pay the legal costs and disbursements associated with litigating this action.

[25] To date, Class Counsel has expended over \$4 million in time prosecuting this class action and many thousands of hours, bearing the risk of no remuneration (other than the prior settlements), for the substantial work conducted on this action. The case is legally and factually complex, including many steps taken to preserve the interests of class members, and many steps remaining to prosecute the action.

[26] For the above reasons, I approve the \$67,800 fee (inclusive of HST) sought by Class Counsel.

(ii) Payment of the CPF levy

[27] Class Counsel obtained funding from the CPF in March 2018. Since then, the CPF has paid for certain disbursements, but other disbursements necessary for the prosecution of this action were borne by Class Counsel.

[28] For the above reasons, the CPF is entitled to its 10% levy. I order payment of that levy on the net settlement fund in the amount of \$13,220.

(iii) Use of the balance of the settlement fund

[29] As I ordered for the two prior settlements, it is appropriate to order:

- (i) The balance of the settlement fund, after payment to the CPF and to Class Counsel, be held by Class Counsel in an interest-bearing trust account for the benefit of the class.
- (ii) Class Counsel may apply the balance of the settlement fund towards the ongoing disbursements incurred in the prosecution of the action.

[30] Trust funds from the prior settlements are rapidly depleting. Pursuant to my prior settlement approval orders, Class Counsel were allowed to use the balance of those settlement

funds to pay for disbursements. The similar order sought in the present action will assist the class in funding the ongoing costs of litigation.

[31] Significant additional disbursements, in the tens of thousands of dollars, are anticipated to be paid by Class Counsel to continue prosecuting this action against the non-settling defendants.

*Order*

[32] I grant the relief sought. Orders to go as per attached.

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Justice Glustein

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**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

LYNN WINTERCORN, PETER NEWMAN, EMILY  
FLAMMINI and ALEX KEPIC

Plaintiffs

**AND:**

GLOBAL LEARNING GROUP INC., GLOBAL  
LEARNING TRUST SERVICES INC. as TRUSTEE OF  
GLOBAL LEARNING TRUST (2004), ROBERT  
LEWIS, IDI STRATEGIES INC., JDS  
CORPORATION, ESCROWAGENT INC., JAMES  
PENTURN, RICHARD E. GLATT, DENIS JOBIN,  
ALLAN BEACH, MORRIS KEPES & WINTERS LLP,  
FASKEN MARTINEAU DUMOULIN LLP, CASSELS  
BROCK & BLACKWELL LLP, WISE, BLACKMAN  
LLP, and EVANS & EVANS INC.

Defendants

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**REASONS FOR DECISION**

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Glustein J.

**Released: October 31, 2024**