

**ONTARIO
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE

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WEDNESDAY, THE 26TH

)

JUSTICE EDWARD BELOBABA

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DAY OF JUNE, 2019

BETWEEN:

LYNN WINTERCORN, PETER NEWMAN, EMILY FLAMMINI and ALEX KEPIC

Plaintiffs

- and -



**GLOBAL LEARNING GROUP INC., GLOBAL LEARNING TRUSTS SERVICES INC.
AS THE 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

CERTIFICATION ORDER

THIS MOTION, made by the Plaintiffs, for an order certifying this proceeding as a class proceeding and appointing the Plaintiffs as representative plaintiffs, was heard this day at the courthouse, 130 Queen Street West, Toronto, Ontario.

ON READING the notice of motion, dated August 14, 2018, the affidavit of John Phillips, sworn August 9, 2018, the affidavit of Lynn Wintercorn, sworn August 13, 2018, the affidavit of Peter Newman, sworn August 13, 2018, the affidavit of Emily Flammini, sworn August 10, 2018,

the affidavit of Alex Kepic, sworn August 10, 2018, the transcript from the cross-examination of Emily Flammini, dated March 17, 2019, the transcript from the cross-examination of Alex Kepic, dated March 17, 2019, the affidavit of Lynn Wintercorn, sworn September 27, 2017, the transcript from the cross-examination of Lynn Wintercorn, dated October 23, 2017, the notice of cross-motion of the Defendant, Cassels Brock & Blackwell LLP ("Cassels Brock"), dated March 29, 2019, and on being advised of the consent of the defendants, Fasken Martineau DuMoulin LLP and Allan Beach (together, the "Fasken Defendants"), Robert Lewis ("Lewis"), Cassels Brock, James Penturn ("Penturn"), Richard E. Glatt ("Glatt"), IDI Strategies Inc. ("IDI Strategies"), Wise Blackman LLP ("Wise Blackman") and Evans & Evans Inc. ("Evans & Evans"), and confirming that Global Learning Group Inc. ("GLGI"), Global Learning Trusts Services Inc. as the Trustee of Global Learning Trust (2004) (the "Trustee"), Denis Jobin and JDS Corporation, (together, the "Jobin Defendants"), and Escrowagent Inc. ("Escrowagent") have been noted in default, and on hearing the submissions of the lawyers for those parties not noted in default, and the issue of certification of the action as against Morris Kepes & Winters LLP ("MKW") having been reserved, and the certification of this action as against the Jobin Defendants to be addressed by separate order,

1. THIS COURT ORDERS that this action is certified as a class proceeding under sections 2 and 5 of the *Class Proceedings Act, 1992*, SO 1992, c. 6.
2. THIS COURT ORDERS that the class is described as:

All persons who participated in the Global Learning Gifting Initiative Charitable Donation program ("the Gift Program"), exclusive of the Defendants, their family members, employees, agents, assigns, parent or subsidiary or affiliated companies, and any person or entity who provided services to one or more of the

Defendants in respect of the creation, promotion, marketing or sale of the Gift Program, including any sales agents or distributors, and exclusive of Juanita Mariano, Douglas Moshurchak, Sergiy Bilobrov, Melba Lapus, Lylyne Santos, the Estate of Penny Sharp, and Janice Moshurchak. (the "Class")

3. THIS COURT ORDERS that Lynn Wintercorn, Peter Newman, Emily Flammini and Alex Kopic are appointed as the representative plaintiffs.

4. THIS COURT DECLARES the nature of the claims asserted on behalf of the Class against:

- (1) Cassels Brock, Wise Blackman and Evans & Evans Inc. is negligence;
- (2) Penturn, Glatt, and IDI Strategies (together the "IDI Defendants") are unjust enrichment, knowing receipt, negligence, conspiracy and fraud;
- (3) Lewis and GLGI are conspiracy, knowing receipt, fraud, fraudulent misrepresentation, breach of sections 14-17 of the Ontario *Consumer Protection Act* and the similar provisions in consumer protection legislation in other provinces and territories, negligence, negligent misrepresentation, and unjust enrichment;
- (4) the Trustee and Escrowagent are conspiracy, knowing receipt, fraud, negligence, negligent misrepresentation, and unjust enrichment; and
- (5) the Fasken Defendants are negligence and negligent misrepresentation.

5. THIS COURT DECLARES that the relief sought by the Class is: (a) general damages and special damages, (b) punitive, aggravated and exemplary damages, (c) declarations, as against the IDI Defendants, Lewis, GLGI, the Trustee, and Escrowagent, and (d) as against GLGI and Lewis, damages in lieu of restitution under the *Consumer Protection Act, 2002*.

6. THIS COURT ORDERS that the common issues for the Class as against **all the Defendants other than the Jobin Defendants and MKW** are:

- (1) Is the release in Direction Two of the Directions to Escrowagent enforceable?
- (2) Is the release in the GLGI Acknowledgment signed by Class members enforceable?
- (3) Ought the class members reasonably to have known on or before March 16, 2014 or September 28, 2015, that they suffered a loss that was caused or contributed to by the Defendants or any one or more thereof?

7. THIS COURT ORDERS that the common issues for the Class as against **the Fasken Defendants, Cassels Brock, the IDI Defendants, Lewis, GLGI, the Trustee, and Escrowagent** are:

- (1) Did the Class members enter into enforceable contracts with GLGI, and if so, what are the terms of the contracts?
- (2) Are the Class members entitled to rescind their contracts with GLGI or to seek damages in lieu of rescission?

8. THIS COURT ORDERS that the common issues for the Class as against **Cassels Brock and the Fasken Defendants** are:

- (1) Did Cassels Brock or the Faskens Defendants owe a duty of care to members of the Class with respect to the claim in negligence?

- (2) If Cassels Brock or the Fasken Defendants owed a duty of care to members of the Class with respect to the claim in negligence, what was the applicable standard of care for Cassels Brock or the Fasken Defendants?
- (3) If Cassels Brock or the Fasken Defendants owed a duty of care to members of the Class with respect to the claim in negligence, did Cassels Brock or the Fasken Defendants breach the applicable standard of care? If so, how?

9. THIS COURT ORDERS that the common issues for the Class as against **the IDI Defendants and the Fasken Defendants** are:

- (1) If the Gift Program was a sham, are the funds that the Class members paid to participate in the Gift Program that were paid to specified charities, and which were in turn paid by those charities to GLGI, impressed with a constructive trust in favour of the class members?

10. THIS COURT ORDERS that the common issues for the Class as against **Lewis, GLGI and the Fasken Defendants** are:

- (1) Did the written documentation describing the nature of the Gift Program, and developments with respect to CRA's reviews of or Tax Court of Canada test cases regarding the Gift Program that were disseminated by GLGI to its sales persons/distributors or participants in the Gift Program, and posted on its website (the "promotional materials") contain material misrepresentations or omissions of material facts regarding the Gift Program? If so, what were the material misrepresentations, and when were the misrepresentations made?

- (2) Who prepared the documents executed by the Class members in order to participate in the Gift Program (the “transaction documents”)?
- (3) Did the transaction documents contain material misrepresentations or omission of material facts? If so, what were the material misrepresentations, and when were the misrepresentations made?
- (4) In the circumstances of this case, can the reliance of the Plaintiffs and other Class members on the misrepresentations or material omissions in either the transaction documents or the promotional materials be inferred?

11. THIS COURT ORDERS that the common issues for the Class as against the **Fasken Defendants** are:

- (1) If the promotional materials and or the transaction documents contained material misrepresentations or omissions of material facts regarding the Gift Program, did Faskens, Beach, or both owe a duty of care to the Class members to ensure that the promotional materials, the transaction documents, or both did not (i) contain material misrepresentations, (ii) did not omit any material information, or (iii) both?
 - (i) If so, did Faskens, Beach, or both breach their duty of care owed to the Class? If so, how?
- (2) Did the trust documents purporting to create the Global Learning Trust (2004) (the "Trust") fail to establish a valid trust?

- (i) If Faskens, Beach, or both prepared the Trust documents and they failed to establish a valid trust, were Faskens or Beach negligent in failing to create a valid trust?
- (ii) If so, did Faskens, Beach, or both breach a duty of care owed to the Class as the intended capital beneficiaries under the Trust?
- (iii) If so, are Faskens, Beach, or both liable to the Class members for their losses arising from their participation in the Gift Program?

12. THIS COURT ORDERS that the common issues for the Class as against **Wise Blackman** are:

- (1) At any time, did Wise Blackman deliver an opinion on the value of software licenses used in the Gift Program?
- (2) Did Wise Blackman deliver an Appraisal Review of the Valuation Opinion dated November 19, 2004 prepared by Michael Ozerkevich of EMC Partners?
- (3) Did Wise Blackman deliver an Appraisal Review of an EMC Partners Valuation Opinion in respect of any taxation year subsequent to 2004?
- (4) Did EMC Partners withdraw their Valuation Opinion dated November 19, 2004?
- (5) If the answer to question 4 is yes, what is the effect of the withdrawal of the EMC Partners Valuation Opinion dated November 19, 2004 on any work done by Wise Blackman in respect of or in relation to that opinion?
- (6) Did Wise Blackman owe a duty of care to the Class, or any part thereof?

- (7) If the answer to 6 is yes, what was the applicable standard of care for Wise Blackman?
 - (8) If the answer to 6 is yes, did Wise Blackman breach the applicable standard of care?
 - (9) In the circumstances of the case pertaining to Wise Blackman can the reliance of the Class, or any part thereof, on the Appraisal Review be inferred, and if so, was such reliance reasonable?
 - (10) If the answers to questions 8 and 9 are yes, and having due regard to other issues and complaints made by the Class regarding the Gift Program, did the work or representations of Wise Blackman cause or contribute to any loss or damage to the Class?
13. THIS COURT ORDERS that the common issues for the Class as against **Evans & Evans** are:
- (1) Did Evans & Evans owe the Class, or any part thereof, a duty of care?
 - (2) If so, what was the applicable standard of care?
 - (3) If Evans & Evans owed a duty of care to the Class or any part thereof, did it breach the applicable standard of care, including by failing to identify whether or not the Gift Program was a fraud or a sham?
 - (4) In the circumstances of this case, can the reliance of the Class, or any part thereof, on Evans & Evans' software license valuation be inferred, and if so, was such reliance reasonable?

- (5) Did Evans & Evans cause or contribute to the losses suffered by the Class, or any part thereof, arising from their participation in the Gift Program?
- (6) If Evans & Evans owed a duty of care to the Class, is it liable to the Class members for their losses arising from their participation in the Gift Program?

14. THIS COURT ORDERS that the common issues for the Class as against the **IDI Defendants** are:

- (1) Have the IDI Defendants been unjustly enriched at the expense of the Class? If so, in what amount?
- (2) Were the IDI Defendants in knowing receipt of funds impressed with a constructive trust in favour of the Class? If so, in what amount?
- (3) Did the IDI Defendants conspire with any of Robert Lewis, GLGI, or the Trustee for the purposes of their own gain and against the interests of the Class?
- (4) Did the IDI Defendants participate in a civil fraud against the Class?
- (5) Did the IDI Defendants owe the Class a duty of care?
- (6) If so, what was the applicable standard of care for the IDI Defendants?
- (7) If the IDI Defendants owed a duty of care to the Class, did they breach the applicable standard of care?
- (8) If so, are the IDI Defendants liable to the Class members for their losses arising from their participation in the Gift Program?

15. THIS COURT ORDERS that the common issues for the Class as against as against **Lewis and GLGI** are:

- (1) Did GLGI breach its contracts with the Class members?
- (2) Are the funds that the Class members paid to participate in the Gift Program that were paid to specified charities, and which were in turn paid by those charities to GLGI, impressed with a constructive trust in favour of the class members and, if so, should there be an order tracing the cash donations to the current holders of those funds?
- (3) If the funds referenced in #2 are impressed with a constructive trust, was Lewis in knowing receipt of funds from GLGI that were impressed with the constructive trust in favour of the Class members?
- (4) If so, is Lewis and or GLGI liable to repay to the class the funds he received from GLGI that were impressed with the constructive trust, or to pay damages in lieu thereof?
- (5) Did Lewis and or GLGI owe the Class a duty of care?
- (6) If so, what was the applicable standard of care?
- (7) If Lewis and or GLGI owed a duty of care to the Class, did Lewis or GLGI breach the applicable standard of care?
- (8) Who prepared the promotional materials with respect to the Gift Program?

- (9) If either the promotional materials or the transaction documents contained material misrepresentations or omissions of material fact, and Lewis and or GLGI is an author of these documents, then:
- (i) was Lewis and or GLGI reckless as to whether the representations in the promotional materials and/or transaction documents were true or false, or materially misleading?
 - (ii) did Lewis and or GLGI act intentionally in making the misrepresentations or omitting material facts from the promotional materials and/or transaction documents?
- (10) If either the promotional materials or the transaction documents contained material misrepresentations or omissions of material fact, and Lewis and or GLGI is an author of these documents, then did Lewis and or GLGI owe a duty of care to the Class Members to ensure that the promotional materials, the transaction documents, or both, did not (i) contain material misrepresentations (ii) did not omit any material information, or (iii) both?
- (11) If Lewis and or GLGI intentionally made misrepresentations and/or omissions of material facts or was reckless in respect thereto, is Lewis and or GLGI liable to the Class for fraudulent misrepresentation?
- (12) Are Lewis and or GLGI liable to the Class on the basis of fraud?
- (13) Are Lewis and or GLGI liable to the Class for conspiracy?

- (14) Have Lewis and or GLGI been unjustly enriched?
 - (15) Did Lewis and or GLGI engage in an unfair or unconscionable practice with respect to the marketing of the Gift Program, contrary to the Consumer Protection Legislation of each province, and if so, is it in the interests of justice to waive any notice requirement under such legislation, and if so, are the Class members entitled to damages in lieu of rescission of their Gift Program contracts?
 - (16) If so, what is the measure of damages to which the Class members are entitled in lieu of rescission?
 - (17) Does Lewis' and or GLGI's conduct justify an award of punitive or aggravated damages under the Consumer Protection legislation, or common law?
 - (18) Can the Class members' damages be assessed in whole or in part in the aggregate, and if so, what is the quantum of aggregate damages?
 - (19) In the circumstances of this case, is it appropriate for the court to pierce the corporate veil and hold Lewis liable for any of GLGI's misconduct?
16. THIS COURT ORDERS that the common issues for the Class as against **Escrowagent and the Trustee** are:
- (1) Did the Class members enter into contracts with Escrowagent, and if so, what are the terms of the contracts?
 - (2) If the Gift Program was a sham or a fraud, is Escrowagent liable to the Class for their losses arising from their participation in the Gift Program?

- (3) If the funds referenced in 15(2) are impressed with a constructive trust, were Escrowagent and or the Trustee in knowing receipt of the trust funds? If so, are Escrowagent or the Trustee liable to repay to the Class the funds they received from GLGI that were impressed with the constructive trust in favour of the Class, and if so, in what amount?
- (4) Are the funds that the Class paid to Escrowagent to participate in the Gift Program impressed with a constructive trust in favour of the Class, and if so,
 - (i) in what amount? and,
 - (ii) should there be an order tracing those payments to the current holders of those funds?
- (5) Did the Trustee or Escrowagent owe the Class a duty of care?
- (6) If so, what was the applicable standard of care?
- (7) If the Trustee or Escrowagent owed the Class a duty of care, did they or either one thereof breach the applicable standard of care?
- (8) Did the Trustee and/or Escrowagent make material misrepresentations or omissions of material facts regarding the Gift Program in the promotional materials and/or in the transaction documents? If so, what were the misrepresentations and when were they made?
- (9) If either the promotional materials or the transaction documents contained material misrepresentations or omissions of material facts regarding the Gift Program, did the Trustee and/or Escrowagent know or were they reckless as to whether the promotional materials and/or transaction documents were true or false or materially misleading?

- (10) In the circumstances of this case, can the reliance of the Class on the misrepresentations or material omissions in either the transaction documents or promotional materials be inferred?
 - (11) If the Trustee or Escrowagent intentionally or recklessly made misrepresentations or material omissions in either the transaction documents or promotional materials, are they, or either one thereof liable to the Class for fraudulent misrepresentation?
 - (12) Are the Trustee and Escrowagent liable to the Class for conspiracy?
 - (13) Have either the Trustee or Escrowagent been unjustly enriched?
 - (14) Does the conduct of the Trustee and Escrowagent justify an award of punitive or aggravated damages?
 - (15) Can the Class's damages be assessed in whole or in part in the aggregate, and if so, what is the quantum of aggregate damages?
17. THIS COURT ORDERS that the trial of any cross-claims shall be heard at the same time as the common issues trial or immediately following the common issues trial, or as the trial judge directs.
18. THIS COURT ORDERS that notice of certification of this proceeding as a class proceeding shall be given to the Class members in a manner to be approved by the court, with the cost of giving notice to be determined by the court.
19. THIS COURT ORDERS that Class members may opt out of the class proceeding by delivering to Class Counsel or as otherwise directed by the court a written and signed statement confirming their intent to opt out, no later than 60 days following first publication of the notice of certification.

20. THIS COURT ORDERS that there shall be no costs of this motion as against Lewis, the Fasken Defendants, Cassels Brock, the IDI Defendants, Wise Blackman and Evans & Evans.

21. ~~THIS COURT ORDERS that costs of this motion are fixed in the amount of \$~~
~~as against GLGI, the Trustee and Escrowagent.~~

EB

E. Belobaba J.

The Honourable Justice E. Belobaba

ENTERED AT / INSCRIPT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

JUN 28 2019

PER/PAR

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LYNN WINTERCORN and others
Plaintiffs

-16-
-and-

GLOBAL LEARNING GROUP INC. and others
Defendants
Court File No. CV-17-583573-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

CERTIFICATION ORDER

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