

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

BETWEEN:

TIM GOULD and ARCHIE LEACH

Plaintiffs

- and -

BMO NESBITT BURNS INC.; BLACKMONT CAPITAL INC.; CANACCORD CAPITAL CORPORATION; NATIONAL BANK FINANCIAL INC.; SPROTT SECURITIES INC.; TD SECURITIES INC.; BDO SEIDMAN, LLP; FMF CAPITAL GROUP LTD.; FMF CAPITAL LLC; FMF HOLDINGS, LLC; MICHIGAN FIDELITY ACCEPTANCE CORPORATION; PKF, LLC; THOMAS LITTLE; ATUL SHAH; MICHAEL HOFFMAN; EDAN KING; HOWARD MOROF; ROBERT PILCOWITZ; ERIC SLAVENS; and LORIE WAISBERG

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**NOTICE OF MOTION**

**(Motion Returnable January 25, 2007)**

The proposed Representative Plaintiffs will make a motion to the Court on Thursday January 25, 2007 at 10:00 a.m., or as soon thereafter as the motion can be heard, before the Honourable Justice Maurice C. Cullity at the Courthouse of the Ontario Superior Court of Justice at 361 University Ave., Toronto, Ontario.

**PROPOSED METHOD OF HEARING:** The motion is to be heard

in writing under subrule 37.12.1(1) because it is (*insert one of on consent, unopposed or made without notice*);

in writing as an opposed motion under subrule 37.12.1(4)

orally.

**THE MOTION IS FOR:**

1. An Order that the within proceeding be certified as a class proceeding pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c.6, ss. 2 and 5 (the "CPA");
2. an Order that "Class I" be defined and certified subject hereto as:

All Persons (excluding Persons who reside in the Province of Québec, but including Persons who reside in the Province of Québec and who are precluded from being a member of a group in a class action under Article 999 of the Québec *Code of Civil Procedure*) who purchased Income Participating Securities ("IPSS") of FMF Capital Group Ltd. during the IPO.

Excluded from Class I are the Defendants, the Transferee Defendants, members of the immediate families of the individual Defendants and Transferee Defendants, the directors, officers, subsidiaries, and affiliates of BDO, the corporate FMF Defendants, and the Transferee Defendants, the directors, senior officers above the office of vice president, subsidiaries, and affiliates of the Underwriter Defendants, any person, firm, trust, corporation, or entity in which any Defendant or Transferee Defendant has a controlling interest or which is related to, or affiliated with, any Defendant or Transferee Defendant, and the legal representatives, agents, affiliates, heirs, successors-in-interest or assigns of any such excluded Person.

3. an Order that "Class II" be defined and certified subject hereto as:

All Persons (excluding Persons who reside in the Province of Québec, but including Persons who reside in the Province of Québec and who are precluded from being a member of a group in a class action under Article 999 of the Québec *Code of Civil Procedure*) who purchased IPSS, or any of the securities represented by such IPSS, over the Toronto Stock Exchange ("TSX") during the period extending from, and including, March 24, 2005 to, and including, November 15, 2005 (the "Class II Period").

Excluded from Class II are the Defendants, the Transferee Defendants, members of the immediate families of the individual Defendants and Transferee Defendants, the directors, officers, subsidiaries, and affiliates of BDO, the corporate FMF Defendants, and the Transferee Defendants, the directors, senior officers above the office of vice president, subsidiaries, and affiliates of the Underwriter Defendants, any person, firm, trust, corporation, or entity in which any Defendant or Transferee Defendant has a controlling interest or which is related to, or affiliated with, any Defendant or Transferee Defendant, and the legal representatives, agents, affiliates, heirs, successors-in-interest or assigns of any such excluded Person.

4. an Order that Tim Gould and Archie Leach be appointed Representative Plaintiffs for the within class proceeding;
5. an Order that the causes of action asserted on behalf of the Classes are breaches of section 130 of the *Securities Act*, R.S.O. 1990, c. S.5 and sections 36 and 52 of the *Competition Act*, R.S. 1985, c. C-34, and negligence and negligent misrepresentation.
6. an Order that the within class proceeding be certified on the basis of the following common issues:

What claims do the Class I Members and the Class II Members have against the Defendants arising from the Defendants' alleged acts, omissions, disclosures or non-disclosures relating either to the IPO, or subsequent alleged acts, omissions, disclosures or non-disclosures relating to the IPSs.

7. a Declaration that the Settlement Agreement, in its entirety (including the Recitals, the definitions set out in paragraph 1 and its Schedules) (the "Agreement"), forms part of the Order and is binding upon the Representative Plaintiffs, upon all Class Members who do not opt out of the Class in accordance with the Notice, and upon the Defendants; and that, the terms defined in the Settlement Agreement shall have the same definitions in the Order as in the Settlement Agreement;
8. a Declaration that the Agreement is fair, reasonable and in the best interests of the Class I Members and the Class II Members;
9. an Order that Deloitte and Touche<sup>LLP</sup> be appointed Claims Administrator;
10. an Order that a notice of certification and approval of settlement be distributed and or published in accordance with the Plan of Notice, which is attached as Schedule C to the Agreement, and that the notice shall be substantially in the form of Schedules J and K of the Agreement;
11. an Order that the Short Form Approval Notice, attached as Schedule "J" to the Settlement Agreement, be sent to CDS Depository Services Inc. ("CDS"), the securities depository for the Defendant, FMF Capital Group Ltd., with a request from the Courts that they provide such Notice to each of the brokerages participating in the CDS system and that

those brokerage firms further forward such Notice onto their individual brokers and affected clients;

12. an Order that the Short Form Approval Notice, attached as Schedule "J" to the Settlement Agreement, be sent to the following brokerage firms, with a request from the Courts that they provide notice to their brokers and affected clients:
  - (a) Edward Jones;
  - (b) Dundee Wealth Management Inc;
  - (c) Raymond James Ltd.;
  - (d) Investors Group Inc.;
  - (e) RBC Dominion Securities Inc.;
  - (f) Desjardins Securities;
  - (g) Canaccord Capital;
  - (h) Scotia McLeod;
  - (i) BMO Nesbitt Burns;
  - (j) National bank Financial;
  - (k) TD Waterhouse Private Investment Advice;
  - (l) CIBC Wood Gundy;
  - (m) HSBC Securities Merrill Lynch; and
  - (n) Assante Corp.
13. an Order that Class Members may Opt Out of the Classes by completing and returning the Opt Out Coupon that forms part of the Claim Form to the Claims Administrator by the date thirty (30) days after the Short Form Approval Notice, attached as Schedule "J" to the Agreement, is published (the "Opt Out Period");
14. an Order that no Class Members may opt out of the Classes after the expiration of the Opt Out Period;
15. an Order that the Agreement is approved pursuant to s. 29 of the *CPA*;

16. an Order that the Parties and the Settling Class Members, and their successors, heirs, executors, administrators, and assigns are hereby permanently barred and enjoined from instituting, commencing, or prosecuting against the Defendants and the Related Parties any claims, including Unknown Claims, demands, rights, liabilities, actions and causes of action, damages, losses, obligations, judgments, suits, matters, and issues of every nature and description whatsoever, known or unknown, contingent or absolute, suspected or unsuspected, disclosed or undisclosed, matured or un-matured, whether or not concealed or hidden, that had been, have been, could have been, or may in the future be, asserted in the Litigation or in any court, tribunal, or proceeding in Canada, the United States, or anywhere else (including but not limited to any claims arising under Federal, provincial, or state law in Canada, the United States, or anywhere else), including, without limitation, all claims alleged or which could have been alleged in the Litigation and all claims for breach of contract, indemnity and/or contribution, negligence, gross negligence, breach of duty of care and/or breach of any other duty (including any fiduciary duty), fraud, securities fraud, misrepresentation, fraudulent misrepresentation, negligent misrepresentation, unjust enrichment, restitution, disgorgement, rescission, breach of trust, false advertising, concert of action, civil conspiracy, willful or wanton misconduct or any other violation of any Federal, provincial, or state statutes, rules, regulations or common law in Canada, the United States, or anywhere else, by any Party or Related Party against any other Party or Related Party, which have arisen, could have arisen, arise now or hereafter arise out of, or relate in any manner to, the allegations, facts, events, transactions, acts, conduct, occurrences, statements, representations, misrepresentations, omissions, obligations, disclosures, nondisclosures, or any other matter, thing, or cause whatsoever, or any series thereof, embraced, involved, alleged, set forth in or otherwise related, directly or indirectly, to the IPO, the IPSs, the Litigation, or the prosecution, settlement, or resolution of the Litigation, all of which are hereby compromised, settled, released, discharged and dismissed with prejudice against the Defendants and the Related Parties.
17. an Order that the within proceeding be dismissed against the Defendants without costs and with prejudice; and
18. such further and other relief as this Honourable Court deems just.

**THE GROUNDS FOR THIS MOTION ARE THAT:**

19. the pleadings herein disclose a cause of action against the Defendants;
20. there is are identifiable Classes and the claims of the Class Members raise common issues;
21. a class proceeding is the preferable procedure for the resolution of the common issues;
22. the proposed Representative Plaintiffs, Tim Gould and Archie Leach:
  - (a) will fairly and adequately represent the interests of both Classes;
  - (b) have a plan, in the form of the Agreement, which sets out a workable method for the advancement of the proceeding on behalf of the Classes, including notification to the Class Members; and
  - (c) do not have interests in conflict with the interests of the other Class Members
23. the proposed settlement of this action is fair, reasonable and in the best interest of the Class I Members and the Class II Members;
24. the *Class Proceedings Act, 1992*, S.O. 1992, c.6;
25. the *Securities Act*, R.S.O. 1990, c. S.5;
26. the *Competition Act*, R.S. 1985, c. C-34; and
27. such further grounds as counsel may advise and this Honourable Court permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:**

1. the Affidavit of C. Scott Ritchie, Q.C., and the Exhibits attached thereto, sworn January 10, 2007;
2. the Affidavit of Mark L. Berenblut and the Exhibit attached thereto, sworn December 22, 2006;
3. the Affidavit of Tim Gould and the Exhibit attached thereto, sworn January 10, 2007;

4. the Affidavit of Archie Leach and the Exhibit attached thereto, sworn December 27, 2006;
5. the Affidavit of Shimshon Gross, and the Exhibit attached thereto, affirmed January 10, 2007;
6. the Affidavit of Estelle Ruth Tritt Aspler, and the Exhibit attached thereto, affirmed January 12, 2007;
7. the Affidavit of Rebecca Bekhor, and the Exhibit attached thereto, sworn January 16, 2007
8. the Affidavit of Mark Wayne Fisher, sworn January 4, 2007;
9. the Affidavit of Stanley Sagan and the Exhibit attached thereto, sworn January 4, 2007;
10. the Affidavit of Ursula Sagan and the Exhibit attached thereto, sworn January 4, 2007;
11. the Affidavit of Giacinto Venditti, sworn January 8, 2007;
12. the Affidavit of Ray Steele, sworn January 3, 2007;
13. the Affidavit of Harvey T. Strosberg and the Exhibits attached thereto, sworn January 11, 2007;
14. the Affidavit of Joel Rochon and the Exhibits attached thereto, sworn January 11, 2007;
15. the Affidavit of Edith Reynolds, sworn January 10, 2007;
16. the Affidavit of Roland Mansell, sworn January 11, 2007; and
17. such further and other material as this Honourable Court permits.

January 16, 2007

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**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at LONDON

**NOTICE OF MOTION  
(MOTION RETURNABLE JANUARY 25, 2007)**

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