

**ONTARIO
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE)
)
JUSTICE AKBARALI) MONDAY, THE 18th DAY
)
) OF December, 2023

BETWEEN:



STEVEN R SAGE

Plaintiff

- and -

1832 ASSET MANAGEMENT L.P.

Defendant

Proceeding under the *Class Proceedings Act, 1992*

**ORDER
(CERTIFICATION, NOTICE AND OPT-OUT)**

THIS MOTION, by the Plaintiff for an order certifying this action as a class proceeding pursuant to the *Class Proceedings Act, 1992*, SO 1992, c 6 (“CPA”) and approving the certification notice, the notice plan, setting the opt-out process and deadline, and appointing RicePoint Administration Inc. (“RicePoint”) as notice and opt-out administrator was heard this day in writing;

ON READING the materials filed by the Plaintiff;

AND ON BEING FURTHER ADVISED that the Defendant does not oppose this Order and that RicePoint consents to being appointed as notice and opt-out administrator;

1. **THIS COURT ORDERS** that for the purposes of this order, except to the extent that they are modified in this order, the definitions set out in the proposed Third Fresh as Amended

Statement of Claim (“Claim”), attached hereto as **Schedule “A”**, apply to and are incorporated into this order.

2. **THIS COURT ORDERS** that the within action is certified as a class proceeding pursuant to the *CPA* as against the Defendant, subject to the provisions of this order.
3. **THIS COURT ORDERS** that the Class is defined as:

All persons, wherever they may reside or be domiciled, who held or hold units of a 1832 Mutual Fund that paid trailing commissions through a Discount Broker, except for the Excluded Persons*, from June 25, 2003 to the date this Order is issued.

* Excluded Persons means the Defendant; the past and present limited and general partners of the Defendant; the past and present parents, subsidiaries, affiliates, officers, directors, senior employees, legal representatives, heirs, predecessors, successors and assigns of the Defendant or of any of the past and present limited and general partners of the Defendant; and the past and present members of the independent review committee of each 1832 Mutual Fund.

4. **THIS COURT ORDERS** that the following issues are certified as common issues for the Class and shall be determined in accordance with the stay order dated August 1, 2023 made in *Yeats v. 1832 Asset Management L.P.*, Court File No. CV-22-690373-00CP:

Breach of Fiduciary Duty

- (a) Did the Defendant, as the trustee of the 1832 Mutual Funds, owe a fiduciary duty? If so, to whom was the duty owed?
- (b) Did the Defendant, as the manager of the 1832 Mutual Funds, owe a fiduciary duty? If so, to whom was the duty owed?
- (c) If the answer to the first question in (a) and/or (b) is yes, did the Defendant breach its fiduciary duty? If so, when and how?

Breach of Trust

- (d) Did the Defendant, as the trustee of the 1832 Mutual Funds, breach the standard of care set out in the Trust Instruments? If so, when and how?
- (e) If the breach of trust is established in the answers to common issues (d), is the Defendant liable to account to the Class Members?

Breach of Contract

- (f) Did the Defendant, as the manager of the 1832 Mutual Funds, breach the Management Agreements? If so, when and how?

Section 23.1 of the Trustee Act

- (g) Should the payment of the Unearned Management Fees by the Defendant be disallowed as an expense pursuant to section 23.1 of the *Trustee Act*?

Prospectus Misrepresentation

- (h) Did the Fund Facts Documents, and the Simplified Prospectuses which incorporate the Fund Facts Documents, contain a misrepresentation within the meaning of the *OSA* (and, as applicable, the Other Canadian Securities Legislation)?
- (i) If the answer to (h) is yes, is the Defendant liable to the Class Members pursuant to section 130 of the *OSA* (and, as applicable, the equivalent provisions of the Other Canadian Securities Legislation)?

Remedies

- (j) If the Defendant is found liable on any claims asserted by the Class Members, as set out in (a) to (i) above, what remedies, including damages and/or equitable remedies, are the Class Members entitled to receive?
- (k) How should recoveries under each type of remedy be measured?
- (l) Can the amount of any monetary relief be determined on an aggregate basis? If so, what is the amount and what is the appropriate method or procedure for distributing that amount to the Class Members?

Interest

- (m) Should the Defendant be ordered to pay an equitable rate of interest and/or pre-judgment and post-judgment interest pursuant to the *CJA*? If so, what is the appropriate measure or amount of such interest?

Administration and Distribution

- (n) Should the Defendant pay the costs of administering and distributing the recovery? If so, what amount should the Defendant pay?

5. **THIS COURT ORDERS** that Steven R Sage is appointed as the representative plaintiff for the Class.

6. **THIS COURT ORDERS** that the relief sought by the Class is as set out in paragraph 3 of the Claim.
7. **THIS COURT ORDERS** that the nature of the claims asserted on behalf of the Class are relief arising out of or under: (i) breach of trust; (ii) breach of fiduciary duty; (iii) breach of contract; (iv) section 23.1 of the *Trustee Act*; and (v) section 130 of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation).
8. **THIS COURT ORDERS** that the litigation plan attached hereto as **Schedule “B”** is hereby approved.
9. **THIS COURT ORDERS** that any other class proceeding in Ontario relating to the subject matter of this action is hereby stayed, except for:
 - (a) *Frayce et al. v BMO InvestorLine Inc. et al.*, Ontario Superior Court of Justice, Court File No. CV-20-00638868-00CP;
 - (b) *Frayce v BMO InvestorLine Inc. et al.*, Ontario Superior Court of Justice, Court File No. CV-20-00634551-00CP; and
 - (c) *Ciardullo v. 1832 Asset Management L.P. et al.*, Court File No. CV-22-684723-00CP, *Ciardullo et al. v. 1832 Asset Management L.P. et al.*, Court File No. CV-22-685386-00CP, *Yeats v. 1832 Asset Management L.P.*, Court File No. CV-22-690373-00CP, *Woodard v. Canadian Imperial Bank of Commerce et al.*, Court File No. CV-22-690374-00CP, *Yeats v. BMO Investments Inc.*, Court File No. CV-22-690519-00CP, *DeJong v. RBC Global Asset Management Inc. et al.*, Court File No. CV-22-691343-00CP, *Aggarwal v. TD Asset Management Inc.*, Court File No. CV-22-691344-00CP, and *Aizic v. Natcan Trust Company et al.*, Court File No.

CV-23-00697428-00CP (collectively, the “**2022 Actions**”), subject to the temporary stay orders granted by this Court on August 1, 2023 in the 2022 Actions and any further orders subsequently made in the 2022 Actions.

10. **THIS COURT ORDERS** that no other class proceeding relating to the subject matter of this action may be commenced in Ontario without leave of the Court.
11. **THIS COURT ORDERS** that RicePoint is hereby appointed as the notice and opt-out administrator and will perform the duties and responsibilities set out herein, and any other related duty or responsibility.
12. **THIS COURT ORDERS** that the long-form notice, short-form notice and internet banner, substantially in the form attached hereto as **Schedules “C”, “D” and “E”**, respectively, are hereby approved.
13. **THIS COURT ORDERS** that the notices shall be published and disseminated by RicePoint (or Siskinds LLP (“**Class Counsel**”) with respect to paragraphs 13(b)(i) and (ii) below or the Defendant with respect to paragraph 13(a)(v) below) substantially in the following manner:
 - (a) Short-form notice:
 - (i) disseminated as a news release in Canada across Canada NewsWire (in English and French);
 - (ii) published once in the business section of the national weekend edition of The Globe and Mail, in English;
 - (iii) published once in the business section of La Presse, in French;

- (iv) sent electronically and/or in paper form to Discount Brokers in Canada with a cover letter requesting that they post the notice on their electronic message/news boards;
 - (v) filed by the Defendant as a news release on SEDAR;
- (b) Long-form notice:
- (i) posted by Class Counsel on <https://www.siskinds.com/class-action/mutual-fund-trailing-commissions/>, in English and French;
 - (ii) provided by Class Counsel to any potential Class Member who has previously contacted Class Counsel for the purposes of receiving notice of developments in the action;
- (c) Internet banner:
- (i) published as a Google banner ad for approximately 700,000 impressions/views across Canada to an investor focused audience, in English and French, over 30 days;
 - (ii) published as a 12 day sponsored news link on Stockhouse.

14. **THIS COURT ORDERS** that the opt-out form (“**Opt-Out Form**”), substantially in the form attached as Appendix “A” to the long-form notice, is hereby approved.

15. **THIS COURT ORDERS** that:

- (a) a person may opt out of this class proceeding by sending (by mail or courier) a fully completed Opt-Out Form in accordance with the instructions set out in the long-

form notice to be postmarked on or before the date that is ninety (90) days after the day on which the short-form notice is first published (“**Opt-Out Deadline**”);

- (b) no person may opt out of this class proceeding after the Opt-Out Deadline; and
- (c) a person who validly opts out of the class proceeding in accordance with this Order shall not be a Class Member on and after the date that such person opts out of the class proceeding.

- 16. **THIS COURT ORDERS** that the costs of disseminating notice and receiving Opt-Out Forms shall be paid by the Plaintiff.
- 17. **THIS COURT ORDERS** that there shall be no costs of this motion.



The Honourable Justice Akbarali

ENTERED DEC 18/23

SCHEDULE "A"
PROPOSED THIRD FRESH AS AMENDED
STATEMENT OF CLAIM

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

STEVEN R SAGE

Plaintiff

- and -

1832 ASSET MANAGEMENT L.P.

Defendant

Proceeding under the *Class Proceedings Act, 1992*

THIRD FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in this statement of claim.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$400.00 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by

the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400.00 for costs and have the costs assessed by the court.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date June 25, 2018

Issued by _____
Local registrar

Address of court office 393 University Avenue
10th Floor
Toronto, ON M5G 1E6

TO: 1832 Asset Management L.P.
1 Adelaide Street East
28th Floor
Toronto, ON M5C 2V9

CLAIM

CURRENCY AND DEFINITIONS

1. Unless otherwise stated, all dollar amounts stated herein are in Canadian dollars.
2. In this Third Fresh as Amended Statement of Claim, in addition to the terms that are defined elsewhere herein, the following definitions apply:
 - (a) “**1832 G.P. Inc.**” means 1832 Asset Management G.P. Inc.;
 - (b) “**1832 Mutual Funds**” means all mutual fund trusts (including, without limitation, all series of units thereof) of which the Defendant is trustee, was trustee or may be trustee at any time prior to the conclusion of the trial of the common issues in this proceeding (but only in respect of the period during which the Defendant is trustee, was trustee or may be trustee, as applicable), including, for greater certainty, (i) those mutual funds that have been or may be terminated, (ii) those mutual funds that have been or may be merged into other mutual funds, and (iii) those mutual funds that have undergone or may undergo name changes;
 - (c) “**CJA**” means the *Courts of Justice Act*, RSO 1990, c C-43, as amended;
 - (d) “**Class**” and “**Class Members**” means all persons, wherever they may reside or be domiciled, who held or hold units of a **1832 Mutual Fund** that paid trailing commissions through a **Discount Broker**, except for the **Excluded Persons**, from June 25, 2003 to the date the Certification Order was issued;
 - (e) “**CPA**” means the *Class Proceedings Act, 1992*, SO 1992, c 6, as amended;
 - (f) “**CSA**” means the Canadian Securities Administrators;
 - (g) “**Current Dynamic Funds DOT**” means the Amended and Restated Master Declaration of Trust, dated as of August 20, 2015 (Dynamic Funds and Marquis Investment Program), as amended and supplemented from time to time;
 - (h) “**Current Dynamic Funds Management Agreement**” means the Amended and Restated Master Management Agreement, dated as of August 20, 2015, between the **Defendant**, Dynamic Global Fund Corporation and Dynamic Managed Portfolios Ltd., as amended and supplemented from time to time;
 - (i) “**Current Scotia Funds DOT**” means the Amended and Restated Master Declaration of Trust, dated as of August 20, 2015 (The Scotia Mutual Funds), as amended and supplemented from time to time;

- (j) “**Current Scotia Funds Management Agreement**” means the Amended and Restated Master Management Agreement, dated as of August 20, 2015, between the **Defendant**, Scotia Corporate Class Inc. and Scotiabonds G.P. Inc., as amended and supplemented from time to time;
- (k) “**Defendant**” means 1832 Asset Management L.P.;
- (l) “**Discount Brokers**” means entities providing “order-execution only services” as defined in Rule 3200 of the **IIROC Rules** or entities performing a function similar to “order-execution only services” prior to the introduction of that definition in Rule 3200 of the **IIROC Rules**, including (without limitation) **Scotia iTRADE**;
- (m) “**Dynamic Funds**” refers to those **1832 Mutual Funds** marketed to investors under the “Dynamic” brand.
- (n) “**Excluded Persons**” means the **Defendant**; the past and present limited and general partners of the **Defendant**; the past and present parents, subsidiaries, affiliates, officers, directors, senior employees, legal representatives, heirs, predecessors, successors and assigns of the **Defendant** or of any of the past and present limited and general partners of the **Defendant**; and the past and present members of the independent review committee of each **1832 Mutual Fund**;
- (o) “**Form 81-101F1**” means Form 81-101F1 – *Contents of Simplified Prospectus*, as amended;
- (p) “**Form 81-101F2**” means Form 81-101F2 – *Contents of Annual Information Form*, as amended;
- (q) “**Form 81-101F3**” means Form 81-101F3 – *Contents of Fund Facts Document*, as amended;
- (r) “**Fund Facts Document**” means a fund facts document as referred to in **NI 81-101** and **Form 81-101F3**;
- (s) “**IIROC**” means the Investment Industry Regulatory Organization of Canada;
- (t) “**IIROC Rules**” means the **IIROC Dealer Member Rules**, as amended;
- (u) “**Management Agreements**” means, collectively, all management agreements pursuant to which the **Defendant** acts, has acted or may act as manager of the **1832 Mutual Funds**, including, without limitation, the **Current Dynamic Funds Management Agreement** and the **Current Scotia Funds Management Agreement**;
- (v) “**NI 81-101**” means National Instrument 81-101 – *Mutual Fund Prospectus Disclosure*, as amended;

- (w) “**NI 81-107**” means National Instrument 81-107 – *Independent Review Committee for Investment Funds*, as amended;
- (x) “**OBCA**” means the *Business Corporations Act*, RSO 1990, c B.16, as amended;
- (y) “**OSA**” means the *Securities Act*, RSO 1990, c S.5, as amended;
- (z) “**Other Canadian Securities Legislation**” means, collectively, the *Securities Act*, RSA 2000, c S-4; the *Securities Act*, RSBC 1996, c 418; *The Securities Act*, CCSM c S50; the *Securities Act*, SNB 2004, c S-5.5; the *Securities Act*, RSNL 1990, c S-13; the *Securities Act*, SNWT 2008, c 10; the *Securities Act*, RSNS 1989, c 418; the *Securities Act*, S Nu 2008, c 12; the *Securities Act*, RSPEI 1988, c S-3.1; the *Securities Act*, RSQ, c V-1.1; *The Securities Act, 1988*, SS 1988-89, c S-42.2; and the *Securities Act*, SY 2007, c 16, all as amended;
- (aa) “**Plaintiff**” means Steven R Sage;
- (bb) “**Scotiabank**” means The Bank of Nova Scotia;
- (cc) “**Scotia Capital**” means Scotia Capital Inc.;
- (dd) “**Scotia Funds**” refers to those **1832 Mutual Funds** marketed to investors under the “Scotia” brand.
- (ee) “**Scotia iTRADE**” means Scotia iTRADE, a division of **Scotia Capital**, or such other discount brokerage business operated, directly or indirectly, by **Scotiabank** from time to time (including previously Scotia Discount Brokerage and ScotiaMcLeod Direct Investing);
- (ff) “**Simplified Prospectus**” means a simplified prospectus as referred to in **NI 81-101** and **Form 81-101F1**;
- (gg) “**Trust Instruments**” means, collectively, all declarations of trust or similar trust instruments that govern, have governed or may govern the **1832 Mutual Funds**, including, without limitation, the **Current Dynamic Funds DOT** and the **Current Scotia Funds DOT**;
- (hh) “**Trustee Act**” means the *Trustee Act*, RSO 1990, c T.23, as amended; and
- (ii) “**Unearned Management Fees**” means, in respect of management fees that have been paid or may be paid out of the assets of the **1832 Mutual Funds**, the portion of those management fees that has been paid or may be paid to **Discount Brokers** as trailing commissions, and any taxes relating to those trailing commissions.

RELIEF SOUGHT

3. The Plaintiff claims on his own behalf and on behalf of the other Class Members:
- (a) an order certifying this action as a class proceeding pursuant to the *CPA* and appointing the Plaintiff as the representative plaintiff for the Class;
 - (b) a declaration that the Defendant committed breaches of trust and breached its common law fiduciary duty to the Plaintiff and the other Class Members by the acts and omissions pleaded herein;
 - (c) a declaration that the Defendant is liable to the Plaintiff and the other Class Members for breach of contract;
 - (d) a declaration that the Defendant made one or more misrepresentations within the meaning of the *OSA* (and, if necessary, the Other Canadian Securities Legislation), and that the Defendant is liable to the Plaintiff and the other Class Members pursuant to section 130 of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation);
 - (e) an order requiring the Defendant to account to the Plaintiff and the other Class Members for the Unearned Management Fees;
 - (f) damages and/or equitable compensation in the sum of \$200 million (or such other sum as this Court finds appropriate at the trial of the common issues or at a reference or references) to restore the Plaintiff and the other Class Members to the position they would have been in had the Unearned Management Fees not been paid;

- (g) if necessary, an order compelling the Defendant to compensate the Plaintiff and the other Class Members in respect of the Unearned Management Fees by means of litigation trusts to be established pursuant to the *CPA*;
- (h) an order disallowing the payment of the Unearned Management Fees as expenses pursuant to section 23.1 of the *Trustee Act* (and, if necessary, the equivalent provisions of comparable Canadian legislation) and requiring the Defendant to repay the expenses to the Plaintiff and the other Class Members or to the 1832 Mutual Funds;
- (i) an interim and permanent order prohibiting the Defendant from seeking or obtaining indemnity or reimbursement from the assets of the 1832 Mutual Funds in respect of monetary relief paid or payable to the Plaintiff and the other Class Members in this action or its costs and expenses of this action;
- (j) an order directing a reference or giving such other directions as may be necessary to determine issues not determined at the trial of the common issues;
- (k) an equitable rate of interest on all sums found due and owing to the Plaintiff and the other Class Members to compensate them for the diminution in the value of their units of the 1832 Mutual Funds resulting from payment of the Unearned Management Fees;
- (l) pre-judgment and post-judgment interest pursuant to the *CJA*;
- (m) costs of this action on a substantial indemnity basis or in an amount that provides full indemnity;

- (n) pursuant to section 26(9) of the *CPA*, the costs of notice and of administering the plan of distribution of the recovery in this action plus applicable taxes; and
- (o) such further and other relief as this Honourable Court may deem just.

OVERVIEW

4. This class proceeding arises out of the payment of excessive, inflated and/or unearned management fees to the Defendant in respect of the 1832 Mutual Funds. The management fees are excessive, inflated and/or unearned because unearned trailing commissions are included in, or embedded into, those management fees.
5. The Defendant is the trustee and manager of the 1832 Mutual Funds.
6. The Class Members are persons who hold or held units of a 1832 Mutual Fund through a Discount Broker, as distinct from other distribution channels through which 1832 Mutual Funds are sold to investors. Discount Brokers are also commonly referred to as “order-execution only”, “DIY” and “online” brokers. Under the IIROC Rules, Discount Brokers are prohibited from providing investment advice to investors.
7. The 1832 Mutual Funds are trusts governed by the Trust Instruments. The assets of the 1832 Mutual Funds are trust property that the Defendant, as trustee and a fiduciary, has undertaken to hold for the exclusive benefit of the beneficiaries, being the Class Members and the other unitholders of the 1832 Mutual Funds. The Defendant has a duty to preserve the trust property and maximize the value of units of the 1832 Mutual Funds.
8. The Defendant receives management fees out of the assets of the 1832 Mutual Funds. The management fees are excessive, inflated and/or unearned because a portion of those management fees — described herein as the Unearned Management Fees — is collected

by the Defendant for the purpose of paying trailing commissions to the Discount Brokers. The Defendant has paid, and continues to pay, trailing commissions to the Discount Brokers through which the Class Members held or hold units of the 1832 Mutual Funds.

9. The purpose of a trailing commission on a mutual fund is to compensate the dealer (through whom the mutual fund is sold) for providing their client with ongoing investment advice about the client's investment in the mutual fund in respect of which the trailing commission is paid. As Discount Brokers do not and cannot provide investment advice to investors, the payment of trailing commissions to Discount Brokers in respect of the 1832 Mutual Funds is improper, unreasonable and unjustified. Consequently, the payment by the Defendant of the Unearned Management Fees on account of those trailing commissions, and their receipt by the Defendant, is improper, unreasonable and unjustified.
10. From 2011 until approximately November 2018, the Fund Facts Documents that the Defendant prepared and filed with securities regulators to permit the sale of units of the 1832 Mutual Funds have acknowledged the purpose of trailing commissions as compensation for advice. Those Fund Facts Documents stated that trailing commissions are paid to dealers for the "services and advice" provided by those dealers to their clients. On or about November 16, 2018 (for Dynamic Funds) and November 9, 2018 (for Scotia Funds), the Fund Facts Documents for the 1832 Mutual Funds were amended to refer to "services and/or advice" (other than Fund Facts Documents for Series D units of certain Scotia Funds, which were amended on or about November 9, 2018 to refer to "services"). By making that amendment to the Fund Facts Documents, the Defendant acknowledged that the reference to "services and advice" in the previous Fund Facts Documents was false, misleading and/or inaccurate.

11. The term “services and advice” refers to a dealer providing ongoing advice to a client with respect to the client’s investment in the 1832 Mutual Funds in respect of which the trailing commission is paid, and services that are specifically connected with that advice, namely determining the suitability for the client of the investment in that 1832 Mutual Fund in light of the personal circumstances of the client (including the client’s other investment holdings). However, Discount Brokers do not and cannot provide investment advice to clients and they do not provide suitability determinations for their clients. Accordingly, the payment of trailing commissions to Discount Brokers in respect of the 1832 Mutual Funds is improper, unreasonable and unjustified. Consequently, the payment by the Defendant of the Unearned Management Fees on account of those trailing commissions, and their receipt by the Defendant, is improper, unreasonable and unjustified.

12. The reality is that trailing commissions function as sales commissions paid on an ongoing basis by the Defendant to Discount Brokers in consideration for services provided by the Discount Brokers to the Defendant, not services provided by the Discount Brokers to the Class Members. The trailing commissions incentivize the Discount Brokers to offer for sale, or provide “shelf space” for, 1832 Mutual Funds on their trading platforms. This is to the detriment of the Class Members (who suffer reduced investment returns), while accruing to the benefit of: the Defendant (which receives increased management fees as the assets of the 1832 Mutual Funds grow through new investment capital); the Defendant’s affiliate, Scotia iTRADE, and other Discount Brokers (which receive the trailing commissions); and the Defendant’s ultimate parent company, Scotiabank (which enjoys the benefits flowing to the Defendant and Scotia iTRADE). The Defendant misused trust

property belonging to the Class Members for the purpose of benefiting itself, its affiliates and others.

13. Further or in the alternative, the payment of trailing commissions to Discount Brokers cannot be justified on the basis of purported “services” because, among other things:

- (a) the Defendant does not impose an obligation on Discount Brokers to provide particular services to Class Members in respect of the 1832 Mutual Funds in consideration for the trailing commissions;
- (b) the Defendant does not conduct any auditing or inquiries, or any adequate auditing or inquiries, into whether Discount Brokers are providing particular services to Class Members in respect of the 1832 Mutual Funds; and
- (c) the Defendant does not conduct any auditing or inquiries, or any adequate auditing or inquiries, into whether Discount Brokers use or apply the trailing commissions for the purpose of providing particular services to Class Members in respect of the 1832 Mutual Funds.

14. In fact, Discount Brokers do not provide Class Members with any services that are specific to the 1832 Mutual Funds in respect of which the trailing commissions are paid and that are provided on an ongoing basis. The services provided by Discount Brokers to their clients (such as research and educational tools) are provided regardless of whether the clients hold 1832 Mutual Funds. Those general services available to all Discount Broker clients do not justify the payment of trailing commissions to Discount Brokers in respect of the 1832 Mutual Funds. Accordingly, the payment of trailing commissions to Discount Brokers on account of “services” is improper, unreasonable and unjustified. Consequently,

the payment by the Defendant of the Unearned Management Fees on account of those trailing commissions, and their receipt by the Defendant, is improper, unreasonable and unjustified.

15. The Unearned Management Fees represent significant sums of money and are paid on a continuous basis. The wasting of the assets of the 1832 Mutual Funds by the payment of the Unearned Management Fees has unjustly enriched the Defendant and decreased the value of the units of the 1832 Mutual Funds held by the Class Members. The Class Members have suffered, and continue to suffer, significant loss and damage as a result of the Defendant's acts and omissions pleaded herein.

THE PARTIES

The Plaintiff

16. The Plaintiff is an individual residing in Fraser Lake, British Columbia.
17. Since March 15, 2018, the Plaintiff has held units of the Scotia Nasdaq Index Fund – Series A (BNS397), and since March 20, 2018, the Plaintiff has held units of the Dynamic Equity Income Fund – Series A (DYN029), both 1832 Mutual Funds, in an account with TD Direct Investing (or TD Waterhouse Discount Brokerage or such other discount brokerage business operated, directly or indirectly, by The Toronto-Dominion Bank from time to time), a Discount Broker.

The Class

18. The proposed Class on whose behalf this proceeding is brought is comprised of all persons, wherever they may reside or be domiciled, who held or hold units of a 1832 Mutual Fund

that paid trailing commissions through a Discount Broker, except for the Excluded Persons, from June 25, 2003 to the date the Certification Order was issued.

The Defendant

19. The Defendant is a limited partnership formed under the laws of the Province of Ontario. Its registered office and headquarters are, and were at all material times, located in Toronto, Ontario.
20. The name of the Defendant was changed from "Scotia Asset Management L.P." to "1832 Asset Management L.P." on or around September 30, 2013.
21. The general partner of the Defendant is, and was at all material times, 1832 G.P. Inc. It is a corporation incorporated under the *OBCA*. It is wholly owned by Scotiabank. The registered office and headquarters of 1832 G.P. Inc. are, and were at all material times, located in Toronto, Ontario. The name of 1832 G.P. Inc. was changed from "Scotia Asset Management G.P. Inc." to "1832 Asset Management G.P. Inc." on or around September 30, 2013.
22. The limited partners of the Defendant are, and were at all material times, Scotiabank and Scotia Capital.
23. The Defendant is, and was at all material times, the trustee and manager of the 1832 Mutual Funds.
24. The Defendant is, and was at all material times, an "investment fund manager" as defined in the *OSA*. As an investment fund manager, the Defendant is, and was at all material times, subject to the duty under section 116 of the *OSA* and/or section 2.1 of NI 81-107 to (a) exercise the powers and discharge the duties of its office honestly, in good faith and in

the best interests of the 1832 Mutual Funds, and (b) exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances.

THE 1832 MUTUAL FUNDS

25. Each of the 1832 Mutual Funds is or was a trust governed by the terms of one of the Trust Instruments.
26. Each of the 1832 Mutual Funds is or was an “investment fund” and a “mutual fund” as those terms are defined in the *OSA*.
27. Each of the 1832 Mutual Funds is or was a reporting issuer in Ontario and in all other provinces of Canada.
28. The 1832 Mutual Funds are marketed to investors under the “Scotia” brand or the “Dynamic” brand. The Defendant has been the trustee and manager of the Scotia Funds since November 1, 2009. The Defendant has been the trustee and manager of the Dynamic Funds since November 1, 2013.
29. To the best of the Plaintiff’s knowledge, the Scotia Funds as of June 25, 2018 are listed in **Schedule “A”** hereto and the Dynamic Funds as of June 25, 2018 are listed in **Schedule “B”** hereto.

THE TRUST INSTRUMENTS AND MANAGEMENT AGREEMENTS FOR THE 1832 MUTUAL FUNDS

30. The 1832 Mutual Funds are currently governed by the Current Scotia Funds DOT and the Current Dynamic Funds DOT.
31. Under each of the Trust Instruments, the Defendant holds in trust all property of each 1832 Mutual Fund for the benefit of the unitholders of the 1832 Mutual Fund.

32. The Class Members are or were unitholders of the 1832 Mutual Funds.

Scotia Funds

33. Pursuant to section 12.1 of the Current Scotia Funds DOT (and the equivalent provisions of other Trust Instruments applicable at material times), the Defendant, as trustee of the Scotia Funds, is and was at all material times required to exercise its powers and authorities and discharge its duties honestly, in good faith and in the best interests of the Scotia Funds, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances.

34. Pursuant to section XV of the Current Scotia Funds Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times), the Defendant, as manager of the Scotia Funds, is and was at all material times required to exercise its powers and authorities and discharge its duties honestly, in good faith and in the best interests of the Scotia Funds, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances.

35. Pursuant to section 3.4 of the Current Scotia Funds DOT (and the equivalent provisions of other Trust Instruments applicable at material times), the Defendant, as trustee of the Scotia Funds, may pay out of the property of each Scotia Fund the expenses relating to its operation and the carrying on of its business, including management fees. The Defendant receives management fees out of the assets of the Scotia Funds. The applicable schedules to the Current Scotia Funds Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times) set out maximum management fee percentage rates. The management fees are calculated as a percentage of

the net asset value of each series of each Scotia Fund (which management fees are calculated and payable monthly).

36. Section 8.7.2 of the Current Scotia Funds DOT (and the equivalent provisions of other Trust Instruments applicable at material times) and section IX of the Current Scotia Funds Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times) provide for the Defendant to accept a lower management fee with respect to units of a series of a Scotia Fund held by a unitholder, and the amount of any reduction in the management fee must be distributed to the unitholder as a “management fee distribution”.
37. The payment of management fees to the Defendant out of the assets of the Scotia Funds reduces the net asset value of the Scotia Funds, which in turn reduces the value of the units of the Scotia Funds. As stated in one or more Simplified Prospectuses disseminated by the Defendant in respect of Scotia Funds, management fees are among the fees and expenses that are paid by such Scotia Funds “which may reduce the value of your investment.” Similarly, as stated in one or more Fund Facts Documents disseminated by the Defendant in respect of Scotia Funds, management fees “affect you because they reduce the returns of” units of the Scotia Funds.
38. Section 4.6 of the Current Scotia Funds DOT (and the equivalent provisions of other Trust Instruments applicable at material times) provides for the reclassification of units of one series of a Scotia Fund as units of another series of the same Scotia Fund.

Dynamic Funds

39. Pursuant to section 10.4 of the Current Dynamic Funds DOT (and the equivalent provisions of other Trust Instruments applicable at material times), the Defendant, as trustee of the Dynamic Funds, is and was at all material times required to exercise its powers and carry out its functions honestly, in good faith and in the best interests of the Dynamic Funds and the unitholders thereof, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances.
40. Pursuant to section 14 of the Current Dynamic Funds Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times), the Defendant, as manager of the Dynamic Funds, is and was at all material times required to exercise its powers and authorities and discharge its duties honestly, in good faith and in the best interests of the Dynamic Funds, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances.
41. Pursuant to section 11.1 of the Current Dynamic Funds DOT (and the equivalent provisions of other Trust Instruments applicable at material times), the Defendant, as manager of the Dynamic Funds, may receive management fees from the assets of the Dynamic Funds. The management fees are calculated as a percentage of the net asset value of each series of the Dynamic Funds (which management fees are calculated and payable monthly).
42. Section 10.2(x) of the Current Dynamic Funds DOT (and the equivalent provisions of other Trust Instruments applicable at material times) requires that all expenses and compensation paid by the Defendant, as trustee, to persons employed for the purpose of discharging the trustee's duties, which includes the Defendant as manager, are "reasonable expenses and compensation".

43. Sections 7.10 and 11.2 of the Current Dynamic Funds DOT (and the equivalent provisions of other Trust Instruments applicable at material times) and section 9 of the Current Dynamic Funds Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times) provide for the Defendant to accept a lower management fee with respect to units of a series of a Dynamic Fund held by a unitholder, and the amount of any reduction in the management fee must be distributed to the unitholder as a “management fee distribution”.
44. The payment of management fees to the Defendant out of the assets of the Dynamic Funds reduces the net asset value of the Dynamic Funds, which in turn reduces the value of the units of the Dynamic Funds. As stated in one or more Simplified Prospectuses disseminated by the Defendant in respect of Dynamic Funds, management fees are among the fees and expenses that are paid by such Dynamic Funds “which will therefore reduce the value of your investment.” Similarly, as stated in one or more Fund Facts Documents disseminated by the Defendant in respect of Dynamic Funds, management fees “affect you because they reduce the returns of” units of the Dynamic Funds.
45. Section 5.3 of the Current Dynamic Funds DOT (and the equivalent provisions of other Trust Instruments applicable at material times) provides for the reclassification of units of one series of a Dynamic Fund as units of another series of the same Dynamic Fund.

TRAILING COMMISSIONS AND DISCOUNT BROKERS

46. The Defendant has paid and continues to pay a portion of the management fees that it receives out of the assets of the 1832 Mutual Funds to dealers, including Discount Brokers, as trailing commissions. The quantum of the trailing commission payable to a dealer is

determined as a percentage of the value of the units of the 1832 Mutual Funds held by the dealer's clients (which trailing commission is paid to the dealer quarterly or monthly).

47. The payment of management fees, within which the trailing commissions payable to Discount Brokers are embedded, depletes the assets of the 1832 Mutual Funds and reduces the value of the Class Members' units of those 1832 Mutual Funds and thereby diminishes their return on investment in the 1832 Mutual Funds.
48. Among other dealers, the 1832 Mutual Funds are sold through Discount Brokers. Discount Brokers are entities that provide order execution only services to investors. They are regulated by IIROC as "Dealer Members". Under the IIROC Rules, Discount Brokers apply to IIROC for approval to offer an "order-execution only service", which is defined as "the acceptance and execution of orders from customers for trades that the Dealer Member has not recommended and for which the Dealer Member takes no responsibility as to the appropriateness or suitability of orders accepted or account positions held." Such approval provides Discount Brokers with an exemption from compliance with IIROC Rules that impose requirements to assess the suitability of a client's orders and account positions. Accordingly, as a condition of the approval provided by IIROC to Discount Brokers to operate their discount brokerage businesses, Discount Brokers are prohibited from providing investment recommendations or advice to clients.
49. One of the Discount Brokers through which 1832 Mutual Funds are sold is Scotia iTRADE, which is a division of Scotia Capital. The Defendant's general partner, 1832 G.P. Inc., and Scotia Capital are both wholly-owned subsidiaries of Scotiabank and are affiliates of each other. Scotiabank and Scotia Capital are both limited partners of the Defendant. Some of

the Unearned Management Fees have been paid to Scotia iTRADE, which is to the ultimate benefit of the Defendant's limited partners, Scotiabank and Scotia Capital.

50. The Defendant knew, or ought to have known, that the Unearned Management Fees were being paid to Discount Brokers as trailing commissions, thereby reducing the value of the Class Members' units, in circumstances where those trailing commissions were not earned by the Discount Brokers because they are not providing services and advice to the Class Members.
51. The Simplified Prospectuses and Fund Facts Documents issued by the Defendant to permit the offering of units of the 1832 Mutual Funds set out, as a maximum, the annual percentage rates for trailing commissions payable in respect of the 1832 Mutual Funds. Class Members are entitled to expect that the Defendant will comply with its duties to the Class Members and will not pay the maximum rate of trailing commission both to dealers that provide full advisory services to their clients and to Discount Brokers who provide no services or advice to their clients. Yet, the trailing commissions paid by the Class Members on each series of the 1832 Mutual Funds are identical to the trailing commissions paid on those same series by investors who hold their 1832 Mutual Funds through a full-service account.
52. The Defendant never disclosed to the Plaintiff the dollar amount of the trailing commissions paid to the Plaintiff's Discount Broker in respect of the units of 1832 Mutual Funds held by the Plaintiff.
53. The Defendant continues the practice of paying trailing commissions to Discount Brokers in respect of the 1832 Mutual Funds despite criticism of the practice and the imminent prohibition of the practice by regulators.

54. On January 10, 2017, the CSA released CSA Consultation Paper 81-408 – *Consultation on the Option of Discontinuing Embedded Commissions*, which addresses issues relating to mutual fund fees, including the payment of trailing commissions to dealers. In relation to the Canadian mutual fund industry generally, CSA Consultation Paper 81-408 states that, as at December 2015, “data suggests that \$25 billion of the total \$30 billion held in mutual funds in the [discount broker] channel (83%) remains in the full trailing commission paying fund series”. It concludes that “[t]he majority of DIY investors investing in mutual funds pay full trailing commission despite not receiving advice” and “many DIY mutual fund investors in the online/discount brokerage channel indirectly pay for services they do not receive.”

55. In a press release issued on May 8, 2017 entitled “Limit Series A Sales to Channels that Permit Advice: IFIC”, the Investment Funds Institute of Canada, which styles itself as the “voice of Canada’s investment funds industry”, called on regulators to ensure that mutual funds that carry a trailing commission are not sold through the Discount Broker channel.

The press release stated that:

The Investment Funds Institute of Canada (IFIC) is calling on regulators to establish rules to ensure that mutual funds carrying an embedded advisor fee are sold only in channels where advice is permitted.

“Investors who buy funds directly, for example through a discount broker, should be confident that they are not inadvertently overpaying by selecting a series that includes fees for services that are not available through that platform,” says Paul C. Bourque, Q.C., IFIC’s president and CEO.

Series A mutual funds bundle an advice fee within the product. Most companies already provide other series of funds with no or nominal trailer fees that investors can purchase if they are do-it-yourself investors or want to pay for advice separately. The industry’s proposal would advance the goal of ensuring that low-trailer or no-trailer funds are available to these types of investors in a more uniform and transparent way.

“IFIC members believe that consumers should be able to choose for themselves the products, services and payment methods that best meet their needs and preferences,”

Bourque stated. "Today's proposal would help to achieve a goal that the industry shares with our regulators: to ensure that fees are aligned with the services that investors receive. It reflects the industry's commitment to provide Canadian consumers with real and meaningful investment choices."

56. On April 9, 2018, IIROC released its final guidance regarding order-execution only services offered by Discount Brokers. In Notice of Implementation 18-0075 dated April 9, 2018, IIROC stated that Discount Brokers face a conflict of interest by making available on their platforms mutual funds that pay a trailing commission for ongoing advice (e.g. Series A mutual funds). The Notice of Implementation stated:

We acknowledge that funds that pay an ongoing trailing commission to registrants (often described as a payment for advice and services provided to the investor by the registrant), and are made available by OEO firms (e.g., a Series A fund), raise a conflict of interest. Under our rules, a Dealer Member must address conflicts of interest considering the best interests of the client or clients.

In the Guidance, we indicate that OEO firms should consider how they will address any compensation-related conflicts when deciding which series (or series equivalent in the case of a PTF) of a fund to make (or not make) available on their platforms. We recognize that many OEO firms have already implemented practices to address this conflict.

We expect that OEO firms will make available, whenever possible, funds that do not pay a trailing commission for ongoing advice (often referred to as a Series D fund).

When a Series D fund is not available (e.g., because a fund family does not offer that type of series) and an OEO firm makes available another series that pays a trailing commission, we also expect the firm to address the conflict by rebating to the client the portion of the trailing commission for ongoing advice, or taking other similar steps.

A large majority of the publically [sic] available funds include a trailing commission. Management of the conflicts of interest relating to trailing commissions by OEO firms allows investors continued access to the widest possible range of investments.

57. On June 21, 2018, the CSA released CSA Staff Notice 81-330 – *Status Report on Consultation on Embedded Commissions and Next Steps*, in which the CSA announced its intention to publish rule changes that will prohibit the payment of trailing commissions to, and the solicitation and acceptance of trailing commissions by, dealers who do not make a suitability determination (e.g. Discount Brokers) in connection with the distribution of

prospectus qualified mutual fund securities. The CSA stated in CSA Staff Notice 81-330 that:

In our view, the fees paid by a vast majority of DIY investors in this channel [*i.e.* the discount brokerage channel] do not appear to align with the execution-only nature of the services they receive. We also observe no justifiable rationale for the practice of paying discount brokerage dealers an ongoing trailing commission for the sale of a mutual fund. For example, other securities including most ETFs are commonly purchased and sold by way of an upfront transaction fee. This ongoing payment may therefore be viewed as one that incentivizes the distribution of mutual funds that pay such an ongoing fee over those that do not (*i.e.* a payment for shelf space), giving rise to a conflict of interest. This is especially the case when the discount brokerage receives the same trailing commission as that of full-service dealers (which rate is typically intended to compensate full service dealers for the costs associated with providing investment advice). Moreover, in our view this fee also limits investor awareness and understanding of the fees associated with the purchase of such products in the discount brokerage channel.

58. Further to the announcement by the CSA on June 21, 2018, on September 13, 2018 the CSA published proposed amendments to securities regulatory instruments that will, when the amendments come into force, prohibit the payment of trailing commissions by fund organizations (which includes mutual fund managers) to dealers who do not make a suitability determination, such as order-execution-only dealers (*i.e.* Discount Brokers). The proposed amendments will prohibit the payment of mutual fund trailing commissions to Discount Brokers in any amount. The CSA stated that fund organizations will need to make available to Discount Brokers a class or series of securities of a mutual fund that does not pay a trailing commission, which will result in a corresponding reduction in the rate of the management fee charged on that class or series. Existing holdings of mutual funds will also need to be switched to the class or series of securities of the mutual fund that does not pay a trailing commission. The CSA also commented that the prohibition on the payment of trailing commissions by fund organizations to Discount Brokers will eliminate “a longstanding conflict between IFMs [investment fund managers] (who have been reluctant to offer non trailing commission-paying fund series in this channel), online/discount

brokerages (who have been satisfied to accept full trailing commission-paying funds), and DIY investors.”

59. On September 17, 2020, the CSA published for adoption final amendments to applicable securities regulatory instruments to prohibit the payment of trailing commissions (of any amount) by fund managers, including the Defendant, to dealers who do not make a suitability determination, including Discount Brokers. The prohibition on the payment of trailing commissions to Discount Brokers will come into force on June 1, 2022.
60. As alluded to in the above-noted press release of the Investment Funds Institute of Canada, some mutual fund families offer a series of their funds, typically called Series D, that is sold only through Discount Brokers. Series D (or similar discount series) pay a lower management fee than traditional retail series (e.g. Series A) because they include a reduced trailing commission to partially reflect the fact that “services and advice” are not being provided to investors through a Discount Broker.
61. Since around November 9, 2018, the Fund Facts Documents that the Defendant has prepared and filed to permit the sale of Series D units of certain Scotia Funds acknowledge that advice is not provided to investors in Scotia Funds through Discount Brokers by stating that trailing commissions are paid for “services” (not “services and advice”) provided by Discount Brokers to investors.
62. While the Defendant offers Series D units on some of the Scotia Funds, it has not made Series D units available for all of the 1832 Mutual Funds, and Series D units are not available for any of the Dynamic Funds. Further, even for the Scotia Funds that have been made available at some stage in Series D, other series of units of those Scotia Funds that carry a higher trailing commission have been held, and continue to be held, by Class

Members through Discount Brokers. When the Defendant introduced Series D units of the Scotia Funds, it failed to advise, permit and/or cause the Class Members to switch their existing units into Series D units.

63. In any event, the payment of any trailing commissions to Discount Brokers in respect of the 1832 Mutual Funds, including on Series D units of the Scotia Funds, was in breach of the Defendant's duties to the Class Members, as pleaded herein.

RIGHTS OF ACTION

Breach of Fiduciary Duty

64. As trustee of each of the 1832 Mutual Funds, the Defendant is and was at all material times in a common law fiduciary relationship with the Class Members, and owes or owed at all material times fiduciary duties to the Class Members.
65. As manager of each of the 1832 Mutual Funds, the Defendant is, and was at all material times, a trustee *de son tort* of the 1832 Mutual Funds. Pursuant to the Trust Instruments and the Management Agreements, the Defendant at all material times undertook full responsibility for the administration of the day-to-day business and affairs of each 1832 Mutual Fund. To carry out that responsibility as manager, the Defendant has possession or control of the property of the 1832 Mutual Funds and administers that property. Pursuant to section 4.7 of the Current Scotia Funds DOT (and the equivalent provisions of other Trust Instruments applicable at material times), the legal ownership of the trust property of the relevant 1832 Mutual Funds and the right to conduct the business of the relevant 1832 Mutual Funds are vested exclusively in the trustee and manager. As trustee *de son tort* of each of the 1832 Mutual Funds, the Defendant is, and was at all material

times, in a fiduciary relationship with the Class Members and owes, or owed at the material times, fiduciary duties to the Class Members. As a trustee *de son tort* of the 1832 Mutual Funds, the Defendant also has or had an obligation to abide by the duties and obligations of the trustee set out in the Trust Instruments.

66. Further or in the alternative, as manager of each of the 1832 Mutual Funds, the Defendant has significant discretion, power or control in relation to the business and affairs of the 1832 Mutual Funds and the assets of the 1832 Mutual Funds. The Defendant can unilaterally exercise that discretion, power or control so as to affect the Class Members' legal or substantial practical interests, including the Class Members' financial interests arising from their ownership of units of the 1832 Mutual Funds, the value of which is tied to the value of the assets of the 1832 Mutual Funds. The Class Members are particularly vulnerable to the Defendant holding that discretion, power or control as manager of the 1832 Mutual Funds.

67. The Defendant, as manager, has expressly or impliedly undertaken to act in the best interests of the Class Members, including as follows:

- (a) by the standard of care imposed on the Defendant under the Management Agreements and under section 116 of the *OSA* and/or section 2.1 of NI 81-107;
- (b) the Defendant is a signatory to the United Nations-supported Principles for Responsible Investment, pursuant to which the Defendant (under the brand name "Scotia Global Asset Management"), in the signatory category of investment manager, signed a declaration in which it acknowledges its "duty to act in the best long-term interests of our beneficiaries" and affirmed its "fiduciary role" and "fiduciary responsibilities"; and

- (c) by its public pronouncements, including in the Defendant's Responsible Investment Policy, which acknowledges the Defendant's "responsibility to act in the best interests of our unitholders" and its "fiduciary duty to clients".

68. Accordingly, as manager of each of the 1832 Mutual Funds, the Defendant is, and was at all material times, in a fiduciary relationship with the Class Members and owes, or owed at all material times, fiduciary duties to the Class Members.

69. By its acts and omissions, the Defendant has breached its fiduciary duty to the Class Members. The Defendant's breaches include (without limitation):

- (a) paying and/or receiving the Unearned Management Fees out of the assets of the 1832 Mutual Funds;
- (b) failing to preserve the property of the 1832 Mutual Funds;
- (c) failing to maximize the value of the units of the 1832 Mutual Funds;
- (d) paying the Unearned Management Fees to the Discount Brokers for no purpose;
- (e) failing to ascertain the nature of any services being provided by Discount Brokers to the Class Members and to ascribe a reasonable value to those services, to ensure that the assets of the 1832 Mutual Funds are being used for proper purposes and in a reasonable amount;
- (f) failing to impose an obligation on Discount Brokers to provide particular services to Class Members in consideration for the trailing commissions;
- (g) failing to conduct any auditing or inquiries, or any adequate auditing or inquiries, into whether Discount Brokers are providing particular services to Class Members in respect of the 1832 Mutual Funds;

- (h) failing to conduct any auditing or inquiries, or any adequate auditing or inquiries, into whether Discount Brokers use or apply the trailing commissions for the purpose of providing particular services to Class Members in respect of the 1832 Mutual Funds;
- (i) permitting series of the 1832 Mutual Funds carrying a trailing commission to be acquired and/or held through Discount Brokers;
- (j) failing to create and make available to Class Members through Discount Brokers a series of units of the 1832 Mutual Funds that carries no trailing commission;
- (k) failing to advise, permit and/or cause Class Members to re-designate or reclassify their units of the 1832 Mutual Funds into series of units that carries no trailing commission;
- (l) in the alternative to paragraphs 69(i) and 69(k):
 - (i) permitting non-Series D units (or similar discount series) of the 1832 Mutual Funds to be acquired and/or held through Discount Brokers;
 - (ii) failing to create and make available to Class Members through Discount Brokers Series D units (or similar discount series) of all of the 1832 Mutual Funds; and
 - (iii) failing to advise, permit and/or cause Class Members to re-designate or reclassify their non-Series D units of the 1832 Mutual Funds into Series D units (or similar discount series) of the 1832 Mutual Funds;
- (m) acting in a conflict of interest by simultaneously acting as both the trustee and the manager of the 1832 Mutual Funds, and thus paying the Unearned Management

Fees to itself and negotiating the Management Agreements for the 1832 Mutual Funds and management fees with itself;

- (n) acting in a conflict of interest by paying trailing commissions to Discount Brokers for the Defendant's own benefit, effectively as a marketing expense to secure access to the Discount Brokers' clients, resulting in increased management fees for the Defendant as the assets of the 1832 Mutual Funds grow through new investment capital from the Discount Broker platforms;
- (o) acting in a conflict of interest by failing to make available to Class Members holding 1832 Mutual Funds through Discount Brokers a series of units of the 1832 Mutual Funds that pays no trailing commission, or alternatively a reduced trailing commission, because of a concern that it would adversely affect the distribution of 1832 Mutual Funds through the full-service or advisory distribution channels and thereby reduce the Defendant's management fees;
- (p) acting in a conflict of interest by receiving a portion of the Unearned Management Fees for the purpose of paying such amount to Scotia iTRADE (a division of Scotia Capital) for the ultimate benefit of Scotiabank, when such amount could have been retained in the 1832 Mutual Funds for the benefit of Class Members;
- (q) failing to pay and/or accept a management fee reduced by the amount of the Unearned Management Fees and distributing (rebating) that amount to the Class Members as a Management Fee Distribution;
- (r) failing to waive payment of the Unearned Management Fees; and

(s) the Defendant, as trustee of the 1832 Mutual Funds, failing to adequately supervise the Defendant, as manager of the 1832 Mutual Funds, and failing to prevent and/or rectify the misconduct of the Defendant, as manager of the 1832 Mutual Funds, as particularized herein, in breach of the manager's standard of care set out in the Management Agreements and section 116 of the *OSA* and/or section 2.1 of NI 81-107.

70. The Plaintiff and the other Class Members have suffered loss and damage as a result of the Defendant's breach of fiduciary duty as particularized herein.

Breach of Trust

71. Under the Trust Instruments governing the 1832 Mutual Funds, the Defendant, as trustee of the 1832 Mutual Funds, has and had at all material times a duty to exercise its powers and discharge its duties honestly, in good faith and in the best interests of each 1832 Mutual Fund (and the unitholders thereof, in the case of the Trust Instruments for the Dynamic Funds), and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances.

72. The duty under the Trust Instruments is a duty to act honestly, in good faith and in the best interests of the Class Members and the other unitholders of the 1832 Mutual Funds, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances. That duty is enforceable by the Class Members and breaches of that duty are actionable by the Class Members.

73. Alternatively, the duty under the Trust Instruments includes a duty to act honestly, in good faith and in the best interests of the Class Members and the other unitholders of the 1832

Mutual Funds, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances. That duty is enforceable by the Class Members and breaches of that duty are actionable by the Class Members.

74. Alternatively, the duty under the Trust Instruments is a duty to act honestly, in good faith and in the best interests of the 1832 Mutual Funds, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances. The 1832 Mutual Funds are trust relationships between the Defendant and the unitholders in respect of property held for the benefit of the unitholders. Any breach of the duty to the 1832 Mutual Funds causes direct loss and damage to the Class Members and the other unitholders of the 1832 Mutual Funds. That duty is enforceable by the Class Members and breaches of that duty are actionable by the Class Members.

75. By its acts and omissions, including (without limitation) its acts and omissions set out in paragraph 69 hereof, the Defendant, as trustee of the 1832 Mutual Funds, has breached its duty under the Trust Instruments and committed breaches of trust.

76. The 1832 Mutual Funds, the Plaintiff and the other Class Members have suffered loss and damage as a result of the Defendant's breach of trust as particularized herein.

Breach of Contract

77. Under the Management Agreements, the Defendant, as manager of the 1832 Mutual Funds, has and had at all material times a duty to exercise its powers and discharge its duties honestly, in good faith and in the best interests of each 1832 Mutual Fund and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances ("**Manager's Standard of Care**"). The Management Agreements make

the Defendant responsible for any loss that arises out of the failure to act in accordance with the Manager's Standard of Care.

78. The Plaintiff and other Class Members are third party beneficiaries of the Management Agreements, and in particular, the Manager's Standard of Care contained therein.
79. The Management Agreements, and the Manager's Standard of Care contained therein, explicitly or implicitly evidence an intention to extend the benefit of those provisions to the Class Members.
80. The Manager's Standard of Care in the Management Agreements are for the protection and benefit of the unitholders of the 1832 Mutual Funds. They are intended to ensure that the manager acts in accordance with a minimum standard of care and complies with the law in administering the business and affairs of the 1832 Mutual Funds and dealing with the property of the 1832 Mutual Funds that is held for the benefit of the unitholders of the 1832 Mutual Funds, and that the manager is accountable for any loss that arises if the manager does not comply with the Manager's Standard of Care.
81. Further, the unitholders of the 1832 Mutual Funds are intended beneficiaries of the Manager's Standard of Care in the Management Agreements as they have the only realistic interest in enforcing those provisions against the manager. The Defendant is both trustee and manager of the 1832 Mutual Funds. The Defendant will not realistically seek recovery against itself for breaches of the Management Agreements in respect of the 1832 Mutual Funds.
82. By its acts and omissions, including (without limitation) the acts and omissions set out in paragraph 69 hereof, the Defendant, as manager, has breached the Manager's Standard of

Care in the Management Agreements and is responsible for the losses arising from the breach. The Defendant's acts and omissions fall within the scope of the Manager's Standard of Care and provisions dealing with liability for losses in the Management Agreements.

83. Alternatively, the Plaintiff and the other Class Members seek recovery from the Defendant, as manager of the 1832 Mutual Funds, for breach of contract on the basis of the cause of action accruing to the Defendant as trustee of the 1832 Mutual Funds.
84. The Defendant, as trustee of the 1832 Mutual Funds, has failed and/or refused to take steps to enforce compliance by the Defendant, as manager, with the Management Agreements and/or seek compensation for breaches thereof.
85. There are special circumstances justifying the Plaintiff and the other Class Members making a claim against the Defendant including, among other things, that:
 - (a) the Defendant is both the trustee and the manager of the 1832 Mutual Funds. It will not realistically seek recovery against itself for breaches of the Management Agreements. It is therefore impossible or difficult for the Defendant as trustee to seek recovery from the Defendant as manager;
 - (b) the Defendant, as trustee, colluded with the Defendant, as manager, to pay and receive the Unearned Management Fees;
 - (c) the Plaintiff and the other Class Members seek recovery of trust property in the form of the Unearned Management Fees; and

(d) the Defendant, as trustee, has failed to protect the beneficiaries in that it paid the Unearned Management Fees to itself, as manager, and failed to take steps to recover compensation for the Defendant's contractual breaches as manager.

86. The Plaintiff and the other Class Members have suffered loss and damage as a result of the Defendant's acts or omissions.

Disallowance of Improper Expenses Under Section 23.1 of the Trustee Act

87. The Unearned Management Fees are expenses paid by the Defendant from the trust property of the 1832 Mutual Funds.

88. The expenses are not properly incurred in carrying out the trust because they are on account of trailing commissions paid or payable to Discount Brokers, and such trailing commissions are not properly paid or payable to Discount Brokers because the Discount Brokers do not provide services or advice to the Class Members.

89. The payment of the expenses ought to be disallowed pursuant to section 23.1(2) of the *Trustee Act* (and, if necessary, the equivalent provisions of comparable Canadian legislation).

Prospectus Misrepresentation

90. The Plaintiff asserts the right of action for prospectus misrepresentation in section 130 of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation) on his own behalf and on behalf of the Class Members.

91. The Defendant has prepared, filed and disseminated Simplified Prospectuses and, since January 1, 2011, Fund Facts Documents, to permit the continuous offering to the public of units of the 1832 Mutual Funds.

92. The Fund Facts Documents are incorporated by reference into the relevant Simplified Prospectuses and form part of those Simplified Prospectuses.
93. Pursuant to section 56(1) of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation), the Simplified Prospectuses are and were required to provide full, true and plain disclosure of all material facts relating to the securities issued or proposed to be distributed under the Simplified Prospectuses.
94. The Simplified Prospectuses are prospectuses for the purposes of section 130 of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation).
95. The Fund Facts Documents prepared, filed and disseminated by the Defendant in respect of the 1832 Mutual Funds (other than Fund Facts Documents after about November 2018) contained a common statement that trailing commissions are paid to dealers for the “services and advice” provided by those dealers to their clients.
96. That common statement is a misrepresentation within the meaning of the *OSA* (and, if necessary, the Other Canadian Securities Legislation). It falsely represents that trailing commissions are only paid to dealers that provide services and advice to investors, whereas in fact trailing commissions are also paid to Discount Brokers even though they do not provide services or advice to their clients. The statement is, and was at all material times, material to the Class Members.
97. On or about November 16, 2018 (for Dynamic Funds) and November 9, 2018 (for Scotia Funds), the Fund Facts Documents for the 1832 Mutual Funds were amended to refer to “services and/or advice” (other than Fund Facts Documents for Series D units of certain Scotia Funds, which were amended on or about November 9, 2018 to refer to “services”).

By making that amendment to the Fund Facts Documents, the Defendant acknowledged that the reference to “services and advice” in the previous Fund Facts Documents was false, misleading and/or inaccurate.

98. The Defendant certified and signed the Simplified Prospectuses as required by NI 81-101 and Form 81-101F2, and is liable pursuant to section 130 of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation).
99. The offering of units of the 1832 Mutual Funds to which the Simplified Prospectuses and Fund Facts Documents related constituted distributions of the units in Ontario and/or distributions of units from Ontario to persons outside of Ontario. The offering was governed by the *OSA* and its subsidiary instruments and regulations, and was carried out under Ontario securities laws.
100. The Plaintiff and the other Class Members have suffered loss and damage as a result of the Defendant’s acts and omissions as particularized herein.

DAMAGE SUFFERED BY THE CLASS MEMBERS

101. The 1832 Mutual Funds, the Plaintiff and the other Class Members have suffered loss and damage as a result of the Defendant’s acts and omissions particularized herein.
102. As a result of the payment of the Unearned Management Fees out of the assets of the 1832 Mutual Funds, the value of the assets of the 1832 Mutual Funds has been significantly reduced.
103. As a result of the payment of the Unearned Management Fees out of the assets of the 1832 Mutual Funds, there has been a significant reduction in the value of the units of the 1832 Mutual Funds held by the Class Members and/or the value of the distributions received by

the Class Members on their units of the 1832 Mutual Funds (whether received in cash or reinvested in additional units).

104. The Plaintiff and the other Class Members have also suffered loss and damage as a result of the loss of opportunity to earn a reasonable return on investment if the Unearned Management Fees had not been paid out of the assets of the 1832 Mutual Funds.
105. The Plaintiff and the other Class Members who continue to hold units of the 1832 Mutual Funds are suffering ongoing loss and damage as a result of the Defendant's acts and omissions particularized herein.
106. The Defendant knew, or ought to have known, that as a result of its acts and omissions particularized herein, the Class Members would suffer loss and damage.

REAL AND SUBSTANTIAL CONNECTION WITH ONTARIO

107. The Plaintiff pleads that this action has a real and substantial connection with Ontario because, among other things:
 - (a) the Defendant is domiciled in Ontario;
 - (b) the Defendant carries on business in Ontario;
 - (c) each of the 1832 Mutual Funds is, or was at material times, a reporting issuer in Ontario;
 - (d) each of the 1832 Mutual Funds is formed pursuant to Trust Instruments governed by the law of Ontario;
 - (e) the Simplified Prospectuses and Fund Facts Documents referred to herein were disseminated in Ontario;

- (f) a substantial portion of the Class Members reside in Ontario; and
- (g) a substantial portion of the damages sustained by the Class were sustained by persons and entities domiciled in Ontario.

RELEVANT LEGISLATION

108. The Plaintiff pleads and relies on the *CJA*, the *CPA*, the *Trustee Act* (and, if necessary, the equivalent provisions of comparable Canadian legislation) and the *OSA* (and, if necessary, the Other Canadian Securities Legislation).

PLACE OF TRIAL

109. The Plaintiff proposes that this action be tried in the City of Toronto, in the Province of Ontario, as a proceeding under the *CPA*.

June 25, 2018

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Lawyers for the Plaintiff

SCHEDULE "A"
SCOTIA FUNDS AS OF JUNE 25, 2018

1. Scotia T-Bill Fund
2. Scotia Premium T-Bill Fund
3. Scotia Money Market Fund
4. Scotia U.S. \$ Money Market Fund
5. Scotia Short Term Bond Fund
6. Scotia Private Short-Mid Government Bond Pool
7. Scotia Mortgage Income Fund
8. Scotia Bond Fund
9. Scotia Canadian Income Fund
10. Scotia Floating Rate Income Fund
11. Scotia Conservative Income Fund
12. Scotia Private Canadian Corporate Bond Pool
13. Scotia U.S. \$ Bond Fund
14. Scotia Global Bond Fund
15. Scotia Diversified Monthly Income Fund
16. Scotia Canadian Balanced Fund
17. Scotia Dividend Balanced Fund
18. Scotia Balanced Opportunities Fund
19. Scotia Global Balanced Fund
20. Scotia U.S. \$ Balanced Fund
21. Scotia Income Advantage Fund
22. Scotia Private Canadian Preferred Share Pool
23. Scotia Canadian Dividend Fund
24. Scotia U.S. Dividend Fund
25. Scotia Canadian Blue Chip Fund
26. Scotia Private Canadian Equity Pool
27. Scotia Canadian Growth Fund
28. Scotia Canadian Small Cap Fund
29. Scotia Resource Fund
30. Scotia Private North American Dividend Pool
31. Scotia Private U.S. Dividend Pool
32. Scotia U.S. Blue Chip Fund
33. Scotia U.S. Opportunities Fund
34. Scotia Private International Core Equity Pool
35. Scotia International Value Fund

36. Scotia European Fund
37. Scotia Pacific Rim Fund
38. Scotia Latin American Fund
39. Scotia Global Dividend Fund
40. Scotia Global Growth Fund
41. Scotia Global Small Cap Fund
42. Scotia Global Opportunities Fund
43. Scotia Canadian Bond Index Fund
44. Scotia Canadian Index Fund
45. Scotia U.S. Index Fund
46. Scotia CanAm Index Fund
47. Scotia Nasdaq Index Fund
48. Scotia International Index Fund
49. Scotia Selected Income Portfolio
50. Scotia Selected Balanced Income Portfolio
51. Scotia Selected Balanced Growth Portfolio
52. Scotia Selected Growth Portfolio
53. Scotia Selected Maximum Growth Portfolio
54. Scotia Partners Income Portfolio
55. Scotia Partners Balanced Income Portfolio
56. Scotia Partners Balanced Growth Portfolio
57. Scotia Partners Growth Portfolio
58. Scotia Partners Maximum Growth Portfolio
59. Scotia INNOVA Income Portfolio
60. Scotia INNOVA Balanced Income Portfolio
61. Scotia INNOVA Balanced Growth Portfolio
62. Scotia INNOVA Growth Portfolio
63. Scotia INNOVA Maximum Growth Portfolio
64. Scotia Private Short Term Income Pool
65. Scotia Private Income Pool
66. Scotia Private High Yield Income Pool
67. Scotia Private American Core-Plus Bond Pool
68. Scotia Private Global Real Estate Pool
69. Scotia Private Strategic Balanced Pool
70. Scotia Private Canadian Value Pool
71. Scotia Private Canadian Mid Cap Pool
72. Scotia Private Canadian Growth Pool

73. Scotia Private Canadian Small Cap Pool
74. Scotia Private U.S. Value Pool
75. Scotia Private U.S. Mid Cap Value Pool
76. Scotia Private U.S. Large Cap Growth Pool
77. Scotia Private International Equity Pool
78. Scotia Private Real Estate Income Pool
79. Scotia Private International Small to Mid Cap Value Pool
80. Scotia Private Emerging Markets Pool
81. Scotia Private Global Equity Pool
82. Scotia Private Global High Yield Pool
83. Scotia Private Global Infrastructure Pool
84. Pinnacle Income Portfolio
85. Pinnacle Balanced Portfolio
86. Pinnacle Growth Portfolio
87. Scotia Aria Conservative Build Portfolio
88. Scotia Aria Conservative Defend Portfolio
89. Scotia Aria Conservative Pay Portfolio
90. Scotia Aria Moderate Build Portfolio
91. Scotia Aria Moderate Defend Portfolio
92. Scotia Aria Moderate Pay Portfolio
93. Scotia Aria Progressive Build Portfolio
94. Scotia Aria Progressive Defend Portfolio
95. Scotia Aria Progressive Pay Portfolio
96. Scotia Private Options Income Pool
97. Scotia Private Canadian All Cap Equity Pool
98. Scotia Private Fundamental Canadian Equity Pool
99. Scotia Private Global Credit Pool
100. Scotia Private Global Low Volatility Equity Pool
101. Scotia Private Total Return Bond Pool

SCHEDULE "B"
DYNAMIC FUNDS AS OF JUNE 25, 2018

1. Dynamic Blue Chip Balanced Fund
2. Dynamic Blue Chip Equity Fund
3. Dynamic Dividend Fund
4. Dynamic Dividend Income Fund
5. Dynamic Energy Income Fund
6. Dynamic Equity Income Fund
7. Dynamic Small Business Fund
8. Dynamic Strategic Yield Fund
9. Dynamic Advantage Bond Fund
10. Dynamic Canadian Bond Fund
11. Dynamic Dollar-Cost Averaging Fund
12. Dynamic High Yield Bond Fund
13. Dynamic Money Market Fund
14. Dynamic Short Term Bond Fund
15. Dynamic Power American Growth Fund
16. Dynamic Power Balanced Fund
17. Dynamic Power Canadian Growth Fund
18. Dynamic Power Global Growth Fund
19. Dynamic Power Small Cap Fund
20. Dynamic Alternative Yield Fund
21. Dynamic Diversified Real Asset Fund
22. Dynamic Financial Services Fund
23. Dynamic Global Infrastructure Fund
24. Dynamic Global Real Estate Fund
25. Dynamic Precious Metals Fund
26. DynamicEdge Balanced Income Portfolio
27. Dynamic American Fund
28. Dynamic Canadian Dividend Fund
29. Dynamic Dividend Advantage Fund
30. Dynamic European Equity Fund
31. Dynamic Asia Pacific Equity Fund
32. Dynamic Global Asset Allocation Fund
33. Dynamic Global Discovery Fund
34. Dynamic Global Dividend Fund
35. Dynamic International Equity Fund

36. Dynamic Value Balanced Fund
37. Dynamic Value Fund of Canada
38. DynamicEdge Balanced Portfolio
39. DynamicEdge Balanced Growth Portfolio
40. DynamicEdge Defensive Portfolio
41. DynamicEdge Equity Portfolio
42. DynamicEdge Growth Portfolio
43. Dynamic Total Return Bond Fund
44. Marquis Institutional Balanced Portfolio
45. Marquis Institutional Balanced Growth Portfolio
46. Marquis Institutional Growth Portfolio
47. Marquis Institutional Equity Portfolio
48. Marquis Institutional Canadian Equity Portfolio
49. Marquis Institutional Global Equity Portfolio
50. Marquis Institutional Bond Portfolio
51. Marquis Balanced Portfolio
52. Marquis Balanced Growth Portfolio
53. Marquis Growth Portfolio
54. Marquis Equity Portfolio
55. Marquis Balanced Income Portfolio
56. Dynamic Corporate Bond Strategies Fund
57. Dynamic Credit Spectrum Fund
58. Dynamic U.S. Dividend Advantage Fund
59. Dynamic Investment Grade Floating Rate Fund
60. Dynamic U.S. Monthly Income Fund
61. Dynamic Premium Yield Fund
62. Dynamic Global Balanced Fund
63. Dynamic Global Equity Fund
64. Dynamic Active Core Bond Private Pool
65. Dynamic Active Credit Strategies Private Pool
66. Dynamic Asset Allocation Private Pool
67. Dynamic Global Yield Private Pool
68. Dynamic Conservative Yield Private Pool
69. Dynamic International Dividend Private Pool
70. Dynamic North American Dividend Private Pool
71. Dynamic Tactical Bond Private Pool
72. Dynamic Global All-Terrain Fund

- 73. Dynamic Premium Bond Private Pool
- 74. Dynamic Global Equity Income Fund
- 75. Dynamic Global Strategic Yield Fund
- 76. Dynamic U.S. Equity Income Fund
- 77. Dynamic U.S. Strategic Yield Fund

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act, 1992*

**THIRD FRESH AS AMENDED
STATEMENT OF CLAIM**

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Lawyers for the Plaintiff

SCHEDULE "B"
LITIGATION PLAN

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

STEVEN R SAGE

Plaintiff

- and -

1832 ASSET MANAGEMENT L.P.

Defendant

Proceeding under the *Class Proceedings Act, 1992*

LITIGATION PLAN

Pursuant to section 5(1)(e)(ii) of the *Class Proceedings Act, 1992* (“*CPA*”), the Plaintiff proposes that this Litigation Plan be followed with respect to these proceedings, subject to the Court’s approval.

INTERPRETATION

1. This Litigation Plan is subject to, and should be read in conjunction with, the stay order of Justice Akbarali dated August 1, 2023 made in the action styled *Yeats v. 1832 Asset Management L.P.*, Court File No. CV-22-690373-00CP (“**2022 Action**”).

DEFINED TERMS

2. Capitalized terms that are not defined in this litigation plan (“**Plan**”) have the meanings attributed to them in the proposed Third Fresh as Amended Statement of Claim.

REPORTING AND COMMUNICATION

3. Siskinds LLP (“**Class Counsel**”) has posted information about the nature and status of this action on its website, <https://www.siskinds.com/class-action/mutual-fund-trailing-commissions/> (“**Website**”). That information will be updated regularly. Copies of important, publicly available court documents, court decisions, notices, documentation, and other information relating to the action are or will be accessible on the Website.
4. The Website also contains a communication webpage, a feature that permits putative Class Members to submit inquiries to Class Counsel, which are sent directly to a designated member of the Class Counsel team, who will promptly respond.

DOCUMENT MANAGEMENT

5. Class Counsel will use data management systems to organize, code, and manage the documents produced by the Defendant and all relevant documents in the Plaintiff’s possession. The agreement of the Defendant’s counsel will be sought to facilitate the electronic exchange of documents. Once the volume of documents to be produced in this action is determined, Class Counsel may retain the services of a third-party document management firm for assistance.
6. Kalloghlian Myers LLP, as counsel to the plaintiff in the 2022 Action, shall, on a go-forward basis until the stay is lifted in the 2022 Action, provided that the 2022 Action has not been settled, discontinued or finally dismissed, will be provided with a copy of all affidavits of documents, productions, transcripts of examination for discovery, motion materials, and transcripts of cross-examinations in this proceeding, with Kalloghlian Myers

LLP and the plaintiff in the 2022 Action being subject to the deemed undertaking rule and only permitted to use any such materials for purposes of observing the progress of the 2018 Action and preserving the rights of the plaintiff in the 2022 Action.

LITIGATION SCHEDULE

7. The Plaintiff has brought a motion seeking certification of the action as a class proceeding pursuant to the *CPA* (“**Certification Motion**”).
8. Following disposition of the Certification Motion, absent agreement among counsel, the Plaintiff will ask the Court to set a litigation schedule for the remaining steps in the action.
9. From time to time, the Plaintiff or Defendant may ask that the litigation schedule be amended.

RESOURCES AND EXPERTISE

10. The Plaintiff has retained Class Counsel as his counsel in this action. Class Counsel has the experience, resources and expertise to prosecute this action on behalf of the Class.

MEDIATION

11. The Plaintiff will participate in a mediation if the Defendant is prepared to do so. If the parties reach a proposed settlement of the action and the court approves the settlement, this Plan will require amendment.

NOTICE OF CERTIFICATION AND OPT OUT PROCEDURE

12. Notice of certification (“**Certification Notice**”) will be circulated to advise Class Members, among other things, that:

- a. the Court certified the action as a class proceeding;
 - b. a person may only opt out of the class proceeding by sending a written opt out election to the recipient designated by the Court, before a date and time fixed by the Court;
 - c. a person may not opt out of the class proceeding after the date fixed by the Court; and
 - d. if the common issues are resolved in favour of the Class, claimants may be required to register, file a claim and submit documentation to a designated person in order to be entitled to any compensation.
13. The Certification Notice, in a form approved by the Court, will be distributed and published in the following manner:
- a. posted by Class Counsel on the Website, in English and French;
 - b. provided by Class Counsel to any person who requests it;
 - c. posted by the Defendant on SEDAR;
 - d. disseminated as a press release in Canada across Canada Newswire (in English and French);
 - e. published once in the business section of the national edition of The Globe and Mail, in English;
 - f. published once in the business section of La Presse, in French;
 - g. published as an internet Google banner ad for approximately 700,000 impressions/views across Canada to an investor focused audience, in English and French, over 30 days; and

- h. sent electronically and/or in paper form to appropriate broker/dealers in Canada, with a cover letter requesting that they bring the Certification Notice to the attention of their clients who may be Class Members.
14. The Plaintiff will appoint an independent person to receive the opt out notices and report to the court the names and addresses of the persons who opt out by the date fixed by the court.
 15. The Plaintiff will pay the costs in the first instance, reserving the right to seek recovery of these costs from the Defendant by order of the judge presiding at the common issues trial.

REFINEMENT OF COMMON ISSUES

16. Following the completion of discovery, the parties may seek an amendment of the order certifying this action to deal with any necessary refinements to the common issues.

TRIAL OR SUMMARY JUDGMENT ON THE COMMON ISSUES

17. The common issues will be determined in two phases in accordance with the stay order dated August 1, 2023 made in the 2022 Action.
18. If appropriate, the Plaintiff or Defendant may seek summary judgment on one or more of the common issues.
19. After the final resolution of the phase one common issues in the 2018 Action, the Plaintiff, the plaintiff in the 2022 Action and the Defendant shall convene a case conference or pre-trial conference to obtain directions on the conduct of the second phase of the common issues trial.

20. The Plaintiff will ask the Court to hold the hearing on the merits (whether a motion for summary judgment or common issues trial) no later than one (1) year after the completion of the examinations for discovery and the production of information required by undertakings and any motions.

INDIVIDUAL CLASS MEMBER PARTICIPATION AFTER JUDGMENT ON THE COMMON ISSUES

21. Once the common issues have been determined, the parties will bring a motion to the Court for directions as to the process to be employed to determine any individual issues that remain.

MOTION FOR DIRECTIONS

22. Class Counsel and the Defendant may apply at any time to the court for directions.

CLASS COUNSEL'S FEES AND THE COSTS OF ADMINISTRATIONS

23. After the trial of the common issues or summary judgment, the Plaintiff will ask the court to approve an agreement respecting fees and disbursements between him and Class Counsel. To the extent that the approved Class Counsel's fees, disbursements and applicable taxes are not completely paid by the costs recovered from the Defendant, the Plaintiff will ask the court to order that the unpaid balance be a first charge on any recovery either by way of aggregate or individual assessment.
24. If the court awards damages in the aggregate, Class Counsel will ask the court to order payment of their fees, disbursements and applicable taxes as a first charge on the aggregate amount.

25. If the court does not award damages in the aggregate and requires the Class Members to prove their damages through individual assessments, Class Counsel will ask the court to order payment of their fees, disbursements and applicable taxes as a first charge on the awards made at individual assessments.

FURTHER ORDERS CONCERNING THIS PLAN

26. This Plan may be amended from time to time by directions given at case conferences or by further order of the Court.

EFFECT OF THIS PLAN

27. This Plan shall be binding on all Class Members who do not opt out in accordance with the procedure directed by the Court whether or not they make a claim under the Plan.

SCHEDULE "C"
LONG-FORM NOTICE

**SCOTIA AND DYNAMIC MUTUAL FUNDS CLASS ACTION
REGARDING TRAILING COMMISSIONS PAID TO DISCOUNT BROKERS**

NOTICE OF CERTIFICATION AND OPT-OUT DEADLINE

Read this notice carefully as it may affect your legal rights

This notice is to certain investors in the units of the 1832 Mutual Funds marketed under the Scotia and Dynamic brands, other than certain persons and entities associated with the defendants, further described below.

THE CERTIFICATION ORDER

By Order dated [date], the Ontario Superior Court of Justice (“Court”) has certified *Steven R Sage v 1832 Asset Management L.P.*, File No. CV--18-00600380-00CP (“Class Action”) as a class proceeding pursuant to the Ontario *Class Proceedings Act, 1992*. The Court has appointed Steven Sage as the representative plaintiff for the class defined as follows (“Class” and “Class Members”):

All persons, wherever they may reside or be domiciled, who held or hold units of a 1832 Mutual Fund that paid trailing commissions through a Discount Broker, except for the Excluded Persons, from June 25, 2003 to the [Certification Order Date].

The Class Action pertains to 1832 Mutual Funds organized as trusts. 1832 Mutual Funds are defined as:

All mutual fund trusts (including, without limitation, all series of units thereof) of which 1832 Asset Management L.P. (“Defendant”) is trustee, was trustee or may be trustee from June 25, 2003 to the [Certification Order Date] (but only in respect of the period during which the Defendant is trustee, was trustee or may be trustee, as applicable), including, for greater certainty, (i) those mutual funds that have been or may be terminated, (ii) those mutual funds that have been or may be merged into other mutual funds, and (iii) those mutual funds that have undergone or may undergo name changes.

Excluded from the Class are the Defendant; the past and present limited and general partners of the Defendant; the past and present parents, subsidiaries, affiliates, officers, directors, senior employees, legal representatives, heirs, predecessors, successors and assigns of the Defendant or of any of the past and present limited and general partners of the Defendant; and the past and present members of the independent review committee of each 1832 Mutual Fund.

Certification is a procedural matter that defines the form of the class action. The merits of the claims in the action, and the allegations of fact on which the claims are based, have not been finally determined by the Court. The Defendant disputes the claims asserted against it.

The Class Action will now proceed to trial as a class action. The Court has identified the issues that will be dealt with collectively. The Class Action will proceed in Toronto, Ontario.

THE NATURE OF THE CLAIMS ASSERTED

It is alleged that the Defendant paid trailing commissions, out of the 1832 Mutual Fund assets, to Discount Brokers. The 1832 Mutual Funds are trusts governed by trust instruments. The Defendant is the trustee and manager of the 1832 Mutual Funds. It is alleged that the Defendant breached its trust and fiduciary duties because the trailing commissions paid to Discount Brokers are excessive, inflated and/or unearned.

It is further alleged that the Defendant made misrepresentations about the nature of the trailing commission payments in the fund facts documents it prepared and filed with securities regulators to permit the sale of units of the 1832 Mutual Funds.

On behalf of the Class, the Class Action asserts claims under section 130 of the Ontario *Securities Act* and, if necessary, the equivalent provisions of the securities legislation of the other Canadian provinces and territories. Additionally, the Class Action advances claims under section 23.1 of the *Trustee Act*, and for breach of trust and breach of fiduciary duty and breach of contract.

If you wish to pursue other claims against the Defendant relating to the matters at issue in the Class Action, you should immediately seek independent legal advice.

**DO NOTHING IF YOU WANT TO PARTICIPATE IN
THE CLASS ACTION**

Class Members who want to participate in the Class Action are automatically included and do not have to do anything at this time.

**YOU MUST OPT OUT IF YOU DO NOT WANT TO BE
BOUND BY THE CLASS ACTION**

Each Class Member who does not validly opt out of the Class Action will be bound by the terms of any judgment or

settlement, whether favourable or not, and will not be allowed to prosecute an independent action.

Class Members who do not want to be bound by the outcome of the Class Action must “opt out,” meaning that they must exclude themselves from the Class Action in accordance with the following procedure.

If you wish to opt out of the Class Action, you must complete, sign and return (by mail or courier) the opt-out form provided at Appendix “A” hereto to RicePoint Administration Inc.

In order for your opt-out to be valid, your complete and signed opt-out form must be postmarked by no later than [DATE].

A Class Member who opts out will not be entitled to participate in the Class Action.

CLASS COUNSEL AND LEGAL FEES

The representative plaintiff and the Class are represented by Siskinds LLP (“**Class Counsel**”). Class Counsel are conducting the Class Action on a contingent fee basis.

In the event of success, Class Counsel will make a motion to the Court for approval of their fees and disbursements to be paid from the funds recovered in the Class Action.

A Class Member will not be required to pay any costs in the event that the Class Action is unsuccessful.

Class Members have the right to seek intervenor status in the Class Action. A Class Member who intervenes in the Class Action may be required to pay legal costs arising from the Class Action.

ADDITIONAL INFORMATION

This notice has been approved by the Ontario Superior Court of Justice. The Court offices cannot answer any questions about the matters in this notice. The Orders of the Court and other information are available on Class Counsel’s website at <https://www.siskinds.com/class-action/mutual-fund-trailing-commissions>.

Questions relating to the Class Action may be directed to Class Counsel:

Gigi Pao
Siskinds LLP
275 Dundas Street, Unit 1
London, ON N6B 3L1
Tel: 226-636-1615
Email: gigi.pao@siskinds.com

If you require assistance in the French language, please contact Class Counsel using the contact details above and we will direct your inquiry to an appropriate person.

The publication of this notice was authorized by the Ontario Superior Court of Justice

(PLEASE CIRCLE THE APPROPRIATE LANGUAGE)

I believe that **I am / the organization that I represent is** a member of the Class in the Class Action.

I believe that **I am not / the organization that I represent is not** amongst the persons and entities excluded from the Class Action.

I understand that by opting out of the Class Action, **I will not be eligible / the organization that I represent will not be eligible** for any benefit that may be available to the Class upon resolution of this matter, if and when such resolution may occur.

I, _____ **(print your full name), OPT OUT FROM THE CLASS ACTION** and wish to be excluded from this class action.

I wish to opt out from this class action for the following reason(s) *(optional)*:

I, _____ **(print your full name), CERTIFY** that the information provided herein is complete and true.

Date

Signature

In order to validly opt out, you must complete and send this Opt-Out Form by no later than [DATE] to:

[Administrator contact details, including mail and courier details]

SCHEDULE "D"
SHORT-FORM NOTICE

DRAFT TEXT (subject to design)

**SCOTIA AND DYNAMIC MUTUAL FUNDS CLASS ACTION REGARDING
TRAILING COMMISSIONS PAID TO DISCOUNT BROKERS
NOTICE OF CERTIFICATION AND OPT-OUT DEADLINE**

**HAVE YOU HELD UNITS OF
A DYNAMIC OR SCOTIA MUTUAL FUND
THROUGH A DISCOUNT BROKER?**

The Superior Court of Justice of Ontario has certified a class action which permits a defined group of investors (the “Class”) to pursue claims against 1832 Asset Management L.P. (“Defendant”). It is alleged that the Defendant paid excessive, inflated, and/or unearned trailing commissions to Discount Brokers out of the assets of the Scotia and Dynamic mutual fund trusts. The class action claims monetary damages on behalf of the Class. The allegations made in the class action have not been proven and are contested by the Defendant.

If you wish to participate in the class action, **DO NOTHING.**

If you do not wish to participate in the class action, be bound by or receive any benefits from it, you must opt out by sending the opt-out form to RicePoint Administration Inc. by [DATE].

To obtain a copy of the opt-out form or for other important information regarding the class action:

- Visit <https://www.siskinds.com/class-action/mutual-fund-trailing-commissions/>
- Call toll-free 1 800 461 6166 ext 1615 (North America)
- Call 226-636-1615 (Outside North America)

***The publication of this notice was authorized by
the Superior Court of Justice of the Province of Ontario***

SCHEDULE "E"
INTERNET BANNER

Have you held units of a Scotia or Dynamic mutual fund through a discount brokerage?

You may be included in a class action certified by the Ontario Superior Court of Justice.

Click to learn your legal rights, including how to opt-out of the class action.

<https://www.siskinds.com/class-action/mutual-fund-trailing-commissions/>

SAGE v. 1832 ASSET MANAGEMENT L.P.

Court File No. CV-18-00600380-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto
Proceeding under the *Class Proceedings Act, 1992*

**ORDER
(CERTIFICATION, NOTICE AND OPT-OUT)**

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London, ON N6B 3L1

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