S-229449

SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY

NOV 25 2022

No.
Vancouver Registry

*In the Supreme Court of British Columbia*

Between

**James Mayer**

Plaintiff

and

**Merchant Law Group LLP**

Defendant

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

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## NOTICE OF CIVIL CLAIM

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This action has been started by the plaintiff(s) for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

(a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and

(b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

(c) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and

(d) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

**Time for response to civil claim**

A response to civil claim must be filed and served on the plaintiff(s),

(a) if you were served with the notice of civil claim anywhere in Canada, within 21 days after that service,

(b) if you were served the notice of civil claim anywhere in the United States of America, within 35 days after that service,

(c) if you were served with the notice of civil claim anywhere else, within 49 days after that service, or

(d) if the time for response to civil claim has been set by order of the court, within that time.

## PART 1: STATEMENT OF FACTS

### Overview

1. This proposed class proceeding arises from the misconduct of the defendant, Merchant Law Group LLP ("Merchant Law" or the "Firm"), in its role as plaintiff's counsel and proposed class counsel in *Piett v. Global Learning Group Inc.*, QBG 590/16 (the "*Piett* Action"), a proposed class proceeding commenced in the Court of King's Bench for Saskatchewan.

2. The *Piett* Action was commenced by Lorne Piett, represented by Merchant Law, on behalf of a putative class of donor participants in a charitable giving tax shelter known as the Global Learning Giving Initiative (the "Gift Program") operated by Global Learning Group Inc. ("GLGI").

3. Commencing in or around 2007, the Canada Revenue Agency ("CRA") began to reassess Gift Program participants, and disallowed their charitable tax credits claimed in respect of the Gift Program. In 2015, in *Mariano v. the Queen*, the Tax Court found the Gift Program was a sham, and that the promoters and others associated with the promoters took the vast majority of the funds donated by the participants. As a result of the CRA reassessments, the participating donors suffered substantial losses including the loss of their donations and substantial interest and/or penalties assessed by CRA.

4. Lorne Piett was one of GLGI's sales agents. He also participated in the Gift Program, himself, in 2004-2006, and he was reassessed by CRA in 2007. Despite

the reassessment, he continued to sell the Gift Program to donors right up until 2013, the last full year that the Gift Program operated. He profited substantially from selling the Gift Program to donor participants.

5. Piett was also one of a large group of Gift Program participants who commenced an action against CRA in 2011 in the Federal Court, in an action called *Scheuer v. Canada*. In 2015, Merchant Law assumed the representation of the plaintiffs in the *Scheuer* action. In January 2016, the Federal Court of Appeal struck out the *Scheuer* claim, and granted leave to amend the claim on very narrow grounds. The *Scheuer* plaintiffs did not amend their claim and abandoned it sometime in 2016.

6. While the *Scheuer* claim remained pending, and after *Mariano* was decided, Piett retained Merchant Law to commence the *Piett* Action as a proposed class action. Merchant Law was not prepared to assume this retainer unless it received a partial retainer fee in advance.

7. Merchant Law devised a scheme with Piett and Ryan Mitchell (who was a former GLGI executive) to create a campaign targeted at Gift Program participants, to induce them to "sign up" with Merchant Law and pay the Firm either $250 or $500, which it characterized as a "retainer" (the "Scheme"). The Scheme operated as follows:

   (a) Merchant Law paid a fee to each of Piett, Mitchell and a team of other sales agents for every putative class member who paid the $500 retainer, which was paid from that $500;

   (b) Mitchell created a fake group called "Donors for Donors" or "Donors4Donors" to undertake the $500 sign-up solicitations;

   (c) Piett and Mitchell were paid at least $1,340,000 from the "retainers" paid by the putative class members; and

(d) Merchant Law paid itself $363,728.51 in respect of accounts rendered to Piett in respect of the *Scheuer* action from the "retainers" paid by the putative class members.

8. Effectively all of the "retainer" funds were disbursed by Merchant Law without reporting to the individuals who paid the funds to it, without rendering an account to the individuals who paid the funds to it, and without court approval.

9. Between 2015 and 2019, Merchant Law collected approximately $1.7 million in "retainer" payments from over 3,500 putative class members in respect of the *Piett* Action (the "Payments"). Merchant Law and its agents induced the putative class members to make the Payments through misleading solicitations, including those in the name of Donors4Donors, which represented to the participants that they had to pay Merchant Law in order to participate in the proposed class action.

10. The extent of Merchant Law's misconduct came to light in the course of Piett's application for certification of the *Piett* Action, and led to that action being struck as an abuse of process by court order on August 27, 2021.

**The plaintiff and the Class**

11. The plaintiff, James Mayer, is a resident of New Westminster, British Columbia. Mayer was a participant donor in the Gift Program and, as such he was a putative class member in the *Piett* Action. He made a Payment of $500 to Merchant Law on November 25, 2015, after receiving a misleading solicitation from Donors4Donors.

12. The plaintiff brings this action on his own behalf and on behalf of:

> All persons who made a retainer payment to Merchant Law Group LLP in respect of *Piett v. Global Learning Group Inc.*, QBG 590/16 (the "*Piett* Action") (the "Class" or "Class Members"), and excluding Lorne Piett, Randy Shoeman, Ryan Mitchell, and any Defendant or Third Party in the *Piett* Action or in Ontario Superior Court of Justice Court File No.: CV-17-583573-00CP.

13. The precise number of Class Members and their identities is known to the defendant.

## The defendant

14. Merchant Law is a Saskatchewan limited liability partnership bearing entity number 101036872 and has an address for service of 2401 Saskatchewan Drive, Regina, SK, which is the office from which it carries on the practice of law in Regina, Saskatchewan. Merchant Law has offices in other locations across Canada.

15. Merchant Law was founded by Evatt Francis Anthony "Tony" Merchant, K.C. ("Merchant") in 1986. Merchant continues to practice as a senior lawyer at Merchant Law. He was at all material times the lawyer at Merchant Law with primary carriage of, and responsibility for, the prosecution of both the *Scheuer* and the *Piett* Actions.

## Factual background

### *The Gift Program*

16. The Gift Program was a charitable donation tax program in operation across Canada between 2004 and 2014. In total, over 41,000 donors participated in the Gift Program.

17. The Gift Program was sold to participants as a charitable donation tax shelter. Participating taxpayers became capital beneficiaries of a trust that distributed educational courseware licenses to them, which were then donated to registered charities. In addition, the participants donated cash to those charities. The participants received charitable giving tax receipts for both the alleged value of the courseware and the cash donations. The value ascribed to the courseware was vastly in excess of its true market value.

18. Unbeknownst to the donors, virtually all of the donated cash was then paid by the charities to the promoter, GLGI, which in turn paid its principals, sales agents, and others associated with the Gift Program. Sales agents marketed the Gift Program to potential donor participants, and received commissions usually between 24%

and 30% of the cash paid by the donors they recruited. "Head fundraisers" contracted with GLGI to recruit other sales agents, and they received commissions not only on the donations of those they recruited, but also on the donations of those recruited by the sales agents they recruited.

19. CRA began disallowing the tax credits claimed by participating donors in or about 2007, charging them interest on their reassessed tax arrears, and, in some cases, charging penalties to the taxpayer/donor.

20. Some participant donors pursued appeals of CRA's reassessments of their income tax liability, including the plaintiffs in *Mariano v. The Queen.* In a decision in that action, indexed as 2015 TCC 244, Justice Pizzitelli of the Tax Court of Canada found that the Gift Program was a sham perpetrated by GLGI, and that GLGI and its accomplices received approximately 90% of the cash donations which were intended for charities.

***The* Scheuer *Action***

21. In 2011, Piett recruited approximately 120 other Gift Program donors—primarily from his own client base—to commence a proceeding against CRA and Canada before the Federal Court (the "*Scheuer* Action"), alleging that the defendants owed them a private law duty of care to not to issue a tax shelter number to GLGI, to warn the participants about CRA's concerns about the Gift Program, and to stop GLGI's continued operations.

22. Canada and CRA brought a motion to strike the *Scheuer* Action claim on the basis that no reasonable cause of action was disclosed. The motion was not successful at the first level or on appeal. But, in a decision indexed as *Canada v. Scheuer*, 2016 FCA 7, the Federal Court of Appeal struck the claim in the *Scheuer* Action as disclosing no reasonable cause of action. Although the plaintiffs were granted leave to amend the claim, it was not amended and the *Scheuer* Action was abandoned.

***Commencing the* Piett *Action***

23. In 2015, after the first level of appeal in the *Scheuer* Action, but before the second appeal proceeded in the Federal Court of Appeal, Piett and the other plaintiffs retained Merchant Law to argue the appeal.

24. Merchant Law acted as plaintiffs' counsel in the *Scheuer* Action and argued the unsuccessful appeal before the Federal Court of Appeal. Merchant Law had unpaid accounts owing in respect of that appeal exceeding $360,000.

25. As described above, Piett and Merchant Law devised the Scheme in concert with a former executive of GLGI, Ryan Mitchell, to commence a proposed class action against CRA and other defendants (the "*Piett* Action") as "back up" to the *Scheuer* Action.

26. As part of the Scheme, Piett and Mitchell decided to fundraise money from putative class members, which would then be used to pay the costs incurred on the *Scheuer* Action, as well as to provide Merchant Law with the funds which it stated it would require in order to prosecute the *Piett* Action. The Scheme involved encouraging former GLGI donors to "sign up" for the proposed class action by paying a retainer fee of $250 or $500 to Merchant Law.

27. Merchant Law agreed to the Scheme, knowing that it would be a breach of the Rules of Professional Conduct governing the practice of law by lawyers and law firms in every province in Canada, and a breach of *The Class Actions Act*, SS 2001, c.C-12.01 ("*CAA*"). Merchant Law agreed to the Scheme, knowing that the Scheme would be, and was, materially misleading, and was intended to re-victimize the victims of the GLGI Gift Program by duping them into making payments to Merchant Law that they did not have to make, and which were going to be used for purposes other than the prosecution of the *Piett* Action.

28. Piett and Mitchell formed a "Steering Committee" to instruct Merchant Law on the conduct of the *Piett* Action. The Steering Committee and Merchant Law agreed that Piett would be the plaintiff and proposed representative plaintiff, even though

they knew that Piett was in a direct conflict of interest with the proposed class, both because of his role as a former sales agent for GLGI and because of the Scheme to solicit funds from the proposed class, which were going to be misused.

***Soliciting the Payments***

29. In or around June 2015, the Steering Committee started soliciting the Payments from former GLGI donors. The solicitations took place in two ways.

30. First, Piett contacted former GLGI sales agents to advise them that Merchant Law intended to commence a class action lawsuit against CRA, and arranged for them to solicit their former Gift Program donor clients to "join" the *Piett* Action by making a Payment. Much like the original Gift Program sales commission structure, the sales agents were promised compensation for each participant donor they convinced to make a Payment. The commissions for these sign-ups were paid by Merchant Law, which received the Payments and then disseminated funds to Piett from the Payments, and Piett, in turn, paid the sales agents.

31. Second, Mitchell devised the ruse of Donors4Donors, which falsely represented that it was made up of an anonymous group of "4 former GLGI donors", who were "NOT affiliated with GLGI in any way". The Donors4Donors website said that these anonymous individuals supported the commencement and prosecution of the *Piett* Action, primarily to assert a claim against CRA. Mitchell created the Donors4Donors website and devised an extensive marketing campaign using the GLGI donor list that he had misappropriated from GLGI.

32. All of Mitchell's marketing efforts were undertaken as agent for Merchant Law, which is responsible at law for Donor4Donors' misrepresentations.

33. In addition to the Donors4Donors website, Mitchell used the misappropriated GLGI participant list to undertake a direct and targeted email solicitation of the Gift Program participants to "join" the Piett Action and make the Payment.

34. Both the Donors4Donors website and the email solicitations were rife with misrepresentations and falsehoods, including misrepresentations about the rights of putative class members, and the use that would be made of the Payments. The website and emails were created and delivered all for the intended purpose of soliciting Gift Program participants to "sign up" with Merchant Law, and make the Payment.

35. Merchant Law was fully aware of, and approved the misrepresentations and the marketing efforts undertaken by Piett and Mitchell/Donors4Donors to drum up people who would pay the funds to Merchant Law, including the content of both the Donors4Donors website and the email solicitations. Merchant Law approved the contents of both either expressly or implicitly.

36. In co-ordination with Piett and Mitchell's marketing efforts, Merchant Law created, or acquiesced in the creation of, a website called Merchant Law Helps, which was also used to solicit Gift Program participants to "sign up" with Merchant Law, and make the Payment.

37. The Merchant Law Helps website included a post of a letter on the home page "from the desk of" Merchant, and a copyright notice reserving all rights to Merchant Law. It grossly misrepresented the rights of putative class members in order to deceive them into making the Payments to Merchant Law.

***Merchant Law's misrepresentations regarding the Payments***

38. Consistently throughout all of its communications regarding the *Piett* Action, Merchant Law and those acting on its behalf, including the Steering Committee and the sales agents, represented to putative class members that it was necessary to "join", "register for", or "sign up" with Merchant Law to participate in/potentially benefit from the *Piett* Action, and that the mandatory cost of doing so was a $500 Payment.

39. Moreover, Merchant Law and those acting on its behalf used deceptive tactics, such as presenting putative *Piett* Action class members with false time limits during

which to "sign up", in order to pressure them into making Payments. On the Frequently Asked Questions ("FAQ") webpage which was posted on both the Donors4Donors and Merchant Law Helps websites, it stated:

> Q. When do we expect to start the class action suit and when does a donor need to sign up?
>
> A. You need to sign-up as soon as possible. The class action case by Merchant Law will be launched in the early fall, therefore all sign-ups are needed now.

40. Only rarely, and always buried deep within longer communications, did Merchant Law ever provide Gift Program donors with the information that putative class members in Saskatchewan class proceedings do not have to "join", "register for", "sign up for", make any payment, or take any action whatsoever in order to participate in a proposed class action. Even where this occurred, however, obfuscating language was used – such as describing the making of a $500 Payment as "technically" optional.

41. Even when Merchant Law communications were truthful regarding the passive nature of being a class member in an opt-out class action regime, the firm still represented to putative *Piett* Action class members that those who did not "join" the *Piett* Action by making a Payment would receive less information than those who did contribute, and that different contingency fee rates would apply to those who made Payments, effectively creating higher and lower tiers of class members.

42. For example, in an email from former GLGI sales agent Randy Shoeman to his personal mailing list of Gift Program sales agents, he described the Payments as follows:

> We sum it up as:
>
> *$500 to be updated and in the know
>
> *$500 to have [Merchant] apply to the courts to have any and all future CRA correspondence stop and/or go direct to him.

> *$500 to lock in the low, low fee of 10% on the back end. Who knows how high that charge may be to those who apply for settlement AFTER a win.

On the joint FAQ page, it stated:

> You help this action only if you decide to sign-up and get behind Merchant Law.
>
> ...
>
> ... The law is that a class certification makes everyone automatically a class member who meets the class description ... However, you will be much less aware of the stage of progress of the class action and will be entirely dependent on the notice provided by the court to know when and how to make your claim. Court notice is good, but studies of class action have shown that many people don't get notice and subsequently don't make any claims under settlements.
>
> More importantly, your participation is crucial to allowing this action to go forward. When we go before a judge and say 2,000 have not only signed up, but paid $500, that is impactful. That lets the judge know that people care about this, that there is a real sense among many people that a significant injustice has taken place. [emphasis added]

43. Similarly, the Steering Committee, on behalf of Merchant Law, advised former GLGI sales agents that it was important to solicit their donor clients to pay to join the class action, stating in emails: "We cannot stress enough that every single paid member is crucial for the fight. Our focus moving forward will be on those who have paid and joined."

44. The plaintiff made a $500 Payment to Merchant Law. He was induced to do so by the representations made by or on behalf of Merchant Law. Relying upon the misrepresentations of Merchant Law and its agents in their marketing efforts, he believed that making a Payment was a prerequisite to "joining" the *Piett* Action. In particular because of Merchant Law's misrepresentations about the importance of

paying and joining the *Piett* Action, the plaintiff was under the impression that he would not be able to participate in the *Piett* Action as a class member unless he made a Payment. His understanding was that he was making a Payment in order to be a class member in the *Piett* Action.

45. The Class Members similarly made their Payments to Merchant Law in reliance upon the misrepresentations of Merchant Law and its agents in their marketing efforts. They, too, believed that if they did not make the Payment, they would be excluded from the *Piett* Action, and were induced to make the Payment as a result of the misrepresentations of Merchant Law and its agents.

***The non-retainer agreements and the* Scheuer *Action fees***

46. When individuals decided to make a Payment on the Merchant Law Helps or Donors4Donors websites, they were taken to a web form entitled "The Next Step", which stated:

> Yes, [Merchant], I want Merchant Law Group LLP to represent me in connection with a class action your firm will soon launch against the Government of Canada. ...
>
> In return for services rendered, I agree to pay Merchant Law Group LLP (as my share of the fee for work done by it in connection with a pending appeal in the Federal Court of Appeal and a potential Supreme Court of Canada appeal, plus any anticipated class action work) the sum of $500 to be paid immediately without regard to the outcome of any litigation. ...

47. This language mirrors that in the joint FAQ page, which reassured readers that Merchant Law's intent was to represent "donors (in a class action – there is power in numbers) to go all the way up to the Supreme Court (if required...)".

48. There was nothing on either website that advised the Class Members that the Payment would applied to the costs of Merchant Law's work on an unrelated piece of litigation. There was nothing on either website that advised the Class Members that they had no responsibility to pay any fees in relation to any appeal in the

Federal Court of Appeal and a potential Supreme Court of Canada appeal that was unrelated to the proposed class action. There was nothing on either website that advised the Class Members that the Payment would be non-refundable.

49. The Payments were processed by Merchant Law, and Merchant Law issued a receipt for each Payment received. The Payments, once received by Merchant Law, were trust funds, and could not be disbursed by Merchant Law except in accordance with the Saskatchewan Rules of Professional Conduct and the *CAA*.

50. After making a Payment, each payor was also asked to execute a standard form "Contingent Fee Agreement" with Merchant Law. The plaintiff executed this "Contingent Fee Agreement" because he believed, based on Merchant Law's representations, that doing so was a requirement to participate in the class action. Merchant Law did not review the terms of the "Contingent Fee Agreement" with the plaintiff, or explain that he was not obliged to make the payment or sign the "Contingent Fee Agreement" to participate as a class member in the *Piett* Action.

51. Despite being labelled a "Contingent Fee Agreement", the form explicitly states that Merchant Law is <u>not retained</u> as the payor's lawyer. The "Contingent Fee Agreement" was a nullity, and is unenforceable at law.

52. In addition to the non-retainer disclaimer, the non-retainer agreements state further that:

    (a) the Payment is non-refundable (even though the Payment was received as trust funds);

    (b) the client "retains" Merchant Law to represent them with respect of legal proceedings in respect of the Gift Program including the *Scheuer* Action (to which the payors were not a party) and a potential class action;

    (c) the client agrees to pay Merchant Law "as their share of the fee to be earned for the work done by [Merchant Law] in connection with a coming Federal Court of Appeal and a potential Supreme Court of Canada appeal (in an

undisclosed proceeding), and in connection with the class action work as anticipated":

(i) a Payment of $500, "already paid and without regard to the outcome of any litigation";

(ii) the additional sum of 10% or 6% of the reduction of the client's tax liability to be paid (depending on the percentage of the reduction);

(iii) any costs awarded in favour of the representative plaintiff[s] and collected; and

(iv) all taxes imposed by law on fees and all disbursements for legal services;

(d) the client agrees that Merchant Law might use the Payment "for the legal services, for fees, for taxes, for disbursements, or as [Merchant Law] deems appropriate", including "to pay for class contact which will probably include a payment to the company or agency making contact with the client and informing the client of the nature of the proposed class action", "by way of a set fee of $175 per client but the payment may be more or less, in the discretion of [Merchant Law]"; and

(e) the client is not a client "in the usual solicitor/client relationship" but rather a member of a proposed class, and that Merchant Law "is only agreeing to pursue a class action…and is not retained as [the client's] individual lawyer in relation to their dealings with the CRA or any other legal matters".

53. The non-retainer agreement was the first time that the plaintiff and the Class were advised that Merchant Law intended that the Payments would be applied to its fees in respect of a Federal Court action. It was not disclosed if this Federal Court action was a separate piece of litigation, to which the plaintiff and the Class were not parties, and that they did not agree to finance at the time that they made their Payment (which they were now told was non-refundable).

54. The plaintiff and the Class did not retain Merchant Law in respect of the *Scheuer* Action, as they were strangers to that action. The plaintiff and the Class had no interest in the *Scheuer* Action. The language in the non-retainer agreement suggesting that they were retaining Merchant Law for this purpose was intentionally deceptive and in breach of every province's Rules of Professional Conduct.

55. In all communications that were available to Class Members prior to making a Payment, Merchant Law and those acting on its behalf communicated consistently that the *Piett* Action and the *Scheuer* Action were completely separate proceedings. The joint FAQ page, for example, described the *Piett* Action as "a completely independent non-related action for donors by donors against CRA and the government...NOT tied" to the *Scheuer* Action in any way, and stated that "Merchant Law's class action is a completely separate action with separate claims very different from the claims GLGI's lawyers are fighting in court". In fact, GLGI was not fighting any proceedings in court by the time that the solicitations for the Payments were made.

56. Also consistently throughout all of its communications regarding the *Piett* Action, Merchant Law and those acting on its behalf described the Payments as being made in respect of legal fees to be incurred for the *Piett* Action specifically. On the Donors4Donors home page, it stated:

> To date, over 3,500 donors have signed up and contributed $500 each to support our new lawsuit, a class action which has already been filed and is awaiting certification to go forward. ...
>
> (Note: We are asking each donor to contribute $500 each to help with the ongoing financing of our lawsuit. Incidentally, this is a one-time fee. No further solicitation of funds will be pursued.)

Similarly, on the joint FAQ page, it stated:

> Why is there a fee of $500?

> Taking this case to court is costly. [Donors4Donors] is working with Merchant Law to provide this service for an initial non-refundable payment of $500 per donor. ...
> Note: Merchant Law expects to put in over $3-5 million of their own money in fees to fund this class action. [emphasis added]

***Distribution of the Payment funds***

57. Merchant Law represented that the Payment funds were to be held in a trust account and that the funds would be paid out for legal fees charged by lawyers working on the file as well as for other administrative costs. It also represented that Statements of Account would be sent to payors when amounts were billed from the trust account. This never happened, in breach of the terms of the non-retainer agreement, and in breach of trust.

58. Prior to the hearing of the *Piett* Action certification application in December 2019, Merchant Law had received approximately $1.7 million in Payments from over 3,500 putative *Piett* Action class members.

59. Of the $1.7 million in Payment funds:
    (a) Merchant Law paid itself at least $368,728.51 for legal fees and disbursements prior to the certification application hearing; and
    (b) at least $1.34 million was paid to Piett's numbered company for work performed by Piett, Mitchell, and other "class group leaders" – *i.e.* former sales agents who received referral fees for recruiting donors to make Payments.

60. The Payments were trust funds held by Merchant Law for the benefit of the Class. Each payment from the trust funds was made in breach of the terms of the non-retainer agreement and in breach of trust and in breach of the fiduciary duty that Merchant Law owed to the plaintiff and the Class.

61. Piett received a referral fee of approximately $100 per person who signed up with Merchant Law, for an approximate total of $100,000 out of the Payment funds.

62. Shoeman, another Merchant Law sales agent, received a referral fee of approximately $200 per person who signed up with Merchant Law, and a referral fee of $50 for each person whom one of his sub-agents successfully solicited, for an approximate total of $25,000 out of the Payment funds.

63. After he made his Payment, the plaintiff received periodic communications from Merchant Law or Donors4Donors explaining the status of the *Piett* Action and future steps to be taken. None of these communications contained information regarding the distribution of the Payment funds or any of the Unlawful and/or Wrongful Conduct as described below.

64. The plaintiff did not receive any statements of account regarding the Payment funds in Merchant Law's trust account. None of the Class Members have received any accounting of either the amounts paid to Merchant Law or the amounts paid to the Steering Committee members.

***Status of the* Piett *Action***

65. On August 7, 2021, in a decision indexed as *Piett v. Global Learning Group Inc.*, 2021 SKQB 232, Justice McCreary of the Saskatchewan Court of King's Bench dismissed the application for certification of the *Piett* Action and struck the entire action as an abuse of process. Merchant Law represented Piett on the application.

66. Justice McCreary found that the content of the Merchant Law Helps website was created or approved by Merchant Law and that the majority of the Payment funds were used to pay referral and/or consulting fees to the members of the Steering Committee and Shoeman, rather than to pay legal fees as stated on the Merchant Law Helps website.

67. Justice McCreary found that it was necessary for Merchant Law to seek court approval, under s. 41(2) of the *CAA*, of any solicitation of contributions from putative class members, and before it could use the Payments, which did not occur, and was therefore improper.

68. Justice McCreary held that the fee arrangement between the Steering Committee and Merchant Law created a conflict of interest, and that the Scheme was contrary to the purpose and objectives of the *CAA*, and brought the administration of justice into disrepute.

69. Piett has sought leave to appeal Justice McCreary's decision only with respect to the dismissal of the claim and denial of certification against CRA. The leave decision of the Court of Appeal remains under reserve.

**The Unlawful and/or Wrongful Conduct**

70. The damages suffered by the plaintiff and Class Members are a result of the conduct of the defendant in the operation of the Scheme and the prosecution of the *Piett* Action. Particulars of this conduct include, but are not limited to the defendant's:

(a) acceptance of direction from the Steering Committee, whose members were in a clear conflict of interest with the putative class members, in the conduct of the *Piett* Action;

(b) misrepresentations to the Class Members regarding the necessity, effect, and import of the Payment funds, and with regard to the nature of their rights and responsibilities as putative *Piett* Action class members;

(c) use of the Payment funds to pay its own legal fees in the *Scheuer* litigation to which the Class Members were not parties;

(d) soliciting and collecting Payments from putative *Piett* Action class members which were non-refundable even if the *Piett* Action did not succeed, which is contrary to the intent of a contingency fee agreement;

(e) failure to seek and obtain court approval prior to soliciting and collecting Payments from putative *Piett* Action class members;

(f) failure to seek and obtain court approval prior to distributing Payment funds to members of the Steering Committee; and

(g) failure to seek and obtain court approval prior to distributing Payment funds to itself as legal fees and disbursements

(the "Unlawful and/or Wrongful Conduct").

71. The plaintiff did not, and could not have, through the exercise of reasonable diligence, become aware of the defendant's Unlawful and/or Wrongful Conduct until the issuance of Justice McCreary's decision on August 27, 2021.

**Damages**

72. Because of the defendant's Unlawful and/or Wrongful Conduct in the creation and operation of the Scheme and the prosecution of the *Piett* Action, the plaintiff and the Class Members suffered loss and damage, particularly the loss of the Payments.

## PART 2: RELIEF SOUGHT

73. The plaintiff claims on his own behalf, and on behalf of the Class:

(a) an order certifying this proceeding as a class proceeding and appointing the plaintiff as representative plaintiff for the Class pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50;

(b) a declaration that the defendant is liable for fraudulent misrepresentation/the tort of deceit, or in the alternative, negligent misrepresentation;

(c) a declaration that the defendant breached its duty of care owed to the Class Members;

(d) a declaration that the defendant breached its fiduciary duty owed the Class Members;

(e) a declaration that the defendant committed an equitable fraud against the Class Members;

(f) a declaration that the defendant acted in breach of trust;

(g) a declaration that the defendant has been unjustly enriched;

(h) general damages;

(i) in the alternative to (g), an order that the defendant account for and make restitution or disgorge to the plaintiff and Class Members in an amount equal to the Payments;

(j) special damages;

(k) aggravated, exemplary, and punitive damages;

(l) pre-judgment and post-judgment interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 78, s. 128;

(m) costs of this action;

(n) costs of all notices and for the administration of the plan of distribution for relief obtained in this action, including all taxes; and

(o) such further and other relief as this Honourable Court may deem just.

**Negligence**

74. The defendant was negligent in the performance of its functions as plaintiff's counsel and proposed class counsel in the *Piett* Action.

75. The defendant's duty was to act as a prudent lawyer would in the circumstances in prosecuting the *Piett* Action, including fulfilling its *sui generis* duty of commitment to the Class Members as putative class members in the *Piett* Action. It breached its duty by the Unlawful and/or Wrongful Conduct set out above, and in particular through the creation and implementation of the Scheme.

76. But for the defendant's conduct in creating and implementing the Scheme, the plaintiff and Class Member would not have made any payments to Merchant Law.

77. The defendant created or approved the content of the Merchant Law Helps website and the Steering Committee's communications with putative *Piett* Action class members, which it knew or ought to have known were inaccurate, false, deceptive, misleading and omitted material information about the Payments and putative class members' rights and obligations, and yet the defendant did nothing to correct the content of the website or the Steering Committee's communications, and, in fact, continued to pay Mitchell to operate the website.

78. As putative class members in the *Piett* Action, each of the Class Members was in a proximate position with the defendant such that the defendant knew, or ought reasonably to have known, that its acts or omissions in respect of its role as intended class counsel and the recipient of the Payments would cause injury or damage to the plaintiff and the Class Members if it failed to take reasonable care.

79. In the circumstances, it was reasonable for the plaintiff and the Class Members to expect that the defendant would not engage in the Unlawful and/or Wrongful Conduct. They were entirely vulnerable to the defendant's behaviour.

80. As a result of the defendant's negligence, the Class Members sustained damages, in particular, they lost the amount of the Payments.

81. With regard to Class Members resident in Quebec, the defendant's lack of diligence and prudence, as particularized herein, is in contravention of art. 1457 of the *CCQ*.

**Fraudulent misrepresentation/deceit**

82. The defendant and its agents made numerous representations to Class Members when soliciting them to make the Payments, including, but not limited to, the following:

(a) potential plaintiffs could only be part of a *Piett* Action if they "signed up and get behind Merchant Law";

(b) in order to become a full class member in the *Piett* Action, individuals were required to make a Payment;

(c) the members of the Steering Committee were "fellow donors" in the proposed class action and the class members' interests were common to the members of the Steering Committee;

(d) the Payment funds would be used to pay Merchant Law's legal fees and disbursements in the *Piett* Action;

(e) the Payments provided the funds necessary to litigate the *Piett* Action. Win or lose, class members would therefore "receive value for this payment";

(f) if donors did not make a Payment in respect of the *Piett* Action, they would "have no back up plan";

(g) Merchant Law is not related to GLGI and the *Piett* Action and Gift Program were brought to Merchant Law's attention by a third party independent group of donors and fundraisers independent of GLGI;

(h) donors who did not make a Payment would only "technically" be included in the outcome of the *Piett* Action and would receive less access to information about the *Piett* Action throughout the litigation, and potential could be excluded from any settlement;

(i) donors who did not make a Payment would have to pay higher contingent legal fees in the *Piett* Action;

(j) a judge would consider whether an individual made a Payment when assessing individual claims under a judgement or settlement; and

(k) if donors did not make a Payment, "studies" "showed" that many of them would not be able to claim against any potential settlement or judgement due to inadequate "court notice"

(the "Representations").

83. The Representations were untrue, inaccurate and misleading.

84. Merchant Law made the Representations despite knowing that the Representations were false. Alternatively, the defendant was reckless as to whether the Representations were true or false.

85. The Representations were capable of being relied upon and it was reasonable for the plaintiff and other Class Members to rely upon the Representations when they made their Payments.

86. The Class Members' reliance on the Representations is established, among other things, by their making Payments. If the Class Members had known that the Representations were false, they would not have made the Payments.

87. The plaintiff and the Class Members' reliance on the Representations caused them to suffer loss and damages.

88. The defendant committed the tort of deceit by purposefully omitting from its, and its agents' communications with the Class Members any information regarding the distribution of the Payment funds, including the material facts that the substantial majority of the Payment funds would be paid out to the members of the Steering Committee and that Payment funds would be paid to Merchant Law for its costs of the unrelated *Scheuer* Action. These omissions were intentional and occurred solely for the purpose of deceiving the plaintiff and the Class Members.

89. Had these material facts been disclosed to the plaintiff and the Class Members, they never would have made the Payments.

**Unjust enrichment**

90. Further, and in the alternative, the plaintiff and the Class Members are entitled to claim and recover based on equitable and restitutionary principles.

91. The defendant has been unjustly enriched by the receipt of the Payments. The plaintiff and the Class Members have suffered a corresponding deprivation in the amount of the Payments, plus interest thereon.

92. Since the Payments received by the defendant from the plaintiff and the Class Members resulted from the defendant's Unlawful and/or Wrongful Acts, there is, and can be, no juridical reason justifying the defendant retaining any part of the Payments. In particular, any contracts upon which the defendant purports to rely on to receive the Payments, including the "Contingent Fee Agreements", are void because they are (1) prohibited by statute, entered into with the object of doing an act prohibited by statute, and/or require performance of an act prohibited by statute, and/or (2) in contravention of common law principles.

93. The defendant is required to make restitution to the plaintiff and the Class Members for the entire Payments because, among other reasons:

(a) the defendant was unjustly enriched by receipt of the Payments;

(b) the Class Members suffered a deprivation by paying the Payments;

(c) the defendant engaged in the Unlawful and/or Wrongful Acts as alleged in this claim;

(d) the Payments were acquired in such circumstances that the defendant may not in good conscience retain them;

(e) justice and good conscience require restitution; and

(f) there are not factors that would render restitution unjust.

94. Equity and good conscience require the defendant to make restitution to the plaintiff and the Class Members for the Payments, or alternatively to disgorge that amount to the plaintiff and the Class Members.

**Equitable Fraud**

95. The defendant was in special or fiduciary relationship with the Plaintiff and Class Members in the circumstances in prosecuting the *Piett* Action.

96. The defendant owed fiduciary obligations to the Plaintiff and Class Members including its *sui generis* duty of commitment to the Class Members as putative class members in the *Piett* Action. It breached its duty by the Unlawful and/or Wrongful Conduct set out above, and in particular through the creation and implementation of the Scheme.

97. The defendant's Unlawful and/or Wrongful conduct in creating and implementing the Scheme amounts to equitable fraud.

**Aggravated, exemplary and punitive damages**

98. The defendant's conduct was high-handed, outrageous, reckless, wanton, entirely without care, deliberate, callous, disgraceful, wilful, and in contumelious disregard of the plaintiff's rights and the rights of the Class Members.

99. The defendant's deliberate decision to work with the Steering Committee to further financially exploit the Class Members, who had already been subjected to the sham Gift Program, represented a flagrant betrayal of their trust and vulnerabilities, and was of such a serious nature as to justify awarding aggravated, exemplary and punitive damages.

Plaintiff's address for service:

**CAMP FIORANTE MATTHEWS MOGERMAN LLP**
#400 – 856 Homer Street
Vancouver, BC V6B 2W5

Tel: (604) 689-7555
Fax: (604) 689-7554

Email: service@cfmlawyers.ca

**WADDELL PHILLIPS PC**
#1120 – 36 Toronto Street
Toronto, ON M5C 2C5

Tel: (647) 261-4486
Fax: (416) 477-1657

Email: reception@waddellphillips.ca

Place of trial: Vancouver Law Courts

Address of the registry: 800 Smithe Street, Vancouver, BC V6Z 2E1

Date: 11/25/2022

Signature of lawyer
for plaintiff

Reidar Mogerman, K.C.

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**ENDORSEMENT ON ORIGINATING PLEADING OR PETITION FOR SERVICE OUTSIDE BRITISH COLUMBIA**

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*The party(ies), name(s) of party(ies), claim(s) the right to serve this pleading/petition on the party(ies), name(s) of party(ies), outside British Columbia on the ground that state the circumstances, enumerated in section 10 of the Court Jurisdiction and Proceedings Transfer Act, on which the plaintiff/petitioner relies*

Rule 7-1 (1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

(a) prepare a list of documents in Form 22 that lists

(i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

(ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record.

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## APPENDIX

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*[The following information is provided for data collection purposes only and is of no legal effect.]*

**CONCISE SUMMARY OF NATURE OF CLAIM:**

A proposed class action regarding the alleged misconduct of a law firm in collecting funds from putative class members in another proceeding on the basis of false and misleading representations, and then distributing those funds in breach of the firm's professional obligations and applicable statutes.

**THIS CLAIM ARISES FROM THE FOLLOWING:**

A personal injury arising out of:

☐ a motor vehicle accident

☐ medical malpractice

☐ another cause

A dispute concerning:

☐ contaminated sites

☐ construction defects

☐ real property (real estate)

☐ personal property

☐ the provision of goods or services or other general commercial matters

☐ investment losses

☐ the lending of money

☐ an employment relationship

☐ a will or other issues concerning the probate of an estate

☒ a matter not listed here

THIS CLAIM INVOLVES:

☒ a class action

☐ maritime law

☐ aboriginal law

☐ constitutional law

☐ conflict of laws

☐ none of the above

☐ do not know

*[If an enactment is being relied on, specify. Do not list more than 3 enactments.]*

*Class Proceedings Act,* [RSBC 1996] c. 50

*The Class Actions Act*, SS 2001, c C-12.01