

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: EUAIN BROWNE, BENJAMIN NEITSCH, and FAISAL YASIN, Plaintiffs

– and –

HORIZONS ETF CORP., HORIZONS ETFS MANAGEMENT (CANADA) INC., STEVEN J. HAWKINS, JULIE STAJAN, KEVIN S. BEATSON, MCGREGOR SAINSBURY, GEOFF SALMON, WARREN LAW, WAN YOUN CHO and THOMAS PARK, Defendants

AND RE: BENJAMIN NEITSCH

– and –

HORIZONS ETFS MANAGEMENT (CANADA) INC., HORIZONS ETF CORP., JULIE STAJAN, STEVEN J. HAWKINS, KEVIN BEATSON, MCGREGOR V. SAINSBURY, GEOFF SALMON and WARREN LAW

BEFORE: Justice E.M. Morgan

COUNSEL: *David Rosenfeld*, for the Plaintiffs
Seumas Woods, for the Defendants

HEARD: April 6, 2023

MOTION TO DISCONTINUE

[1] The Plaintiffs in these related matters wish to discontinue both actions. Since they are both proposed class actions, leave to discontinue is required under section 29(1) of the *Class Proceedings Act, 1992*, SO 1992, c 6 (“CPA”).

[2] As of April 22, 2020, the Plaintiffs in both actions owned shares in an exchange-traded fund issued and managed by the corporate Defendants and trading under the symbol HOU. The individual Defendants are the directors and officers of the corporate Defendants.

[3] HOU was designed to provide daily returns to shareholders equal to two-times the daily movements of an index which tracked oil futures prices. On April 22, 2020, the Defendants implemented changes to HOU which affected the potential returns paid to shareholders; in

particular, the changes reduced the fund's leverage from two-times to one-time the daily movements of a different oil futures index.

[4] Both actions were commenced within several months of those changes being made. The Plaintiffs allege that the Defendants' actions on and around April 22, 2020 were oppressive, negligent, and in breach of a fiduciary duty owed to shareholders. The two actions were ultimately joined together and prosecuted as a single action by agreement of the Plaintiffs in both.

[5] On April 30, 2021, the Defendants served their Statement of Defence. That pleading asserted facts in defence to the Plaintiffs' allegations which had not previously been publicly disclosed. The Plaintiffs concluded that those new facts materially changed the risks they faced in attempting to establish wrongdoing by the Defendants.

[6] In response, the Plaintiffs sought to amend their Statement of Claim to assert claims of negligent misrepresentation, prospectus misrepresentation under Part XXIII of the *Securities Act*, and secondary market misrepresentation under Part XXIII.1 of the *Securities Act*. Motions for leave to amend the Statement of Claim, certification under the *CPA*, and (3) leave to proceed with a secondary market misrepresentation claim under Part XXIII.1 of the *Securities Act* were scheduled to be heard by the court on February 28 – March 3, 2023.

[7] In the meantime, the Plaintiffs and their counsel applied for, but were unsuccessful in obtaining funding or an indemnification agreement, from either the Law Foundation's Class Proceedings Fund or any private third-party funders. The retainer agreements between the Plaintiffs and their counsel stipulate that the proceeding could be discontinued if third-party funding could not be obtained. Plaintiffs' counsel submit that under the circumstances, the risks of continuing to prosecute the action are high, and the potential for adverse costs against the Plaintiffs is significant.

[8] In light of this assessment of the risks of continued litigation, combined with the absence of third-party funding or indemnification, the Plaintiffs seek to discontinue the actions. In pursuing this course of action, the Plaintiffs, Defendants, and Plaintiffs' counsel have entered into an agreement (the "Discontinuance Agreement") containing the following terms:

- (i) None of the Plaintiffs will release any rights to pursue individual actions against the Defendants;
- (ii) Two of the three Plaintiffs have agreed not act as proposed representative plaintiffs in any proposed class proceedings against the Defendants in respect of the subject matter of the Browne Action;
- (iii) The Defendants will not seek costs in connection with the discontinuance;
- (iv) The Defendants will pay \$225,000 on account of disbursements incurred by Plaintiffs' counsel; and

- (v) No costs or legal fees will otherwise be paid to Plaintiffs' counsel.

[9] The actions were brought in good faith and leave to discontinue is likewise being sought in good faith. There is no suggestion that this action was brought as a meritless "strike suit" designed simply to extract a payment as the price of discontinuance: see *Naylor v. Coloplast Canada Corporation*, 2016 ONSC 1294, at para 24.

[10] No notice to the putative class about the actions has been disseminated to date. Further, any possible prejudice to putative class members who are aware of the action caused by the resumption of limitation periods will be mitigated by the Notice Plan that Plaintiffs' counsel has produced. Any putative class members who may have been aware of either action and who registered for updates through Plaintiffs' counsel's website will be notified of the discontinuance via the Notice Plan.

[11] The factors which have prompted the Plaintiffs to seek discontinuance – i.e. elevated litigation risks in light of newly disclosed facts, and lack of third party funding or indemnification (where obtaining such funding was a condition of Plaintiffs' counsel's retainer) – have been found to justify discontinuance: *Raghavan v Ontario Stars Corporation*, 2021 ONSC 7887, at paras 5-11. Likewise, a substantial increase in litigation risk also constitutes a valid basis for a discontinuance: *Johnson v North American Palladium Ltd.*, 2021 ONSC 3346, at para 6.

[12] There is no prejudice to the putative class arising from the discontinuance: *Winter v. C.R. Bard*, 2020 ONSC 3532, at para 20. The limitation period has been tolled since commencement of the two actions. Further, the Notice Plan will ensure that any putative class members who have been in touch with Plaintiffs' counsel will have the discontinuance drawn to their attention and can start a new action if they wish. Moreover, no general notice of either action has ever been published or otherwise disseminated: *O'Brien v. Maxar Technologies Inc.*, 2022 ONSC 5196, at paras 4-7.

[13] In addition, the Defendants consent to the discontinuance and will not be prejudiced by leave to discontinue being granted.

[14] The Defendants' agreement to contribute toward payment of Plaintiffs' counsel's disbursements is fair and reasonable. The amount is relatively modest, and is not aimed at compensating Plaintiffs' counsel for their time but rather is reimbursement of expenses.

[15] Leave to discontinue both actions is hereby granted. The Notice Plan is hereby approved.

[16] There will be Orders to go as submitted by counsel.

Date: April 11, 2023

Morgan J.