

AMENDED THIS May 30/22 PURSUANT TO
MODIFIÉ CONFORMÉMENT À

Court File No. CV-20-00651976-00CP

RULE/LA RÈGLE 26.02 (A)

THE ORDER OF _____
L'ORDONNANCE DU _____
DATED/FAIT LE _____

**ONTARIO
SUPERIOR COURT OF JUSTICE**

KARIN VISTOLI

Digitally signed by LYNETTA AVERSA
DN: cn=LYNETTA AVERSA, o=ATTORNEY
GENERAL, ou=CIVIL INTAKE
Email=LEE.AVERSA@ONTARIO.CA, c=CA
Date: 2022.05.30 16:40:00
REGISTRAR
SUPERIOR COURT OF JUSTICE
COUR SUPÉRIEURE DE JUSTICE

BETWEEN:

Plaintiff

and

HAVENTREE BANK, also known as BANQUE HAVENTREE

Defendant

PROCEEDING COMMENCED UNDER THE *CLASS PROCEEDINGS ACT, 1992*

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiffs. The claim made against you is set out in the following pages.

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 Plaintiffs' lawyer or, where the Plaintiffs do not have a lawyer, serve it on the Plaintiffs, 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.

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:

Issued: _____

Address of Court Office:

330 University Avenue

6th Floor

Toronto, Ontario M5G 1E8

TO:

HAVENTREE BANK also known as BANQUE HAVENTREE

100 King Street West, Suite 4610 Toronto,

Ontario, Canada M5X 1E5

CLAIM

1. The Plaintiff, Karin Vistoli, claims on behalf of herself and others similarly situated in Canada, for:

- (a) an order certifying this action as a class proceeding pursuant to the *Class Proceedings Act, 1992*, SO 1992, c 6, as amended, and appointing the Plaintiff as representative Plaintiff on behalf of a class as defined in Paragraph 3 of the within Claim;
- (b) a declaration that clauses in the Defendant's mortgage contracts that purport to allow the Defendant unfettered discretion to unilaterally renew mortgages, and to the calculation and imposition of Higher Renewal Interest and Excess Charges (as such terms are defined herein), are void for uncertainty, unconscionability, or else are unenforceable at common law and in equity;
- (c) an accounting of the amounts resulting from the imposition of the Higher Renewal Interest and Excess Charges (as such terms are defined herein) in accordance with those clauses, paid by the Plaintiff and Class Members who had or have mortgage contracts containing same, and an award of damages against the Defendant in the corresponding amounts, including interest on said amounts from the time that said amounts were incurred or imposed on the Plaintiff and the Class Members;
- (d) alternatively, an award of damages against the Defendant of the amount referred to above in paragraph (c) on the basis of breach of statute, breach of contract, breach

of fiduciary duties, breach of the duty of good faith and honest contractual performance, negligence, misrepresentation and/or unjust enrichment.

- (e) a declaration that the Higher Renewal Interest and Excess Charges (as such terms are defined herein) imposed by the Defendant are in violation of section 8 of the *Interest Act*, RSC 1985, c I-15, as amended, and seek relief and compensation in respect of such violation pursuant to, but not limited to, section 9 thereof;
- ~~(f) a declaration that the Higher Renewal Interest and Excess Charges (as such terms are defined herein) imposed by the Defendant are in violation of sections 23 to 26 of the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, SO 2006, c 29, as amended, and seek relief and compensation in respect of such violation pursuant to, but not limited to, section 50 of same;~~
- ~~(g) a declaration that the Higher Renewal Interest and Excess Charges (as such terms are defined herein) imposed by the Defendant and the associated provisions in the Defendant's mortgage contracts are in violation of the Defendant's statutory obligations under sections 436(1) and 438(1)(a) the *Trust and Loan Companies Act*, SC 1991, c 45, as amended, as well as sections 5 and 6 of the *Cost of Borrowing and Disclosure to Borrowers, O-Reg 191/08*, as amended, to disclose in plain language that is clear, simple and concise, the manner in which the Higher Renewal Interest and Excess Charges are to be calculated and imposed;~~

- (h) (f) a declaration that any Automatic Renewal Agreement imposed by the Defendant (as such term is defined herein) is void for uncertainty, unconscionability, or else are unenforceable at common law or equity;
- (i) (g) a declaration that any Automatic Renewal Agreement imposed by the Defendant (as such term is defined herein) is in violation of section 4 of the *Statute of Frauds*, RSO 1990, c S.19, in so far as such Automatic Renewal Agreements were not signed by the borrower/mortgagor thereto, and acceptance of such was not in writing;
- (j) (h) Punitive, aggravated and exemplary damages in an amount to be determined prior to or at trial, but in any event not less than \$100,000.00 for the Plaintiff and per Class Member;
- (k) (i) compounded pre-judgment and post-judgment interest pursuant to the provisions of the *Courts of Justice Act*, RSO 1990, c C.43, as amended;
- (l) (j) costs of this action on a full indemnity basis, as well as the costs of all notices to the Class, and of administering the distribution of any recovery in this action, plus disbursements and applicable taxes; and
- ~~(m) any tax which may be payable on any amounts pursuant to Bill C-62, the *Excise Tax Act*, RSC 1985, as amended, or any other legislation enacted by the Government of Canada; and~~
- (n) (k) such further and other relief as counsel may advise and this Court may permit and deem just and appropriate in the circumstances.

The Parties

2. The Plaintiff is an individual who resides in the Province of Ontario. The Plaintiff and the Class are persons who had or have mortgages as borrowers/mortgagors, with the Defendant as lender/mortgagee.

3. The Plaintiff is the proposed representative of a class defined as (collectively the “**Class**” or “**Class Members**”):

all persons situated in Canada (including their heirs, estates, executors, trustees or personal representatives) whose mortgages held by the Defendant were involuntarily and/or automatically renewed, and who ~~have correspondingly paid to the benefit of the Defendant~~ paid or were charged any amount of excess interest, costs and fees.

4. The Defendant (“**Haventree**”) is a Schedule I Bank, federally regulated as a private financial institution in Canada. Haventree is federally incorporated pursuant to the laws of Canada and operates across all Canadian provinces under reciprocal provincial authority and registrations.

5. At all material times, Haventree has been in the business of lending money to and taking mortgages from homeowners and other property owners. Haventree is a provider of residential mortgages, mortgage products and lending services to customers.

6. Haventree was created pursuant to an amalgamation and has operated as its own entity since 2018. Prior to same, operations (including the practice of mortgage lending) carried on under the name and entities associated with “Equity Financial Trust Company”.

Equity Financial Trust Company is still listed as the lender/mortgagee on some of the subject mortgages due to Haventree having assumed this business name and entity as part of the amalgamation. Haventree is solely responsible for the claims of the Plaintiff and the Class as they relate to mortgages, including mortgages that are held under this previous entity and business name.

7. Haventree, by its practices, has caused the Plaintiff and the Class to have paid higher rates of interest and incur higher fees and costs on mortgages than is lawfully permitted, and that which was agreed to by the Plaintiff and the Class.

8. The Plaintiff and the Class were wrongly charged and/or overcharged, interest, fees and costs in association with mortgages.

The Mortgage Contracts

9. In the course of conducting its business, Haventree entered into, or assumed previously entered into, mortgage contracts. Each of the mortgage contracts ~~and~~ that are the subject of this proceeding (each a “**Mortgage Contract**”) name Haventree (or its related/predecessor entities) as the lender/mortgagee, and the Plaintiff or Class Member(s) as the borrower(s)/mortgagor(s).

10. The Mortgage Contracts are for various stated periods of time (each an “**Initial Mortgage Term**”); and typically not longer than 5 years.

11. All Mortgage Contracts provide for payment of interest calculated at either a specified fixed rate, calculated not in advance, or a variable or floating rate subject to change at various times throughout the Initial Mortgage Term. When a Mortgage Contract

is voluntarily renewed following an Initial Mortgage Term, a new interest rate is voluntarily accepted and becomes a new interest rate agreed upon for the new term (each an “**Initial Rate**”).

Standard Charge Terms

12. The mortgages offered by Haventree include reference to Standard Charge Terms which outline further terms and conditions of the Mortgage Contracts (the “**Standard Charge Terms**”).

13. The Standard Charge Terms include various terms and conditions in relation to the rights and remedies of both mortgagor and mortgagee relating to these mortgages. It is in these Standard Charge Terms where amendments to mortgages, renewal of mortgages, and interest, fees and costs are partially identified.

14. However, various provisions under these Standard Charge Terms, and their companion provisions in the Mortgage Contracts, are of no force and effect for being in violation of various statutes and regulations, and are void for uncertainty, unconscionability, vagueness, ambiguity, and for not having been assented to by the mortgagors or borrowers.

15. Haventree’s reliance on these provisions has resulted in direct overcharging of interest, fees and costs associated with Haventree mortgages. This is in violation of the ~~pled~~ pleaded statutes, regulations, common law and equity.

The Automatic Renewal Provision

16. Section 2.3 of the Standard Charge Terms #2010/30, originally filed October 7th, 2010 by Haventree's predecessor entity, and currently utilized by Haventree, states the following:

“Mortgage Amendments and Renewals, including Automatic Renewals

(a) With your consent, we may, at our option change any part of the mortgage, including renewing or amending the initial loan, increasing the principal amount or any other term of the mortgage.

*(b) The initial loan may, at our sole discretion, be automatically renewed if we send you a notice offering to renew the outstanding loan amount at a certain rate or rates and upon certain terms before the balance due date and you do not respond in writing accepting one of the renewal terms offered or you do not pay the loan amount in full and have not made other arrangements with us for payment or extension of your loan on or before the balance due date. In such circumstances, the initial loan may, at our sole discretion, be renewed for the term **and at a rate for automatic renewals we set out in the renewal notice we sent you**. We may also automatically renew any other fixed rate loan or variable rate loan you have with us, if any [Emphasis Added].” (the **“Automatic Renewal Provision”**).*

17. This unfettered discretion purportedly given to Haventree pursuant to the Automatic Renewal Provision to amend the Mortgage Contracts (and create new renewal contracts) is contrary to and in breach of the Interest Act ~~various statutes and regulations relied upon and stated above.~~

18. ~~These provisions in the Standard Charge Terms~~ The Automatic Renewal Provision purports to allow Haventree to do any of, or all of, the following:

- a) append any higher rate of interest to an automatically renewed mortgage, in its sole discretion, without consent or the execution of a new mortgage agreement;
- b) offer a renewal of a mortgage on any terms ~~they~~ that Haventree feels are warranted, and, if any borrower/mortgagor refuses to elect the new terms offered, unilaterally select one of the renewal options offered without the consent of the borrower/mortgagor or the execution of a new mortgage agreement; and
- c) automatically renew mortgages held by Haventree for a new term, without the consent of the borrower/mortgagor or execution of a new mortgage agreement.

19. By failing to specify the interest rate that could be appended to an automatically renewed mortgage at the time the original Mortgage Contracts were entered into, Haventree failed to ~~apprise~~ disclose to the Plaintiff and the Class Members of the costs of borrowing in a clear and concise manner.

20. ~~These provisions of the Standard Charge Terms are~~ The Automatic Renewal Provision is thus void and severable from the other terms of the Mortgage Contracts for being uncertain, ambiguous, vague, and unconscionable. These provisions are entirely unenforceable and cannot be relied on by Haventree.

21. Specifically, the phrase “*be renewed for the term and at a rate for automatic renewals we set out in the renewal notice we sent you*” is overly uncertain, ambiguous, vague, unconscionable, and would permit a unilateral imposition of an interest rate in violation of the *Interest Act*, and common law. The reliance on this provision provides no certainty to the contracting borrower/mortgagor, and would permit rates of interest that are not agreed to, unlawful, or even criminal.

22. Alternatively, to the extent that ~~these provisions are~~ the Automatic Renewal Provision is enforceable (which ~~are~~ is not admitted and is strictly denied), ~~they are~~ the provision is overly onerous and ~~required~~ requires specific disclosure and signaling to the Plaintiff and the Class Members, rather than simply being appended to the Mortgage Contract through the Standard Charge Terms.

Renewal of Mortgages After Initial Mortgage Term

~~23. Following the Initial Mortgage Term, some individuals holding a mortgage with Haventree chose to voluntarily renew, on new terms and conditions, for a new set length, and at a new interest rate. Those who voluntarily chose to do so would execute a new contract and associated paperwork with Haventree after having been offered a new mortgage.~~

~~24. For clarity, those who chose to do so do not form part of the Class.~~

~~25.~~ 23. However, Haventree has also automatically renewed mortgages when the Initial Mortgage Term expired on new terms and conditions At the expiry of the Initial Mortgage Term, the Plaintiff and Class Members did not voluntarily renew their mortgages and did not execute a new contract and associated paperwork. Instead,

Haventree relied on the Automatic Renewal Provision to unilaterally impose a renewed mortgage agreement on new terms and conditions, set out at Haventree's sole discretion ("each an **Automatic Renewal Agreement**"). Each Automatic Renewal Agreement was imposed on the original borrowers/mortgagors without their consent and without their execution of a new mortgage agreement.

~~26.~~ 24. Each Automatic Renewal Agreement is void for, among other things, being in violation of section 4 of the *Statute of Frauds*, which requires that all agreements relating to land be in writing and executed by the parties.

~~27.~~ 25. Further, each Automatic Renewal Agreement is also void based on the longstanding equity maxim that silence is not a valid form of acceptance.

~~28.~~ 26. In the alternative, to the extent that the Automatic Renewal Agreements are not void in their entireties but rather are enforceable in part (which is not admitted and is strictly denied), then the maximum permissible interest rate under the Automatic Renewal Agreement and the renewed mortgage is the amount of the Initial Rate. Haventree is obligated to refund the Plaintiff and the Class Members amounts paid by them for interest under the Automatic Renewal Agreements in excess of each of their respective Initial Rates.

~~29.~~ 27. Haventree has processed these Automatic Renewal Agreements with a higher rate of interest than the Initial Rates, based on ~~their~~ Haventree's imposition of arbitrarily selected additional amount of interest, calculated in ~~their~~ its sole discretion, without consent of the Plaintiff and the Class, and without ~~their~~ the Plaintiff's or Class Member's signatures to the Automatic Renewal Agreements (the "**Higher Renewal Interest**").

~~30.~~ 28. The Automatic Renewal Agreement utilized by Haventree states the following:

“AUTOMATIC RENEWAL

*If the renewal offer is not signed and returned by the above Offer Expiry Date, or you do not pay the loan amount in full and have not made any other arrangement(s) with us for payment or extension of your loan on or before the balanced due date, then upon maturity the loan will be automatically renewed for a 1 year open term at **Current Rate plus 4%**. An automatic renewal fee of \$750.00 will be added to the mortgage and the mortgagor(s) will be informed, in writing, of the automatic renewal... [Emphasis Added].”*

~~31.~~ 29. The borrowers/mortgagors were not, prior to receipt of the Automatic Renewal Agreement, put on notice that this would be imposed by Haventree. The unilateral imposition of the Higher Renewal Interest represents unconscionability, bad faith, predatory lending practices and breaches of the underlying Mortgage Contracts.

~~32.~~ 30. The Higher Renewal Interest breaches of section 8 of the *Interest Act* and represents an interest escalation provision. In addition to being in violation of statutes and regulations, the Higher Renewal Interest runs afoul of established common law.

~~33.~~ 31. This provision titled “Automatic Renewal” is otherwise void and severable from the other terms of the Automatic Renewal Agreement and/or the Mortgage Contracts.

~~34.~~ 32. The imposition of a \$750.00 “automatic renewal fee”, among other related fees as described in the Automatic Renewal Agreements are examples of “paper charges”, whereby a charge/cost is imposed on a borrower without a corresponding real cost associated therewith, or else represents costs/charges that are excessive, were not ~~accented~~ assented to, or are unnecessary for the administration of the mortgages (collectively, the “**Excess Charges**”).

~~35.~~ 33. The Excess Charges are unlawful, represent penalties or fines as such terms are defined in accordance with section 8 of the *Interest Act*, and/or are ~~else~~ in violation of established common law and principles of equity.

The Plaintiff’s Experience

~~36.~~ 34. In or around May 2015, the Plaintiff, as borrower, and Equity Financial Trust Company, as lenders, jointly entered into a fixed rate closed mortgage with a one-year term for the purpose of the Plaintiff purchasing her home located at 80 Lynnhaven Road, Toronto, Ontario (the “**Property**”).

~~37.~~ 35. The original mortgage was subsequently renewed (voluntarily, with the consent of the ~~borrowers~~ Plaintiff) for additional one-year terms between 2016, 2017 and 2018. The original mortgage was finally renewed for an additional year from 2018 to 2019, with a maturity date of May 7, 2019. The mortgage between 2018 and 2019 was, at this point, fully vested with Haventree as the lender and the successor entity.

~~38.~~ 36. The details of the then current mortgage of the Plaintiff (the “**2018-2019 Haventree Mortgage**”) were as follows:

Maturity Date:	May 7, 2019
Term:	One year
Interest Rate:	5.37% semi-annual (5.49% APR)
Principal upon Maturity (expected):	\$891,003.02

~~39-~~ 37. By letter dated May 8, 2019, Haventree confirmed to the Plaintiff that the 2018- 2019 Haventree Mortgage was up for renewal. Haventree enclosed a mortgage renewal agreement stipulating proposed options for the terms of said renewal.

~~40-~~ 38. Haventree offered to renew the 2018-2019 Haventree Mortgage in one of three ways: (1) at the same interest rate of 5.37% for a one year closed term; (2), at the same interest rate of 5.37% for a two year closed term; or (3), ~~or~~ at the rate of 9.99% for a one year open term.

~~41-~~ 39. The letter dated May 8, 2019 called for the Plaintiff to execute, date and notate various portions of the letter, and indicate on the letter and accompanying mortgage agreement which of the three options the Plaintiff wished to select.

~~42-~~ 40. The letter and proposed renewal agreement included the language present in the Automatic Renewal Agreement, indicating that if the offer was not signed by the expiry date, the Plaintiff's mortgage would be automatically renewed for a one-year open term at the current rate **plus 4%**.

~~43-~~ 41. The Plaintiff opted not to execute any of the renewal documents provided by Haventree by the specified expiry date. The Plaintiff was wholly unaware of the specific provision that purported to allow Haventree to automatically renew the 2018-2019 Haventree Mortgage with a 4% increase to the Initial Rate, and this onerous provision was not brought to her attention.

44. ~~42.~~ The 2018-2019 Haventree Mortgage went into default shortly thereafter due to failure of the Plaintiff to make new monthly mortgage payments associated with the new mortgage under the Automatic Renewal Agreement.

45. ~~43.~~ Eventually, the Plaintiff sold the Property so that the mortgage could be discharged. The Property was sold in February 2020 with a closing date of April 30, 2020 (the "**Lynnhaven Closing**").

46. ~~44.~~ As part of the Lynnhaven Closing, Haventree provided a mortgage discharge statement on April 20, 2020 in order to proceed with the closing, and stating the total amount owing to Haventree (as well as a breakdown of each of the elements of same) (the "**April 2020 Discharge Statement**").

47. ~~45.~~ The Plaintiff instructed her real estate solicitor to proceed with the Lynnhaven Closing ~~closing~~, notwithstanding that she noticed that some of the amounts on the April 2020 Discharge Statement seemed strange, confusing and excessive to her.

48. ~~46.~~ The sale of the Property closed in and around April 30, 2020, and Haventree received the full amount stated under the April 2020 Discharge Statement from the proceeds of sale.

49. ~~47.~~ The April 2020 Discharge Statement stated the following with respect to amounts to pay out the 2018-2019 Haventree Mortgage:

Principal balance:	\$891,201.07
Interest:	\$81,628.06
Outstanding fees:	\$1,925.00
Discharge fee:	\$395.00
Property management charges:	\$395.50
Legal fees and disbursements:	\$12,073.50
Litigation holdback	\$2,500.00
Total:	\$990,118.13

~~50.~~ 48. As stated above, the Plaintiff's interest rate on the 2018-2019 Haventree Mortgage was 5.37%, with an APR of 5.49%.

~~51.~~ 49. Based on the May 8, 2019 renewal letter and date of automatic renewal, the interest payable from this date by the April 30, 2020 date **without** the higher renewal rate of "Current Rate plus 4%" would have been as follows:

$$\$891,201.07(.0549)*(358/365) = \mathbf{\$47,987.54}$$

~~52.~~ 50. The difference between this quantum and the \$81,628.06 quantum for interest on the April 2020 Discharge Statement is **\$33,640.52**. This is the damage associated with the Higher Renewal Interest as imposed on the Plaintiff at the time of discharge (previous interest rate plus 4%).

~~53.~~ 51. There are further charges imposed on the April 2020 Discharge Statement that represent Excess Charges as defined above. The "Outstanding fees", "Legal fees and disbursements", and "Litigation holdback" represent overcharging to the Plaintiff to a total quantum of **\$16,498.50**.

~~54.~~ 52. While some of these Excess Charges were contemplated under the Plaintiff's original mortgage, and are quite possibly as a result of actual amounts incurred by Haventree upon default, the amounts in their totality are excessive, arbitrary, were not assented to, are unconscionable, or else are not supported by a valid charge incurred by Haventree. Such charges constitute 'paper charges' and should be disgorged in favour of the Plaintiff.

~~55.~~ 53. The damages experienced by the Plaintiff are approximately **\$50,139.02**, before accounting for interest, costs, loss of opportunity, consequential and punitive damages.

Causes of Action

(a) Breach of the *Interest Act*

54. The Higher Renewal Interest and Excess Charges and their imposition are contrary to established case law and in violation of the *Interest Act*.

55. Pursuant to the Automatic Renewal Provision in the Standard Charge Terms, Haventree is purported to have the unilateral right to automatically renew the mortgages held by the Plaintiff and Class Members and impose the Higher Renewal Interest and Excess Charges. The imposition of the increased rate and fees in the Automatic Renewal Agreement operates as a penalty upon non-payment of principal.

56. When the principal is not fully repaid at the maturity date, the Mortgage Contracts become in arrears. The existence of arrears of principal is a condition precedent that then triggers the Automatic Renewal Provision.

57. Haventree informed the Plaintiff that her mortgage was up for renewal by letter stipulating that the mortgage was due for renewal on the maturity date of May 7, 2019. This letter contains the Automatic Renewal Agreement, which provides that if the letter is not signed and returned prior to the maturity date or the loan is not paid in full and no other arrangements are made for payment or extension, “the loan will automatically be renewed for a 1 year open terms at the Current Rate plus 4%.”

58. Until the maturity date, the Plaintiff and Class Members had the right to repay the mortgage and the Defendant had no right to compel renewal. When the Plaintiff and Class Members did not repay the mortgage at the maturity date, the Defendant relied on its Automatic Renewal Provision to penalize the Plaintiff and Class Members by imposing the Higher Renewal Interest and Excess Charges.

59. The Higher Renewal Interest and Excess Charges are fines, penalties, and/or rates of interest that become due as a result of non-payment of the principal due at maturity by the mortgagor, in violation of section 8 of the *Interest Act*. The Plaintiff and Class Members are entitled to recover back the amounts paid in Higher Renewal Interest and Excess Charges pursuant to section 9 of the *Interest Act*.

60. The Class Members include individuals who are currently paying higher rates of interest as a result of the Higher Renewal Interest. The Class Members are not limited to those who have, following a discharge, paid a set and quantifiable amount of higher interest and fees. The damages of the Class Members are thus increasing and subsisting on a daily basis.

~~56. But for Haventree's conduct and unilateral imposition of Higher Renewal Interest and Excess Charges, the Plaintiff and the Class Members would not have incurred the losses and damages as described herein.~~

~~57. The Plaintiff and Class Members have suffered damages arising out of the wrongful conduct of Haventree as it relates to the administration of the mortgages, and its lending operations as governed by the Mortgage Contracts.~~

~~58. The Plaintiff and the Class Members are entitled to an accounting to determine the amount of overcharging as a result of the Higher Renewal Interest and Excess Charges, and a common law award for damages in the corresponding amount, with interest.~~

~~59. Alternatively, the Defendant has been unjustly enriched as a result of the Higher Renewal Interest and Excess Charges. The Plaintiff and the Class Members have experienced a corresponding detriment to Haventree's benefit, for which there is no juristic reason.~~

(b) Breach of Contract

~~60.~~ 61. The Higher Renewal Interest and Excess Charges constitute breaches of the Mortgage Contracts, as well as breaches of Haventree's duties and obligations of honesty, reasonableness and good faith.

~~61.~~ 62. Alternatively, if the Higher Renewal Interest or Excess Charges are permitted under the Mortgage Contracts (which is not admitted and specifically denied), then those amounts are unconscionable, void for ambiguity and uncertainty, and/or unenforceable ~~based on various statutes herein pled, common law and/or equity.~~

~~62.~~ 63. Haventree knew or ought to have known that they have imposed on the Plaintiff and the Class Members charges and higher amounts of interest than is permitted by law.

~~63.~~ 64. Haventree knew or ought to have known that even if the Plaintiff and the Class Members were, prior to renewal, warned of the potential for automatic renewals of their mortgages, that such knowledge does not justify the imposition of the Higher Renewal Interest and Excess Charges.

~~64.~~ 65. By failing to apprise the Plaintiff and the Class Members about the specific terms of the Automatic Renewal Agreements in advance, and specifically by failing to advise about the imposition of the Higher Renewal Rate and Excess Costs, Haventree failed to advise the Plaintiff and the Class Members of the consequences of failing to renew to their mortgages voluntarily and in a timely manner.

~~65.~~ 66. ~~Haventree has further or in the alternative~~ Further, or in the alternative, Haventree has breached the duty of good faith and honest contractual performance owed to the Plaintiff and the Class Members as a result of the imposition of the Higher Renewal Interest and Excess Charges.

~~66.~~ 67. ~~Haventree owed a duty of care to the Plaintiffs and Class Members in the administration of the mortgages. Haventree has breached the standard of care, by, among other things~~ Haventree owes contractual duties to the Plaintiff and Class Members, including a duty of good faith and honest contractual performance, which requires the Defendant to act honestly in the performance of contractual obligations. Haventree has breach the duty of good faith by, among other things:

- a) failing to apprise the Plaintiff and the Class Members of the Higher Renewal Interest and Excess Charges when the initial Mortgage Contracts were executed;
- b) failing to specify and identify the Higher Renewal Interest and Excess Charges, until they were unilaterally imposed;
- c) imposing the Higher Renewal Interest and Excess Charges without permission and with disregard to the consequences of same;

- d) failing to appropriately highlight the impugned provisions to the Plaintiff and the Class Members which are onerous and required specific and notable emphasis;
- e) failing to appropriately inform the Plaintiff and the Class Members about the consequences of each of the Automatic Renewal Agreements prior to their unilateral imposition;
- f) failing to regularly review the administration of the Mortgage Contracts, the Standard Charge Terms and Automatic Renewal Agreements, to prevent unlawful overcharging; and
- g) failing to update the Standard Charge Terms, Mortgage Contracts and Automatic Renewal Agreements to remove the impugned and unlawful provisions, as well as prevent the associated overcharging;

(c) Unjust Enrichment

68. But for Haventree's conduct and unilateral imposition of Higher Renewal Interest and Excess Charges, the Plaintiff and Class Members would not have incurred the losses and damages as described herein.

69. As a result, the Defendant has been unjustly enriched by receiving the benefit of payment of the Higher Renewal Interest and Excess Charges. The Plaintiff and Class Members have experienced a corresponding deprivation to Haventree's benefit by having the Higher Renewal Interest and Excess Charges imposed on them, for which there is no juristic reason. The Automatic Renewal Agreements are unlawful and do not provide a juristic reason.

(d) Breach of Fiduciary Duty

~~67.~~ 70. As a financial institution, Haventree owed a fiduciary duty to its customers, the Plaintiff and the Class Members. The Plaintiff and the Class Members were and are in a vulnerable position as compared to Haventree, and were totally reliant on Haventree with respect to the proper administration of mortgages.

~~68.~~ 71. This fiduciary duty was breached by the imposition of the Higher Renewal Interest and Excess Charges, and as specified in paragraph ~~66~~ 73 above.

Damages

~~69.~~ 72. The imposition of the Higher Renewal Interest and Excess Charges have caused the Plaintiff and the Class Members to incur consequential expenses, losses and damages, including additional or unnecessary outlays of monies to discharge Haventree mortgages, or maintain existing Haventree mortgages. These losses were known and foreseeable by Haventree.

73. The Plaintiff and Class members have suffered damages arising out of the wrongful conduct of Haventree, and continue to do so, as it relates to the administration of the mortgages, and Haventree's lending operations as governed by the Standard Charge Terms and the Mortgage Contracts.

74. The Plaintiff and Class Members are entitled to an accounting to determine the amount of overcharging as a result of the Higher Renewal Interest and Excess Charges, and a common law award of damages in the corresponding amount, with interest.

75. Pursuant to section 9 of the *Interest Act*, the Plaintiff and Class Members are entitled to recovery of the amounts paid in Higher Renewal Interest and Excess Charges in violation of section 8 of the *Interest Act*.

76. The Plaintiff claims against the Defendant, on her own behalf and on behalf of the Class Members, the relief more particularly set forth in paragraph 1 above.

~~70. The Higher Renewal Interest and Excess Charges and their imposition are contrary to established case law, as well as federal and provincial statutes and regulations known or ought to be known by Haventree.~~

~~71. The Class Members include individuals who are, currently, unbeknownst to them, currently paying higher rates of interest as a result of the Higher Renewal Interest. The Class Members are not limited to those who have, following a discharge, paid a set and quantifiable amount of higher interest and fees. The damages of the Class Members are thus increasing and subsisting on a daily basis.~~

~~72. 77.~~ The Defendant is in a position of power over the Plaintiff and Class Members, who are vulnerable borrowers, and Haventree owed the Plaintiff and Class Members fiduciary duties and a duty of good faith, which they flagrantly breached. The Plaintiff and the Class Members further claim punitive, aggravated and exemplary damages for Haventree's intentional, negligent arbitrary and wrongful conduct as described herein.

78. The Plaintiff pleads and relies upon the following statutes and regulations:

- a) *Class Proceedings Act*, S.O. 1992, c.6;
- b) *Interest Act*, R.S.C., 1985, c. I-15; and
- c) *Statute of Frauds*, R.S.O. 1990, c. S.19.

~~73.~~ 79. The Plaintiff and the Class propose that this action be tried in the City of Toronto, in the Province of Ontario.

Date: November____, 2020

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**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO

STATEMENT OF CLAIM

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