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Toronto

(Court Seal)

Court File No.

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**EUAIN BROWNE and FAISAL YASIN**

**Plaintiffs**

and

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

**Defendants**

Proceeding under the *Class Proceedings Act, 1992*

**STATEMENT OF CLAIM**

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff.  
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 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,

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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 by \_\_\_\_\_  
Local Registrar

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

TO: Horizons ETFs Inc.  
55 University Avenue, Suite 800  
Toronto, Ontario, M5J 2H7

AND TO: Horizons ETFs Management (Canada) Inc.  
55 University Avenue, Suite 800  
Toronto, Ontario, M5J 2H7

AND TO: Steven J. Hawkins  
55 University Avenue, Suite 800  
Toronto, Ontario, M5J 2H7

AND TO: Julie Stajan  
55 University Avenue, Suite 800  
Toronto, Ontario, M5J 2H7

AND TO: Kevin S. Beatson  
55 University Avenue, Suite 800  
Toronto, Ontario, M5J 2H7

AND TO: McGregor Sainsbury  
55 University Avenue, Suite 800  
Toronto, Ontario, M5J 2H7

AND TO: Wan Youn Cho  
55 University Avenue, Suite 800  
Toronto, Ontario, M5J 2H7

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AND TO: Thomas Park  
55 University Avenue, Suite 800  
Toronto, Ontario, M5J 2H7

**(1) DEFINITIONS**

1. In this Statement of Claim, the following definitions apply:

- (a) "April 22 News Release" means the press release issued by Horizons on April 22, 2020 entitled "Horizons ETFs Announces Temporary Changes to the BetaPro Crude Oil 2x Daily Bull ETF and BetaPro Crude Oil -2x Daily Bear ETF";
- (b) "April 28 News Release" means the press release issued by Horizons on April 28, 2020 entitled "Horizons ETFs Announces Amendments to the New Rolling Methodologies Employed by HOU and HOD";
- (c) "Beatson" means the Defendant, Kevin S. Beatson, a director of Horizons Corp during the relevant time period;
- (d) "Cho" means the Defendant, Wan Youn Cho, a director of Horizons Corp during the relevant time period;
- (e) "CBCA" means the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44, as amended;
- (f) "CJA" means the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (g) "Class" and "Class Members" means all persons and entities, wherever they may reside or be domiciled, who owned units of HOU on April 22, 2020, other than Excluded Persons;
- (h) "Corporate Class" means a separate investment fund having specific investment objectives;
- (i) "CPA" means the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, as amended;
- (j) "Defendants" means, collectively, Horizons, Horizons Corp, and the Individual Defendants;
- (k) "derivative" means a security that is a contract between two or more parties that is reliant upon or derived from the value of an underlying asset or group of assets;
- (l) "ETF" means an exchange traded fund, which is an investment fund traded on a stock exchange that tracks an index, commodity, or basket of assets;
- (m) "Excluded Persons" means (i) the Defendants; (ii) each of Horizons' and Horizons Corp's past and present subsidiaries, affiliates, officers, directors, senior employees, partners, legal representatives, heirs, predecessors, successors and assigns; and (iii) any member of the Individual Defendants' respective family;

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- (n) “futures contract” means the light sweet crude oil futures contract “CL” traded on the Chicago Mercantile Exchange;
- (o) “Hawkins” means the Defendant, Steven J. Hawkins, the Chief Executive Officer of Horizons Corp and Horizons Management during the relevant time period;
- (p) “Horizons” means the Defendants, Horizons Corp and Horizons Management;
- (q) “Horizons Corp” means the Defendant, Horizons ETF Corp.;
- (r) “Horizons Management” means the Defendant, Horizons ETFs Management (Canada) Inc.;
- (s) “HOU” means BetaPro Crude Oil 2x Daily Bull ETF, as renamed to BetaPro Crude Oil Daily Bull ETF;
- (t) “Individual Defendants” means collectively, Hawkins, Stajan, Beatson, Cho and Park;
- (u) “investment fund” or “fund” means HOU;
- (v) “May 14 News Release” means the press release issued by Horizons on May 14, 2020 entitled “Horizons ETFs Announces Shareholder Meetings for HOU and HOD”;
- (w) “NAV” or “net asset value” means the value of the assets of HOU, minus its liabilities;
- (x) “New Underlying Index” means Horizons Crude Oil Rolling Futures Index;
- (y) “OSA” means the *Securities Act*, R.S.O. 1990, c. S.5, as amended;
- (z) “Park” means the Defendant, Thomas Park, a director of Horizons Management during the relevant time period;
- (aa) “Plaintiffs” means collectively the plaintiffs, Euain Browne and Faisal Yasin;
- (bb) “Prospectus” refers to the November 15, 2019 final long form prospectus that offered units of HOU;
- (cc) “Sainsbury” means the Defendant, McGregor Sainsbury, a director of Horizons Corp during the relevant time period;
- (dd) “SEDAR” means the system for electronic document analysis and retrieval of the Canadian Securities Administrators;
- (ee) “Stajan” means the Defendant, Julie Stajan, the Chief Financial Officer of Horizons Corp and Horizons Management during the relevant time period;

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- (ff) "Trust Declaration" refers to the Amended and Restated Master Declaration of Trust for Horizons BetaPro ETFs, including HOU, dated March 27, 2017;
- (gg) "TSX" means the Toronto Stock Exchange;
- (hh) "Underlying Index" means the Solactive Light Sweet Crude Oil Front Month MD Rolling Futures Index ER, an index developed by Solactive AG to track the performance of the front month WTI Light Sweet Crude Oil Future Contract; and
- (ii) "Yasin" means Faisal Yasin, one of the Plaintiffs.

## (2) CLAIM

2. The Plaintiffs claim on their behalf and on behalf of all Class Members:
  - (a) compensatory damages in the amount of \$500,000,000 or such other sum as this court finds appropriate at the trial of the common issues, or at a reference or references;
  - (b) a declaration that Horizons was negligent:
    - i. in its management of HOU; and
    - ii. in failing to diligently perform its duties as manager of HOU;
  - (c) a declaration that each of the Plaintiffs is a "complainant" under the CBCA;
  - (d) a declaration that the Plaintiffs and Class Members have been oppressed by the Defendants under the CBCA;
  - (e) compensation pursuant to s. 241(3)(j) of the CBCA in an amount not exceeding \$500,000,000;

- (f) an interim and permanent Order prohibiting the Defendant from seeking or obtaining indemnity or reimbursement from the assets of HOU in respect of monetary relief paid or payable to the Plaintiffs and the other Class Members in this action or its costs and expenses of this action;
- (g) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43;
- (h) costs of this action on a substantial indemnity scale, plus applicable goods and services and harmonized sales taxes; and
- (i) such further and other relief as this Honourable Court deems just, including all further necessary or appropriate accounts, inquiries and directions.

### **(3) OVERVIEW**

3. This action seeks to recover losses caused to investors in HOU shares from April 22 to July 2, 2020. HOU, previously known as the “BetaPro Crude Oil 2x Daily Bull ETF”, was an open-ended mutual fund designed to allow investors to gain two-times exposure to fluctuations in the price of oil. HOU was managed and promoted by the Horizons.

4. HOU, as its name previously indicated, was designed and promoted to provide shareholders with two-times leverage to the price of oil futures contracts as tracked by a leading futures index. HOU was structured and promoted as a passively-managed fund that invested in oil futures contracts that rolled over on regular, fixed dates as described in HOU’s Prospectus. The nature of the fund was risky but the potential rewards were significant. For example, if the value of the Underlying Index dropped by 10% in one day, the corresponding value of HOU shares

dropped by approximately 20%. Conversely, if the value of the underlying index rose by 10%, the corresponding price of HOU shares rose by approximately 20%.

5. Beginning in March 2020 and extending until late April 2020, the price of oil futures went into a freefall due to the impact of the global coronavirus pandemic and other factors. The price of HOU shares fell twice as hard because of the two-times leverage. On April 22, 2020, near the bottom of the market, Horizons, unilaterally and without authorization, fundamentally changed the nature of HOU from a two-times to a one-time fund. This change deprived HOU shareholders of the benefit of two-times leverage just as the price of the Underlying Index was set to recover much of what it had lost over the preceding weeks and months.

6. In and around the same time, Horizons fundamentally changed the investment objectives of HOU by changing the roll methodology of the futures contracts in which the fund invested and which was mandated in the Prospectus. The changing of these roll dates exacerbated the losses to the Class Members at the very time when they should have been reaping the benefits of the strong and sustained rally in the price of oil and the value of the Underlying Index.

7. To make matters worse, in and around the same time, Horizons changed the entire nature of HOU from a passive fund, which invested in futures contracts on a set timeline disclosed in the Prospectus, to a discretionary fund that would rise and fall based on decisions made by unnamed individuals.

8. These fundamental changes made HOU's investment strategy virtually unrecognizable from the stated investment objectives set out in the Prospectus. Contrary to the governing regulations, all of these changes were put into effect without prior shareholder approval or the consent of the securities regulator.



9. These changes, alone and combined, caused substantial losses to the Class Members at the very time they should have been profiting. Despite a dramatic rebound in the price of the Underlying Index from April 22, 2020 to July 2, 2020, HOU investors were deprived of any increase in the price of HOU due to the negligence and oppressive conduct of Horizons. In fact, they experienced significant losses. Even as the value of the Underlying Index soared by 177.9% during that time period (which should have resulted in two-times that return), HOU investors experienced a cumulative return of **negative** 55.2%. These significant losses and the lost opportunity to gain from the increase in the Underlying Index were the result of unilateral, unauthorized and unlawful decisions made by Horizons primarily for its own benefit.

#### (4) PARTIES

10. The Plaintiff, Euain Browne is an individual residing in Mississauga, Ontario. He is a retail investor who held shares of HOU on April 22, 2020 through a self-directed brokerage account.

11. The Plaintiff, Faisal Yasin is an individual residing in Dundas, Ontario. He is a retail investor who held shares of HOU on April 22, 2020 through a self-directed brokerage account.

12. The Defendant, Horizons Corp, is a mutual fund corporation established under the federal laws of Canada. The authorized capital of Horizons Corp includes an unlimited number of non-cumulative, redeemable, non-voting classes of shares issuable in an unlimited number of series, referred to as a Corporate Class. Each Corporate Class is a separate investment fund having specific investment objectives. HOU was one such Corporate Class.

13. The Defendant, Horizons Management, is a corporation established under the federal laws of Canada and carries on business as the manager and investment manager of ETF products sold

by Horizons Corp. Horizons Management has approximately \$14.5 billion in assets under management.

14. Horizons Management was the manager and investment manager of HOU pursuant to a Management Agreement with Horizons Corp. As manager, Horizons Management had authority and responsibility to manage and direct the business and affairs of HOU and to make all decisions regarding the business of HOU in accordance with its investment objectives and to bind HOU. Horizons Management was responsible for the execution of HOU's investment strategy and also provided and arranged for the provision of required administrative services to HOU. Horizons Management was also the "promoter" of HOU within the meaning of the OSA.

15. The Defendant, Hawkins, was the Chief Executive Officer of both Horizons Corp and Horizons Management during the relevant time period.

16. The Defendant, Stajan, was the Chief Financial Officer of both Horizons Corp and Horizons Management during the relevant time period.

17. The Defendant, Beatson, was a Director of Horizons Corp during the relevant time period.

18. The Defendant, Sainsbury, was a Director of Horizons Corp during the relevant time period.

19. The Defendant, Cho, was a Director of Horizons Management during the relevant time period.

20. The Defendant, Park, was a Director of Horizons Management during the relevant time period.

## **(5) BACKGROUND TO THE FUND**

### **General Nature of HOU Fund**

21. HOU was an open-ended mutual fund trust established under the laws of Ontario. HOU was designed to allow investors to gain exposure to fluctuations in the price of oil futures contracts. Because most retail investors are not equipped to buy and sell barrels of oil or authorized to trade oil futures contracts, they utilize ETFs such as HOU to make investments based on the price of oil and to gain investment exposure to fluctuations in oil prices.

22. Shares of HOU were offered for sale on the primary market on a continuous basis pursuant to the Prospectus, as amended, filed by Horizons. Shares of HOU that were offered for sale pursuant to the Prospectus, were generally sold at a price which closely tracked the net asset value, or NAV, of HOU. There was no maximum number of shares of HOU that could be issued. The NAV of HOU was calculated by adding up the cash, securities and other assets of HOU, less the liabilities and dividing the value of the net assets by the total number of shares of HOU outstanding.

23. Shares of HOU also traded on the secondary market on the TSX under the ticker symbol HOU.TO, which was the most common way for an investor to purchase shares of HOU. As an ETF, the secondary market price for HOU shares reflected either a premium or a discount to the Fund's NAV. However, because market makers, known as "authorized participants," could buy new shares or redeem outstanding shares from the Fund at or near HOU's NAV, arbitrage opportunities generally caused daily changes in HOU's share price on the TSX to closely track daily changes in HOU's NAV.

### **Mandated Investment Strategy of HOU**

24. As reflected in its name “BetaPro Crude Oil 2x Daily Bull ETF”, HOU was a “Double ETF”, which was designed, marketed, promoted and sold to investors to provide daily investment results that corresponded to two times (200%) the daily performance of the Underlying Index.

25. The Underlying Index was licensed by HOU from Solactive AG. The Underlying Index tracked the performance of oil futures contracts, namely the front month WTI Light Sweet Crude Oil future contract “CL” traded on the Chicago Mercantile Exchange. HOU did not invest in the physical spot commodity market.

26. As a Double ETF, HOU’s NAV was supposed to gain approximately twice as much on a given day, on a percentage basis, as any increase in the Underlying Index when the Underlying Index increased on that day. Conversely, HOU’s NAV was supposed to lose approximately twice as much on a given day, on a percentage basis, as any decrease in its Underlying Index when the Underlying Index declined on that day.

### **Rolling of Futures Contracts**

27. Unlike equities, which provide holders a continuing interest in a corporation, commodities futures like the futures contracts specify a delivery date for the underlying physical commodity. In order to avoid delivery and maintain a futures position, nearby contracts must be sold, and contracts that have not yet reached the delivery date must be purchased. This process is known as “rolling” a futures position.

28. As part of the rolling process, the Underlying Index would refer to a primary futures contract and a secondary futures contract in different weightings over the period of time the roll is

implemented. As contracts reached the delivery date at the end of the expiring contract month, the secondary contract for the next applicable delivery month would become the primary futures contract.

29. As set out in the Prospectus, the roll dates for the Underlying Index of HOU were from the 4th to 7th (inclusive) trading day of each month. The allocation between the primary and secondary futures contracts during a roll for the Underlying Index of HOU was as follows:

<b>Trading Day(s) of the Month</b>	<b>Primary Contract</b>	<b>Secondary Contract</b>
1-3	100%	0%
4	75%	25%
5	50%	50%
6	25%	75%
7	0%	100%

30. Based on the above, for example, by the seventh trading day in April, 2020, HOU would have rolled 100% of its May 2020 futures contracts to the June 2020 futures contracts.

### **Oil Market Takes a Steep Decline in Early 2020**

31. Demand for oil suffered a steep decline in early 2020 due to the global coronavirus pandemic. Governments imposed mandatory lockdowns to mitigate the spread of the disease. Businesses closed and consumer spending plummeted. Adding to pricing pressures, on March 8, 2020, the Kingdom of Saudi Arabia unexpectedly announced price discounts for its oil exports of \$6 to \$8 per barrel to its customers in Europe, Asia and the United States. The next day, the

spot price of WTI fell 25%, its biggest single-day decline in decades. In the days that followed, Saudi Arabia and Russia announced significant increases in oil production, further depressing crude oil prices.

32. On March 10, 2020, as a result of the falling share price of HOU, Horizons announced that “based on recent market volatility”, it intended to consolidate the shares of HOU in a 1:5 ratio effective March 20, 2020. The consolidation meant that the price of HOU shares increased by a factor of five, while the number of shares outstanding went down by the same factor.

### **Things Get Worse in April**

33. The May 2020 futures contracts held by the Underlying Index were set to expire on April 21, 2020. In early April, 2020, the Underlying Index rolled its futures contracts to make the primary contract the June 2020 futures contract in accordance with the roll methodology set out in the Prospectus. As a result, by April 9, 2020, the Underlying Index no longer held May 2020 futures contracts and was holding the June 2020 futures contracts.

34. On April 20, 2020 – the day before the May 2020 futures contracts were set to expire – the May 2020 futures contracts closed at a negative price as investors became concerned that the cost to store the barrels of oil would be more than the oil was worth.

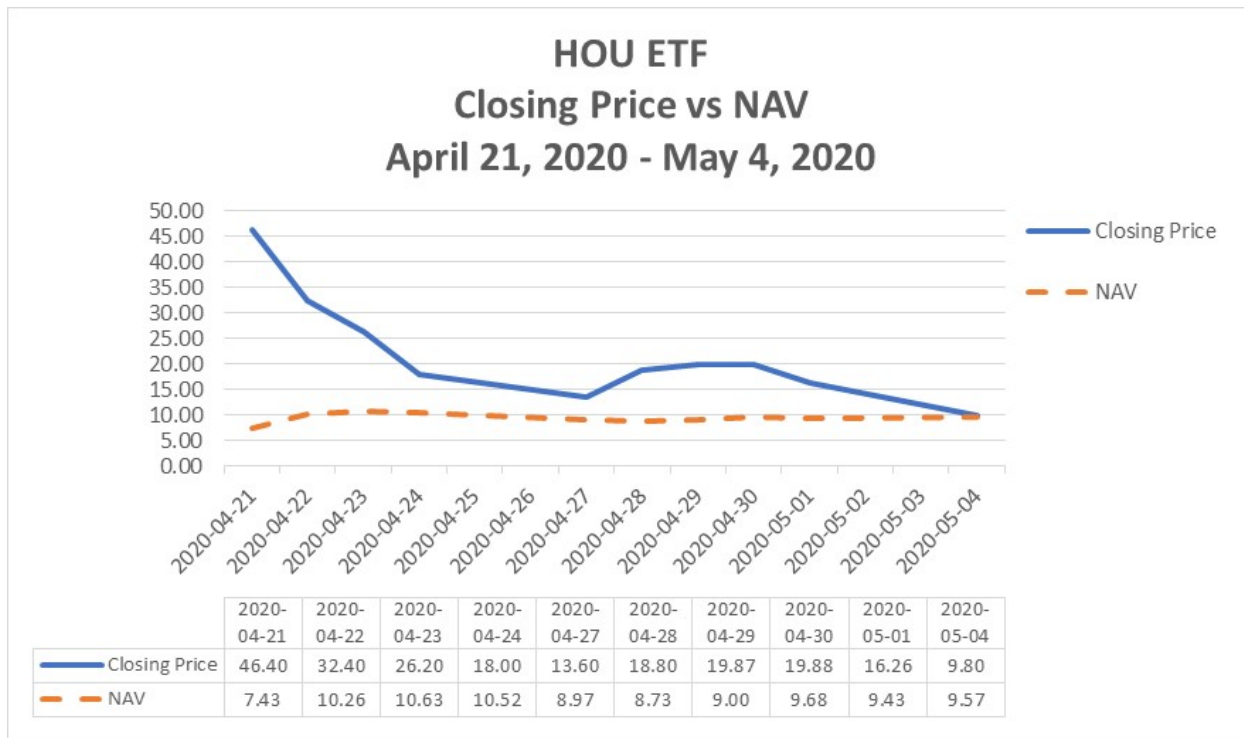
35. Although the risk of excess oil supply continuing into June, 2020 put downward pressure on the June 2020 futures contracts held by the Underlying Index, the June 2020 futures contracts did not go negative. In any event, as per the Prospectus, Horizons was not scheduled to roll the June 2020 futures contracts until the fourth trading day of May, 2020.

### **Horizons Suspends New Share Subscriptions**

36. Given the market volatility, Horizons was uncertain whether it could gain additional exposure to the June 2020 futures contracts if it continued to issue new shares on the primary market pursuant to the Prospectus. As a result, on April 21, 2020, at 10:40am ET, Horizons announced that “in response to the extreme volatility in crude oil markets”, Horizons would be suspending new subscriptions for shares of HOU.

37. The ability to gain additional exposure to the futures market did not affect existing shareholders of HOU since Horizons already had sufficient futures contracts exposure for those shares.

38. Despite the suspension of new shares, shares of HOU continued to trade in the secondary market on the TSX. However, almost immediately after the suspension of new shares, without the arbitrage function performed by market makers in the issuance of new shares that ensured the share price would remain close to the NAV, the market price for HOU on the TSX diverged dramatically away from HOU’s NAV. On April 21, 2020, the share price of HOU closed at 6.5 times the NAV as shown in the chart below:



**HOU Fundamentally Changes Fund Without Proper Approvals**

39. The next day, on April 22, 2020, HOU released the April 22 News Release announcing fundamental changes to the investment objectives of the fund. Citing “the volatility in the underlying futures contracts”, Horizons announced that it was unilaterally changing the investment objectives of HOU as set out in the Prospectus by converting it from a two-times fund to a one-time fund:

...it is anticipated by the Manager that the daily performance of HOU will endeavour to correspond **to one-times, instead of two-times**, the daily performance of its underlying exposure based on an amended rolling methodology described below. [emphasis added]

40. The change from two-times to one-time was a fundamental change to the nature and risk/reward profile of HOU. It was done without prior approval of shareholders and without forewarning. Metaphorically, the change from two-times to one-time meant that the Class



Members bought a ticket for an express elevator but while the elevator brought them down at dizzying speed, they were forced to take the staircase on the way back up.

41. In addition to this fundamental change, the April 22 News Release also announced that even though the roll of the June 2020 futures contracts into the July 2020 futures contract was not scheduled to occur until May 6, 2020 pursuant to the roll methodology in the Prospectus, Horizons was immediately rolling 100% of its June 2020 futures contracts to the July 2020 futures contracts. Further, Horizons announced that 100% of the primary futures contract would roll to the secondary futures contract on the 10th trading day of the primary futures contract, rather than in accordance with the roll timetable set out in the Prospectus, as reproduced in paragraph 29, above.

42. The decision to prematurely roll 100% to the July 2020 futures contracts contrary to the investment objectives in the Prospectus caused an immediate, crystallized loss in value of HOU shares since the July 2020 futures contracts which were purchased were priced significantly higher than the price of the June 2020 futures contracts which were sold (\$18.69 vs \$11.57).

43. Later that day on April 22, 2020, Horizons issued a further news release announcing that it was changing the name of the fund from “BetaPro Crude Oil 2x Daily Bull ETF” to “BetaPro Crude Oil Daily Bull ETF”, removing any reference to HOU being a two-times fund.

44. In the evening on April 22, 2020, Horizons released its third news release of the day to announce a 1:20 share consolidation effective April 29, 2020. As a result of the share consolidation, shares that had fallen to \$1.62 were repriced at \$32.40 and the number of shares in circulation was reduced by a factor of 20.

45. On April 28, 2020, Horizons issued the April 28 News Release announcing further changes to its roll methodology, as last revised only six days earlier on April 22. The April 28 News Release announced that going forward, HOU would effectively change from a passively managed fund to an actively managed fund with no set formula for the purchase and roll over of futures contracts:

With respect to subsequent roll dates, the ETFs will no longer roll to the secondary futures contract on the 10th trading day of each month as previously announced. Instead, the Manager will assess the situation on an ongoing basis and announce any future roll dates and schedules, whether monthly, quarterly or otherwise, by issuance of a press release and by way of updates on the Manager's website.

46. In the April 28 News Release, Horizons also announced that effective that day, 100% of the underlying exposure of the ETFs would roll to the September 2020 futures contract. Despite the Prospectus requiring Horizons to hold June 2020 futures contracts at the end of April, Horizons now held futures contracts with the Underlying Index that were three months away.

47. As a result of the unilateral and unauthorized changes to HOU on April 22, 2020 and April 28, 2020, HOU had become virtually unrecognizable from the investment vehicle set out in the Prospectus and represented a very different risk/reward profile to that set out in the Prospectus:

(a) No longer did it provide to two-times leverage to the Underlying Index, which was its hallmark. It now provided no leverage at all. This meant that when the Underlying Index recovered from its recent lows, which it did in dramatic fashion very soon after April 21, 2020, HOU investors would be deprived of the benefit of the additional leverage which they had bargained for and reasonably expected when they purchased the stock. Many of these investors bore the full extent of the losses caused by the two-times leverage as the price of the Underlying Index swooned up to April 21, 2020. Other investors who sensed

(correctly) that the Underlying Index was poised to rebound and “bought the dip” in and around April 21, 2020, were suddenly deprived of the leverage which they paid for and reasonably expected. Because of Horizons’ unilateral and unauthorized conduct, Class Members were deprived of any additional leverage just as prices of the Underlying Index sharply recovered.

(b) No longer did the contracts roll predictably by the seventh trading day of the month to the next month’s futures contracts as disclosed in its Prospectus. Instead, Horizons had rolled contracts without any timetable and for futures contracts that would not become due for several months. The expiry dates of the futures contracts and the roll strategy of a fund are among the most fundamental determinants of the value of a commodities futures fund which is why it was disclosed in the Prospectus.

(c) No longer did HOU operate pursuant to a disclosed and predictable strategy that corresponded to the value of the Underlying Index. Instead, it was converted into a managed fund that would operate at the discretion of Horizons and primarily at the whims of one or more undisclosed individuals. Horizons promised no set strategy in the April 28 News Release but merely to “assess the situation”.

48. All of these fundamental changes were made by Horizons without prior notice or shareholder approval. These changes were all contrary to the investment objectives set out in the Prospectus and the Class Members’ reasonable expectations.

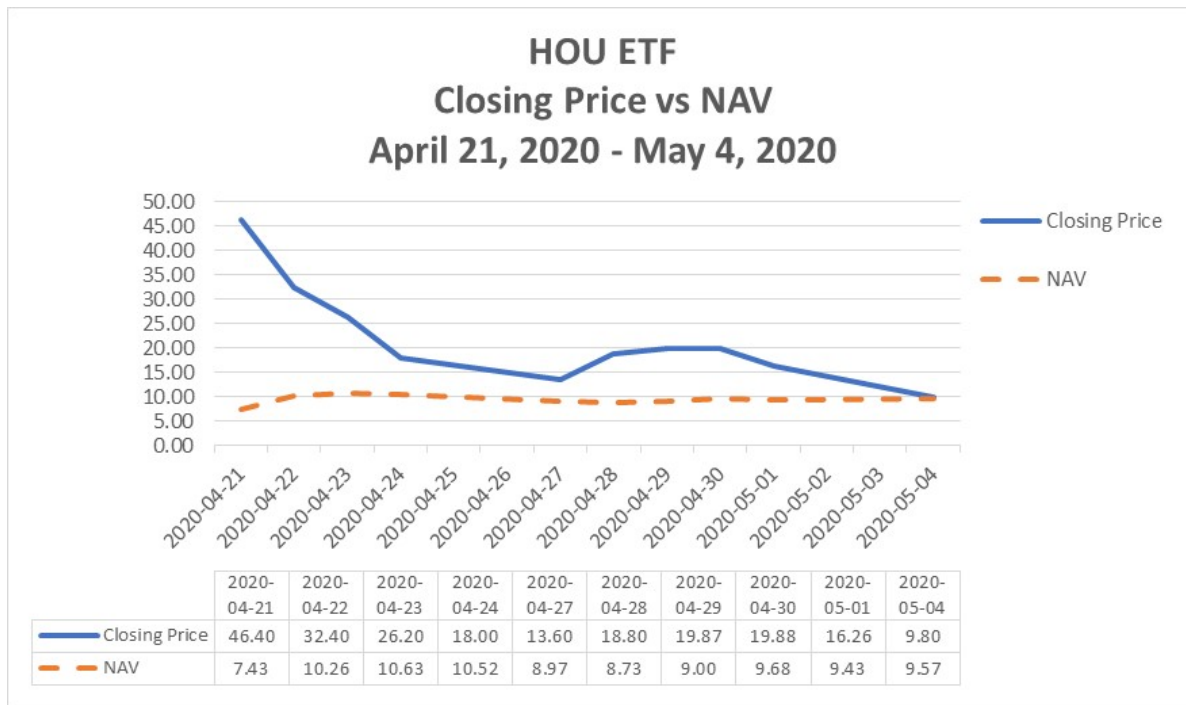
49. Class Members paid for and reasonably expected HOU to perform according to the predictable and known investment objectives and roll methodology set out in the Prospectus. Instead, just as the price of the Underlying Index was bottoming out, Horizons completely

abandoned the leverage and roll methodology required by the Prospectus and improvised by purchasing futures contracts well outside of the required date range. Horizons shuffled the deck by fundamentally changing the fund to a discretionary fund subject to the whims of undisclosed individuals who would manage it pursuant to undisclosed objectives that bore little to no resemblance to the investment objectives described in the Prospectus.

50. These changes were made immediately before the price of the Underlying Index was about to dramatically recover and retract much of the losses suffered in the period leading up to April 22, 2020. Each of these changes combined to deprive Class Members of the benefit of the price recovery that began within a few days of these unilateral and unauthorized changes.

### **Horizons Resumes Accepting New Subscriptions**

51. On May 4, 2020, Horizons announced that, effective 8:00 a.m. on May 5, 2020, it would resume accepting subscriptions for shares of HOU which it had suspended on April 21, 2020. By that time, the share price and NAV were closely aligned, as depicted in the chart shown at paragraph 38 above and reproduced here for convenience:



**Horizons Tries to Rectify its Unilateral Changes**

52. In late April, 2020 and early May, 2020, the Plaintiff Yasin contacted Horizons complaining that the changes to the investment objectives and roll methodology were contrary to the information set out in the Prospectus as to how HOU was to be managed.

53. Recognizing that it did not have proper authority for the changes it had unilaterally implemented, on May 14, 2020, Horizons issued the May 14 News Release which called a special meeting of shareholders for July 2, 2020 to approve the changes to the investment objectives of HOU. The May 14 News Release acknowledged that Horizons had not adhered to the investment objectives of HOU since April 22, 2020:

The current investment objectives have not been met since April 22, 2020, when the Manager instituted temporary measures as a result of the extraordinary market volatility in the crude oil futures market.

54. The May 14 News Release also announced that Horizons intended to change the underlying index from the Underlying Index licenced from Solactive to the New Underlying Index, the “Horizons Crude Oil Rolling Futures Index”, a previously unknown index owned and operated by Horizons Corp.

55. Unlike the changes announced on April 22, 2020 and April 28, 2020, the May 14 News Release suggested that the move to the New Underlying Index would not be implemented until after shareholder approval was obtained at the special meeting on July 2, 2020. In fact, as set out below, Horizons would implement changes over the news few days that mirrored the same results as though the change to the New Underlying Index had already been approved.

56. On May 19, 2020, Horizons announced that HOU would no longer track the September 2020 futures contract and that 100% of the underlying exposure of HOU would roll to the October 2020 futures contract.

57. On May 22, 2020, Horizons announced that as of June 22, 2020, HOU would no longer track the October 2020 futures contract and that 100% of the underlying exposure of HOU would roll to the November 2020 futures contract.

58. Throughout the months of May and June, 2020, the Plaintiff Yasin contacted Hawkins and other directors of Horizons requesting that an independent inquiry be conducted into Horizons’ changes made on April 22 and 28, 2020 and that Yasin be permitted to add a proposal to the agenda for the July 2, 2020 shareholders’ meeting which sought clarity on the changes to the investment objectives and roll methodology. Horizons and Hawkins in his capacity as Chief Executive Officer of Horizons Corp and Horizons Management refused all of Yasin’s requests and specifically refused to add Yasin’s proposal to the agenda. Hawkins asserted, without justification, that

Yasin's proposal amounted to a "personal grievance". Hawkins advised Yasin that he could ask questions *at the conclusion of the shareholder vote*.

59. The shareholders' meeting occurred on July 2, 2020, where only the resolutions proposed by Horizons were tabled and approved. As a result of the vote at the shareholders' meeting, the investment objective of HOU was changed to:

Previous Investment Objective	New Investment Objective
<p>HOU seeks daily investment results, before fees, expenses, distributions, brokerage commissions and other transaction costs, that endeavour to <b><u>correspond to two times (200%) the daily performance of the Solactive Light Sweet Crude Oil Front Month MD Rolling Futures Index ER</u></b>. HOU is denominated in Canadian dollars. Any U.S. dollar gains or losses as a result of HOU's investment will be hedged back to the Canadian dollar to the best of its ability.</p>	<p>HOU seeks daily investment results, before fees, expenses, distributions, brokerage commissions and other transaction costs, that endeavour to <b><u>correspond to up to two times (200%) the daily performance of the Horizons Crude Oil Rolling Futures Index</u></b>. HOU is denominated in Canadian dollars. Any U.S. dollar gains or losses as a result of HOU's investment are hedged back to the Canadian dollar to the best of its ability.</p>

60. The shareholder vote also approved the change to the New Underlying Index owned by Horizons Corp. At the conclusion of the vote, Yasin attempted to ask questions about the changes to the investment objectives and Underlying Index. Yasin's questions were refused on the basis that the questions were "not relevant to the business of the Meeting".

61. All of Yasin's questions related to the unilateral and unauthorized changes announced on April 22 and 28, 2020. Yasin was silenced. Horizons, and Hawkins in particular, used their ability to control the meeting in order to stifle any opposition to the resolutions and to pre-empt questions in order to conceal the basis for their actions.

62. Yasin's questions were reasonable and justified questions relating to the management of the fund. They bore no element of a personal grievance and were posed politely and professionally by a sophisticated individual investor. Horizons' and Hawkins' obstruction of Yasin's questions and proposed resolution were acts of oppression which prejudiced all Class Members.

### (6) CHANGES WERE MADE WITHOUT PROPER AUTHORITY

#### Investment Objectives

63. The change to the fundamental investment objectives on April 22, 2020 was made without shareholder approval. Section 5.1(1)(c) of National Instrument 81-102 which governs the investment fund states:

5.1 (1) The **prior approval** of the securityholders of an investment fund, given as provided in section 5.2, is required before the occurrence of each of the following:

(c) the fundamental investment objectives of the investment fund are changed;  
[emphasis added]

64. The Prospectus further recognized that certain matters, such as changes to the investment objectives, required shareholder approval:

In addition to certain matters required by corporate law, NI 81-102 requires a meeting of Shareholders of an ETF to be called to approve certain changes described in NI 81-102. In the absence of an exemption, the Manager will seek Shareholder approval for any such change. The Manager will also seek Shareholder approval of any matter which is required by the constitutive documents of an ETF, by the laws applicable to the ETF or by any agreement to be submitted to a vote of the Shareholders.

65. Horizons did not obtain shareholder approval or obtain an exemption from the Regulator from the requirements under National Instrument 81-102 before changing the investment



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objectives. Horizons recognized that it required shareholder approval which is why it scheduled the shareholders' meeting for July 2, 2020 after Yasin's persistent inquiries.

### **Roll Methodology**

66. The Prospectus only permitted Horizons to amend the roll methodology under certain circumstances. With respect to amending the roll methodology, the Prospectus states:

The roll methodology for a Double Commodity Underlying Index (which includes roll dates, the primary and secondary futures contracts, and the allocation between the primary and secondary futures contract) may be changed at any time by the Manager and the Index Provider in their sole discretion based on, among other things, liquidity for the underlying primary and secondary futures contracts **as the primary futures contract's expiry approaches**. [emphasis added]

67. As set out above, contrary to the Prospectus, between April 22, 2020 and April 28, 2020, Horizons took it upon itself to roll futures contracts months before their expiry. By May 22, 2020, Horizons had announced that it was rolling the futures contracts to the November 2020 futures contracts. This was a significant departure from the future contracts tracked by the Underlying Index set out in the Prospectus, as shown in the table below:

<u>Current Month</u>	<u>Primary Contract</u>	<u>Secondary Contract</u>
January	February	March
February	March	April
March	April	May
April	May	June
May	June	July
June	July	August
July	August	September

68. There were no liquidity issues for the futures contracts held by the Underlying Index that necessitated the rolling of futures contracts for futures contracts that were months away. The shocks to the oil market from early March had largely dissipated and concerns over the spot price of oil going negative had largely faded.

69. Further, the premature rolling of the futures contracts caused significant losses to the shareholders since the price of the more distant futures contracts was much higher at the time of the roll. As set out in the Prospectus, the difference between the price at which the primary futures contract is sold and the secondary futures contract is purchased is called the “roll yield” and is an important part of the return on a commodities investment such as HOU. Horizons’ failure to adhere to the roll methodology set out in the Prospectus caused a large negative return to be realized by the Class Members.

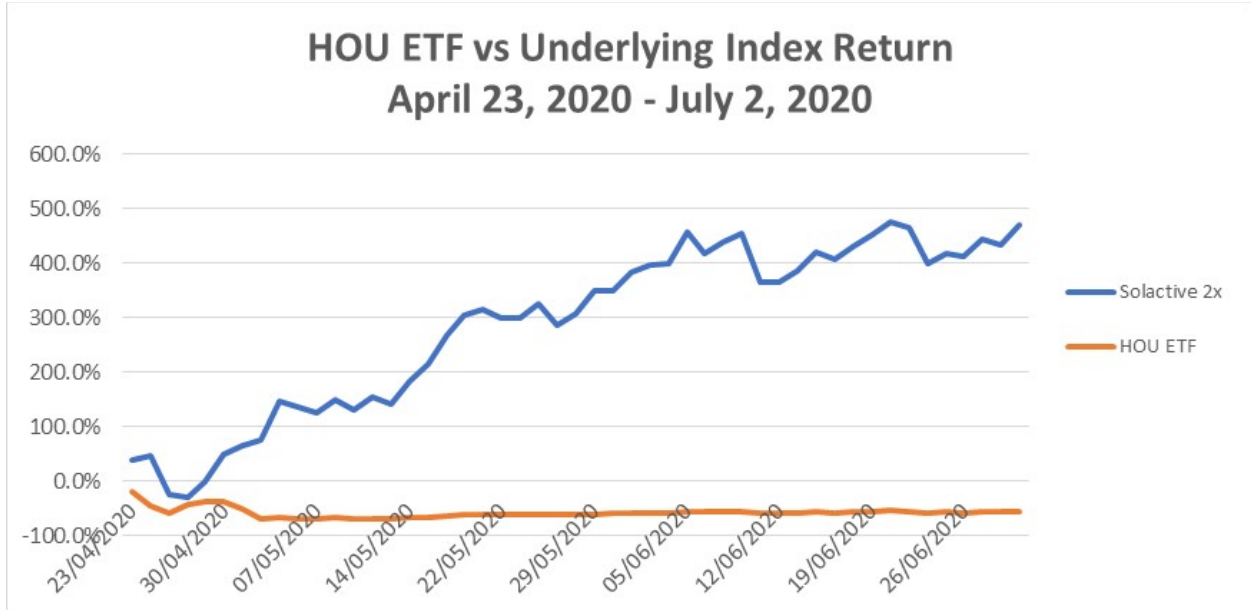
70. Horizons implemented the change to the roll methodology in order to ease the transition to the New Underlying Index owned and operated by Horizons Corp. Under the New Underlying Index, the rolling of futures contracts would occur on the following timetable:

<u>Current Month</u>	<u>Primary Contract</u>	<u>Secondary Contract</u>
January	May	June
February	June	July
March	July	August
April	August	September
May	September	October
June	October	November
July	November	December

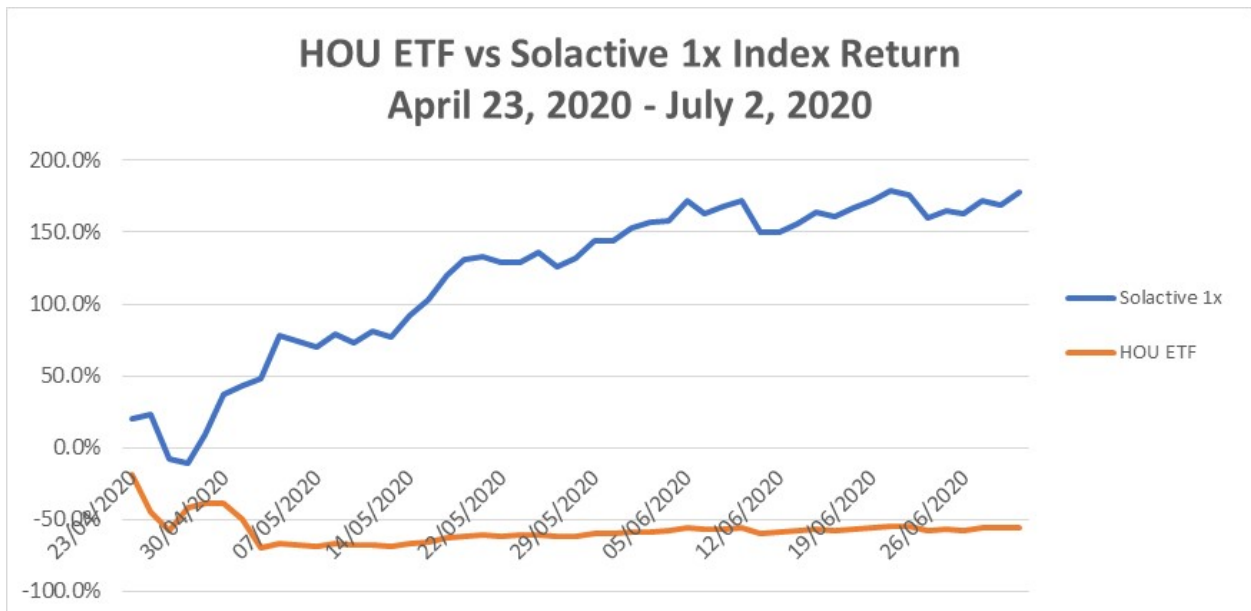
71. The change to the roll methodology timetable was contrary to the investment objectives in the Prospectus and was a fundamental change which required prior shareholder approval. The unauthorized change caused significant losses to the Class Members and was done for the primary benefit of Horizons and its counterparties in order, among other reasons, to facilitate the transition to Horizons' own proprietary index. To illustrate, as alleged in paragraphs 56 and 57 above, on May 19, 2020, Horizons announced the roll to the October contracts, and on May 22, 2020 announced that as of June 22, 2020, the fund would be 100% invested in the November contracts. In other words, even before formally submitting to the shareholders on July 2, 2020 the proposal to change the New Underlying Index, Horizons had unilaterally adopted the roll methodology of the New Underlying Index.

#### **(7) LOSSES TO CLASS MEMBERS**

72. As a result of the unilateral and unauthorized changes to the Fund implemented by Horizons, from April 22 until July 2, 2020 HOU had a negative return of 55.2%. During the same period, the Underlying Index had a cumulative positive return of 177.9%. HOU was required by its Prospectus to track that return at a two-times rate. If HOU generated two-times the daily return of the Underlying Index as it was required to do under the Prospectus, for the same period it would have had a cumulative positive return of 469.7%, as shown in the following chart:



73. Even if Horizons had just tracked the Underlying Index at a one-time rate but otherwise adhered to the investment objectives in the Prospectus, HOU would have risen by approximately 177.9%, instead of dropping by 55.2%, as depicted by the chart below:



74. The Class Members’ losses were caused entirely by Horizons’ unilateral and unauthorized changes to the investment objectives.

## (8) CAUSES OF ACTION

### **Negligence**

75. Pursuant to section 9.7 of the Trust Declaration, section 116 of the OSA, OSC Rule 31-505 - *Conditions of Registration*, and the common law, at all material times Horizons owed the following duties to HOU and to the Unitholders, including the Class Members:

- (a) a duty to exercise the powers and discharge the duties of its office honestly, in good faith and in the best interests of HOU and its Unitholders;
- (b) a duty to act fairly, honestly and in good faith with its clients, which included the Unitholders; and
- (c) a duty to exercise the degree of care, diligence and skill that a reasonably prudent trustee, investment fund manager and investment manager would exercise in comparable circumstances.

76. Contrary to its obligations, by its acts and omissions, Horizons has failed to:

- (a) act fairly, honestly, in good faith and in the best interests of Unitholders, including the Class Members; and
- (b) exercise the degree of care, diligence and skill that a reasonably prudent manager, investment manager, promoter and trustee would exercise in comparable circumstances.

77. Specifically, and by virtue of the actions of Horizons particularized above, Horizons breached its duties to Unitholders and the Class by:

- (a) failing to diligently perform its duties as manager of HOU;
- (b) failing to follow the investment objectives, including the roll methodology, set out in the Prospectus;
- (c) converting the fund from a two-times to a one-time fund without authorization;
- (d) rolling the June 2020 futures contracts to the July 2020 futures contracts on April 22, 2020;
- (e) rolling the July 2020 futures contracts to the September 2020 futures contracts on April 28, 2020;
- (f) rolling the September 2020 futures contracts to the October 2020 futures contracts on May 19, 2020; and
- (g) rolling the November 2020 futures contracts to the November 2020 futures contracts on June 22, 2020.

### **Oppression**

78. Many of the Class Members had just experienced stomach-churning losses due to the effect of the sharp drop in oil prices in March and April 2020. Other Class Members bought HOU shares on or about April 21, 2020 reasonably expecting that they were “buying the dip” and would reap the benefits from the likely rebound in the price of the Underlying Index which did in fact happen shortly after April 21, 2020. All Class Members, regardless of whether they experienced staggering losses in the previous weeks, or whether they “bought the dip” in and around April 21, 2020 reasonably expected to benefit significantly from the rebound in the price of oil which did in

fact occur following April 21, 2020. They reasonably expected that HOU would not take steps unilaterally and without authorization to change the fund's investment objectives and thereby deprive them of the entire benefit of the rebound.

79. Due to the oppressive conduct of Horizons, investors were deprived of their reasonable expectations and suffered significant losses when they would have realized significant gains if Horizons had simply adhered to the investment objectives in the Prospectus.

80. The actions of Horizons were carried out with the full approval of the Individual Defendants, and with knowledge by the Individual Defendants that the changes were contrary to the Prospectus and required prior shareholder approval.

81. The unilateral changes carried out by Horizons in late April, 2020 were intended to preserve for Horizons what had been an enormously lucrative and virtually risk-free source of fees. Although the value of HOU had consistently and steadily fallen since its inception, Horizons had never lost a penny. On the contrary, it made millions of dollars each year in fees for passively performing the same rolling transactions month after month, year after year.

82. The severe drop in the Underlying Index in March, 2020 and April, 2020, multiplied by the two-times leverage, caused Horizons to fear that HOU would be forced to close out and liquidate. This would have resulted in the loss of this lucrative revenue stream and a reputational hit to Horizons.

83. At the same time, the investors who had ridden the stock price down to the point where it was on April 22, 2020 had little left to lose if the price of the Underlying Index fell further since

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the share price of HOU had already been routed. They stood to gain significantly, however, if the price of the Underlying Index were to rebound as it did shortly after April 22, 2020.

84. Investors who purchased HOU were continually warned through the Prospectus and other statements by Horizons of the risk of the loss of their investment, including potentially the loss of their entire investment. Such was the nature of the risk that they undertook by investing in HOU. They were not warned, and did not reasonably expect, however, that Horizons would fundamentally change the investment objectives at any time – let alone near the bottom of the market – by removing the leverage which was the hallmark of the fund, changing the roll methodology and changing the fund from a passive one to an actively-managed one. All of these changes, individually and combined, deprived investors of the ability to recover some of their investment losses or to reap an opportunistic gain if they had “bought the dip” expecting a rebound as many of them did in the days before April 22, 2020.

85. Horizons used the volatile markets and the fear of futures prices turning negative (as widely reported in the media at the time) as an opportunity to dramatically de-leverage and de-risk the fund when it was at or near the bottom for the primary purpose of preserving the ongoing revenue stream which it had realized for many years on HOU.

86. Horizons was in a direct conflict of interest with the Class Members when it set out to preserve its own lucrative revenue stream by fundamentally changing the investment objectives. The Individual Defendants knew that Horizons’ own financial interests diverged from those of the Class Members and nevertheless approved the changes. Instead of seeking shareholder approval or an exemption from the OSC, they used the cover of market turmoil to implement changes which



were designed to preserve Horizons' lucrative revenue stream and which were to the detriment of the Class Members.

87. Horizons and Hawkins further used their ability to control the shareholders meeting on July 2, 2020 to oppress the shareholders by, *inter alia*, preventing Yasin and other shareholders known only to Horizons from expressing any opposition to its plans or asking questions designed to inform shareholders of the true nature of Horizons' conduct.

88. By taking the actions as described above, the Defendants have:

- (a) effected a result;
- (b) carried on the business and affairs of Horizons in a manner; and
- (c) exercised their powers in a manner,

that has been and continues to be oppressive and unfairly prejudicial to and that unfairly disregarded the interests of the Plaintiffs and Class Members, contrary to section 241 of the CBCA.

89. The Plaintiffs and the Class Members are complainants under section 238(d) of the CBCA and are entitled to the relief claimed in paragraph 2 above, or such other relief as the Court may determine to redress the Defendants' oppression of the Plaintiffs and Class Members.

90. The Plaintiffs plead and rely on the CBCA, and particularly Part XX thereof.

### **Causation and Damages**

91. But for the negligence and/or oppressive conduct of the Defendants described above, the Plaintiffs and the other Class Members would not have suffered loss and damage on their investments in HOU. Alternatively, Class Members would not have suffered equivalent losses.

92. As stated above, the Plaintiffs and the Class Members suffered the loss of the market returns from April 22, 2020 to July 2, 2020 that they would have received if Horizons had adhered to the investment objectives.

93. The Plaintiffs and the Class Members are also entitled to recover costs in accordance with the CPA, the costs of notice and of administering the plan of distribution of the recovery in this action, plus reasonable legal fees.

94. The Plaintiffs and the Class Members are entitled to an accounting of all fees or commissions and other payments made to or received by Horizons in relation to HOU as well as disgorgement of those sums during the Class Period.

### **Punitive/Exemplary/Aggravated Damages**

95. The acts of the Defendants as aforesaid were taken for the direct financial benefit of the Defendants and with the wanton disregard for the interests of the Plaintiffs and the Class Members. The Plaintiffs and the Class Members are entitled to an award of punitive, exemplary and aggravated damages, or any of them, as against the Defendants.

## Relevant Legislation

96. The Plaintiffs plead and rely on the CBCA, CJA, the CPA, the OSA, and all relevant amendments thereto.

August 28, 2020

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**Plaintiffs**

-and-

**HORIZONS ETF CORP. et al.**  
**Defendants**  
**Court File No.**

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***ONTARIO***  
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

Proceeding under the *Class Proceedings Act, 1992*

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**STATEMENT OF CLAIM**

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