

Court File No: CV-12-9780-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

BETWEEN:

**MARCUS WIDE of Grant Thornton (British Virgin Islands) Limited, and HUGH  
DICKSON, of Grant Thornton Specialist Services (Cayman) Ltd, acting together herein in  
their capacities as joint liquidators of Stanford International Bank Limited**

Plaintiffs

- and -

**THE TORONTO-DOMINION BANK**

Defendant

**AFFIDAVIT OF MARCUS A. WIDE**

**(Sworn November 28<sup>th</sup>, 2014)**

I, **MARCUS A. WIDE**, of the City of Tortola, British Virgin Islands, MAKE OATH  
AND SAY:

1. This affidavit is sworn in my capacity as a court-appointed liquidator of Stanford International Bank Limited ("**SIB**") and as a plaintiff in the within action that I have commenced along with my colleague, Hugh Dickson (together, the "**Joint Liquidators**"), against The Toronto-Dominion Bank ("**TD Bank**"). I have knowledge of the matters to which I depose in this affidavit, except where my statements are of my information or belief, in which case I have identified the source of that information or belief and believe the statements to be true.

2. I provided a copy of this affidavit to Mr. Dickson before swearing it. He reviewed the affidavit and has confirmed to me that the matters to which I depose in this affidavit also reflect

his information and belief in respect of those matters. This being the case, we agreed that I would swear this affidavit on behalf of the Joint Liquidators.

## **I. BACKGROUND AND QUALIFICATIONS**

3. In 1967, I began my career as an articled clerk at Coopers & Lybrand, a predecessor firm to PricewaterhouseCoopers in the United Kingdom. I qualified as a Chartered Accountant in 1971. In 1972, I moved within the firm to Toronto, Canada and joined the insolvency practice in 1974. Since that time, I have been a full-time practitioner in insolvency, restructuring, fraud investigation, forensic accounting and asset recovery. In 1984, I became a Partner at Coopers & Lybrand, now PricewaterhouseCoopers, and later that year I moved my practice to PricewaterhouseCoopers' office in Halifax, Nova Scotia where I remained until 2011, latterly as a Consultant. In May 2011, I became the Managing Director of Grant Thornton (British Virgin Islands) Ltd., a specialist Recovery and Reorganization practice in the British Virgin Islands. I continue to hold this title today. In this role, I work alongside the other Joint Liquidator, Hugh Dickson, who is a Partner with Grant Thornton UK LLP and the Managing Director of Grant Thornton Specialist Service (Cayman) Limited.

4. From 1996 onwards, my practice has primarily revolved around and specialized in dealing with insolvent financial services enterprises across the Eastern Caribbean and into Latin America. Over that time, I have been the leader in winding-up over 34 offshore financial businesses including banks, mutual funds, hedge funds, venture funds, foreign exchange speculators, and other similar enterprises. For instance, I was the Partner responsible for the court-ordered receivership or liquidation of:

- (a) eighteen (18) offshore banks and other financial service companies in Grenada;

- (b) four (4) offshore banks or other financial service companies in Dominica; and
- (c) eight (8) offshore banks in St. Vincent and the Grenadines.

5. In virtually every one of my projects since 1996, there has been some element of fraud or an outright "Ponzi" scheme has occurred. Therefore, one of my principal priorities has been to gather in funds that have been used to fund wrongdoers' lifestyles and schemes not authorized in the context of the offerings of the investment businesses. This has led to asset recovery exercises in at least 35 different countries including Hong Kong, Singapore, the Antipodes, Ghana, Uganda, South Africa, the United Kingdom, the United States, Canada, and various countries throughout the European Union, South and Central America, as well as most of the Caribbean countries. It has also meant overseeing complex legal actions against those persons or organizations that have assisted the wrongdoers in their activities.

6. I am a chartered accountant and a Member of the Canadian Institute of Chartered Accountants, the Canadian Association of Insolvency and Restructuring Practitioners, and the Insolvency Institute of Canada. I am also licensed as a Trustee in Bankruptcy under the Canadian *Bankruptcy and Insolvency Act*.

## II. THE JOINT LIQUIDATORS' POSITION

7. On May 16, 2014, the Joint Liquidators had issued an amended statement of claim in the within action against TD Bank. This claim was commenced on August 22, 2011. A copy of the Joint Liquidators' amended statement of claim is attached as **Exhibit "A"** to this affidavit.

8. On September 12, 2014, TD Bank delivered its statement of defence. In its statement of defence, TD Bank pleads that:

a reasonable person with the abilities and in the circumstances of the Joint Liquidators first ought to have known of a potential claim against TD Bank on the date of the Freeze Order [February 16, 2009], or in the alternative no later than February 25, 2009, or in the alternative no later than April 6, 2009, or in the alternative no later than April 17, 2009, or in the alternative no later than April 24, 2009, or in the alternative no later than June 19, 2009, or in the alternative no later than July 29, 2009.

9. Having done so, TD Bank pleads that “since this action was not commenced until August 22, 2011, it is statute barred and ought to be dismissed.” TD Bank’s statement of defence does not address the Joint Liquidators’ claim on the merits. A copy of TD Bank’s statement of defence is attached as **Exhibit “B”** to this affidavit.

10. On October 10, 2014, TD Bank delivered a motion for summary judgment seeking dismissal of the Joint Liquidators’ action on the basis that the action is limitations barred. In its notice of motion, TD Bank again utilized the exact language quoted in the previous two paragraphs.

11. The Joint Liquidators’ position in response to TD Bank’s motion for summary judgment is two-fold:

- (a) first, in all of the circumstances of this case, a summary judgment motion is not the proportionate, expeditious or least expensive means to address the limitations issue. As such, the summary judgment motion is inappropriate and should be struck or, if heard, should be dismissed; and

- (b) second, in any event, the Joint Liquidators' claim is not limitations barred and therefore TD Bank's limitations defence cannot succeed, whether on a summary judgment motion or at trial. If the court is inclined to grant summary judgment, it should do so in favour of the Joint Liquidators.

12. The Joint Liquidators' delivered a reply pleading alleging various facts indicating that our claim is not limitations barred. A copy of the Joint Liquidators' reply pleading is attached as **Exhibit "C"** to this affidavit.

13. Further, based on my reading of TD Bank's statement of defence, my understanding is that TD Bank's position is that "a reasonable person with the abilities and in the circumstances of the *Joint Liquidators* first ought to have known of a potential claim against TD Bank" at various points in 2009.

14. Although TD Bank's position addresses various points throughout 2009, the Joint Liquidators were not appointed as liquidators until May 2011. A copy of the order of the Antigua court appointing the Joint Liquidators is attached as **Exhibit "D"** to this affidavit.

15. Until the time of our appointment in May 2011, the Joint Liquidators were not officeholders with respect to SIB's estate, did not act on behalf of SIB or have any knowledge of or involvement with SIB. Therefore, until that time, the Joint Liquidators did not have any reason to be aware of any facts giving rise to a claim against TD Bank and in fact did not have knowledge of those facts, including the fact that TD Bank provided services to SIB. Instead, the Joint Liquidators were individually engaged in various other projects around the world, none of which had any connection to SIB or TD Bank. The Joint Liquidators therefore did not know, and

a reasonable person with the abilities and in the circumstances of the Joint Liquidators could not have known, of any potential claim against TD Bank at any point throughout 2009.

16. The Joint Liquidators are successor officeholders of SIB's estate, having replaced Nigel Hamilton-Smith and Peter Wastell (the "**Former Officeholders**"). Upon our appointment in May 2011, the Joint Liquidators took control of SIB's estate, which from the time of SIB's collapse in February 2009 until that point had been controlled by the Former Officeholders. As such, notwithstanding that TD Bank's position on the limitations issue appears to concern only the Joint Liquidators, in our reply pleading, the Joint Liquidators have alleged facts relevant to determining whether a reasonable person in the circumstances of the Former Officeholders and with the abilities of the Former Officeholders first ought to have known of the facts giving rise to a claim against TD Bank before August 22, 2009, which is two years prior to the commencement of the Joint Liquidators' claim.

17. Accordingly, in response to TD Bank's motion for summary judgment, the Joint Liquidators have arranged for evidence to be provided concerning the abilities and circumstances of the Former Officeholders from the period of their appointment as receiver-managers in February 2009 until August 22, 2009 (the "**Limitations Timeframe**"), by which time the Former Officeholders were acting as joint liquidators of SIB. In particular, evidence has been provided or will be provided by:

- (a) Peter R. Wiltshire, lead counsel to the Former Officeholders throughout the Limitations Timeframe;
- (b) Omari Osbourne, Manager of SIB's Accounting Department prior to and throughout the Limitations Timeframe;

- (c) Beverly Jacobs, SIB's Vice President of Client Support prior to and throughout the Limitations Timeframe; and
- (d) Ralph Janvey, the U.S. Securities and Exchange Commission equity receiver of SIB and all affiliated entities, including throughout the Limitations Timeframe (the "U.S. Receiver").

18. Upon receiving TD Bank's motion for summary judgment, the Joint Liquidators intended to acquire evidence from each of the Former Officeholders and contacted the Former Officeholders in an attempt to arrange for their evidence to be provided. However, the Former Officeholders have not responded to the Joint Liquidators' correspondence and, as such, the Joint Liquidators have not been able to acquire evidence from the Former Officeholders.

19. Although the Former Officeholders have not explained their unwillingness to cooperate, my guess, which I believe to be reasonable, is that they are withholding their cooperation due to ongoing litigation between the Former Officeholders and the Joint Liquidators. The litigation concerns a dispute over the fees that the Former Officeholders charged for their time while acting as receiver-managers and joint liquidators of SIB.

20. The Joint Liquidators remain engaged in ongoing negotiations with the Former Officeholders regarding the fee litigation. I have reason to believe that the parties may resolve the various issues in that litigation without the need for a trial in the foreseeable future. However, I am advised by Malcolm Arthurs, my counsel in the fee litigation, that even if a trial were required, it would in all likelihood take place by mid-2015 at the latest.

21. Once the fee litigation is resolved, the Former Officeholders may be willing to cooperate with the Joint Liquidators and therefore may be available to provide evidence as to their abilities and circumstances during the Limitations Timeframe should the Joint Liquidators' claim against TD Bank proceed to trial.

22. In addition to the evidence noted above, the Joint Liquidators have also retained experts to provide relevant opinion evidence. In particular, expert evidence will be provided to the Court with respect to:

- (a) various questions concerning Antiguan law; and
- (b) how a "reasonable liquidator" with the abilities and in the circumstances of the Former Officeholders would have proceeded throughout the Limitations Timeframe.

23. At the time of swearing this affidavit, I have not received the requested reports from either expert witness. However, those reports will be included with the Joint Liquidators' materials in response to TD Bank's summary judgment motion. Further evidence may also be relied upon and will be delivered when it becomes available and as is appropriate.

### **III. THE COMMENCEMENT OF THE JOINT LIQUIDATORS' CLAIM**

#### **A. The Joint Liquidators' Investigation Into Facts Giving Rise to a Claim against TD Bank**

24. Immediately after the Joint Liquidators' appointment in May 2011, transition meetings were conducted with the Former Officeholders. The purpose of these meetings was for the Joint Liquidators and our counsel to learn of the steps that had been taken by the Former Officeholders and to acquire information that would be relevant to the Joint Liquidators' efforts on behalf of



SIB going forward. At the transition meetings, the Former Officeholders confirmed that they did not know of and had not considered facts giving rise to claims against any third parties.

25. The transition meetings also made clear that the Joint Liquidators faced dramatically different circumstances upon our appointment in May 2011 than were faced by the Former Officeholders during the Limitations Timeframe. For instance, unlike the circumstances faced by the Former Officeholders during the Limitations Timeframe, at the time of our appointment, the Joint Liquidators had the benefit of, among various other things:

- (a) having previously undertaken various projects and efforts in the course of court-ordered receiverships or liquidations in Antigua and, as a result, having extensive knowledge of the relevant laws, personnel and customs relevant to undertaking a liquidation in Antigua;
- (b) not being required to navigate the chaos resulting from the recent collapse of SIB and its various affiliated entities;
- (c) the Former Officeholders' efforts to identify SIB's liabilities and assets, and therefore not needing to prioritize the identification and securing of those assets, including by identifying and corresponding with third party financial institutions or otherwise identifying assets in jurisdictions around the world;
- (d) not needing to take steps to obtain recognition of our appointment or approval to act in various jurisdictions around the world (with the exception of limited steps in Canada and the U.S., as described below);

- (e) knowing that the Former Officeholders' efforts to cooperate with the U.S. Receiver had not been successful and that, in fact, the Former Officeholders and the U.S. Receiver had extensively disagreed over the scope of their respective mandates and efforts to secure SIB's assets;
- (f) the extensive information regarding the financial affairs of SIB and its various affiliated entities that had been made publicly-available by the U.S. Receiver or resulted from the various criminal proceedings connected to SIB's collapse;
- (g) readily available and verifiable public information regarding the fact that a fraud had been perpetrated on SIB; and
- (h) not needing to address or minimize the ongoing operating costs of SIB, including by reducing the number of staff employed by SIB or dealing with various third party service providers to reduce or eliminate past and ongoing expenses.

26. The circumstances faced by the Joint Liquidators upon our appointment in May 2011 directly impacted the priorities that were established by and required of the Joint Liquidators and the steps that the Joint Liquidators took to fulfill those priorities.

27. Given that the Former Officeholders had taken extensive steps in respect of securing and recovering SIB's most readily available liquid and tangible assets, one priority that was established by the Joint Liquidators soon after our appointment was to consider our ability to undertake more complex, long-term and expensive asset recovery, including by pursuing third party claims on behalf of SIB and, to the extent potential third party claims might exist, to investigate and, if appropriate, commence such third party claims.

28. In my experience, it is proper and reasonable for a liquidator to consider third party claims after the various more pressing priorities are addressed upon the commencement of a receivership or liquidation. Such priorities include stabilizing the affairs of the company, identifying assets and liabilities of the company and taking steps wherever necessary to secure the most readily available liquid and tangible assets, commencing a claims process and attempting to determine the financial positions of SIB's customers and other creditors, minimizing the expenses being incurred by the company, and dealing with the multitude of demands placed on the receiver or liquidator by the company's clients and other creditors, as well as the court and legal or regulatory authorities.

29. Based on the transition meetings with the Former Officeholders, it is my view that the Former Officeholders did attempt to pursue such priorities during the Limitations Timeframe. This conclusion was also supported by the work product and records that came into the Joint Liquidators' possession upon our appointment in May 2011. In these circumstances, and given the various benefits held by the Joint Liquidators (and not held by the Former Officeholders during the Limitations Timeframe, as detailed above), it was the Joint Liquidators' view that it was appropriate to turn our attention to, among other things, third party claims soon after our appointment in May 2011.

30. In these circumstances, the Joint Liquidators began investigating various potential claims against third parties that provided services to SIB in jurisdictions around the world, including against TD Bank in Canada. The Joint Liquidators' investigation in respect of a potential claim against TD Bank was informed by certain facts that were available to and known by the Joint Liquidators soon after our appointment in May 2011. These facts included the fact that:

- (a) SIB was insolvent;
- (b) SIB's insolvency resulted from a fraud;
- (c) the manner in which the fraud had been perpetrated, including the fact that SIB was the victim of the fraud, not the perpetrator;
- (d) the duration of the fraud; and
- (e) the fact that TD Bank had provided correspondent banking services to SIB throughout most or all of the period that the fraud was being perpetrated.

31. The Joint Liquidators were able to learn of these facts following our appointment due to the fact that, unlike during the Limitations Timeframe, these facts were readily available. It was only as a result of the Joint Liquidators' knowledge of these facts that a coherent investigation could be undertaken into whether TD Bank acted or failed to act in a manner that caused or contributed to the losses or damages suffered by SIB.

32. After undertaking diligent preliminary investigative efforts, and given the passage of time since SIB's collapse, it was the Joint Liquidators' view that a claim against TD Bank should be issued as soon as possible. The Joint Liquidators therefore proceeded to take steps in order to commence a claim against TD Bank in Canada.

**B. The Joint Liquidators' Acquired Permission to Pursue a Claim Against TD Bank**

33. At the time the Joint Liquidators determined that we intended to commence a claim against TD Bank in Canada, neither the appointment of the Joint Liquidators nor the Former Officeholders had been recognized by the Canadian court nor had either been given permission to act in Canada. Rather, pursuant to an Order of the Quebec Superior Court dated September 11,

2009, the U.S. Receiver's Canadian representative, Ernst & Young Inc. ("E&Y"), had been appointed as interim receiver of the Canadian assets of SIB and authorized to initiate and pursue proceedings in respect of SIB in Canada to the express exclusion of the Former Officeholders (and, in turn, the Joint Liquidators) (the "**Quebec Recognition Order**"). A copy of the Quebec Recognition Order is attached as **Exhibit "E"** to this affidavit.

34. In particular, the Quebec Recognition Order provided, among other things:

[52] ORDERS that [E&Y] is hereby empowered and authorized, but not obligated, to act at once in respect of the Property in coordination with the [U.S. Receiver] and, without in any way limiting the generality of the foregoing, [E&Y] is hereby expressly empowered and authorized to do any of the following in Canada having due regard for the consultation obligations and the relationship of these proceedings to the U.S. Receivership Proceedings:

[...]

g) with the approval of this Honourable Court, to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Respondents, the Property or [E&Y], and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

[...]

q) and in each case where [E&Y] takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of the Respondents and the [Former Officeholders]. [translation]

35. In light of the Quebec Recognition Order, notwithstanding that the Joint Liquidators discovered the facts giving rise to a claim on behalf of SIB following our appointment in May 2011, such a claim could not be commenced in Canada without permission from a Canadian court. Instead, the Joint Liquidators recognized that the only person capable of commencing a

proceeding in respect of a claim on behalf of SIB against TD Bank in Canada was E&Y and that E&Y had not yet commenced such an action.

36. Accordingly, the Joint Liquidators sought the U.S. Receiver and E&Y's consent to an order permitting them to commence an action against TD Bank in Canada. However, as this consent was not forthcoming, the Joint Liquidators scheduled the first available motion date before the Quebec Superior Court, which was August 18, 2011. On that date, the Joint Liquidators brought a motion before the Quebec Superior Court seeking leave to institute proceedings on behalf of SIB against TD Bank in Canada. The Joint Liquidators included in our motion record the pleading that had been prepared following our then-current investigation. A copy of the Joint Liquidators' notice of motion and my accompanying affidavit (without exhibits) is attached as **Exhibit "F"** to this affidavit.

37. On August 19, 2011, after hearing the Joint Liquidators' motion, the Honourable Justice Chantal Corriveau granted the Joint Liquidators leave to institute proceedings on behalf of SIB against TD Bank in Canada (the "**Authorization Order**"). The Authorization Order represented the first time that either the Former Officeholders or the Joint Liquidators had been authorized to commence or pursue any legal proceedings in Canada. A copy of the Authorization Order is attached as **Exhibit "G"** to this affidavit.

38. In particular, the Authorization Order provided, among other things:

WHEREFORE, THE COURT:

[...]

[2] GRANTS leave to, authorizes and empowers the Joint Liquidators to institute and litigate, in place and stead of [E&Y], the proceeding substantially in the form

of the draft Motion to Institute Proceedings dated August 17, 2011 (Exhibit R-17) against The Toronto-Dominion Bank and any other related party (the "TD Action") or proceedings similar in scope in other Canadian jurisdiction(s), settle and compromise the TD Action, and/or engage in any appellate or judicial review proceedings in respect of the TD Action, the whole in the Province of Quebec and/or in any other appropriate jurisdiction(s);

[3] ORDERS the delegation, without liability for or admission by [E&Y] and the U.S. Receiver, by [E&Y] in favour of the Joint Liquidators, of the powers vested in [E&Y] in the Judgment issued by Honourable Justice Claude Auclair on September 11, 2009 in the present file, limited to such powers as are necessary to allow the exercise by the Joint Liquidators of the acts authorized pursuant to this Order in relation to the TD Action;

[...]

[5] RECOGNIZES that the Joint Liquidators appointed by the High Court of Antigua and Barbuda in the New Liquidation Order (Exhibit R-15) have the equivalent or substantially similar powers and capacities than those of a trustee in bankruptcy or other insolvency office holder within Canada and DECLARES that the Joint Liquidators may exercise those powers and capacities for the purposes of the institution and the litigation by the Joint Liquidators of the TD Action, the settlement and compromise of the TD Action, and/or the engagement in any appellate or judicial review proceedings in respect of the TD Action.

39. I note as well that the Former Officeholders had unsuccessfully appealed the Quebec Recognition Order to the Quebec Court of Appeal and subsequently sought leave to appeal to the Supreme Court of Canada. Following our appointment, the Joint Liquidators continued the efforts to obtain leave to appeal to the Supreme Court, but the leave motion was dismissed by the Supreme Court in December 2011. Similarly, the Joint Liquidators also continued the Former Officeholders' efforts to have our appointment recognized in the United States, but these efforts were also largely unsuccessful.

#### **C. The Joint Liquidators Commenced Claims Against TD Bank**

40. On August 22, 2011, the first business day following the Authorization Order, the Joint Liquidators commenced proceedings against TD Bank in Canada.

41. In particular, on that date, the Joint Liquidators commenced an action against TD Bank in Quebec. On that same date, the Joint Liquidators also commenced the within action against TD Bank in Ontario by having issued a notice of action. The action in Ontario was expressly commenced as a placeholder pending the determination of whether the Joint Liquidators' action in Quebec would proceed on its merits. A copy of the Joint Liquidators' notice of action is attached as **Exhibit "H"** to this affidavit.

42. On July 10, 2012, as a result of a motion by the Joint Liquidators, the Honourable Justice Cumming of the Ontario Superior Court of Justice rendered a decision staying the Joint Liquidators' action in Ontario pending a determination of whether their action in Quebec would proceed on its merits. A copy of the decision of Justice Cumming dated July 10, 2012 is attached as **Exhibit "I"** to this affidavit.

**D. Events After the Joint Liquidators Commenced Claims Against TD Bank**

43. Notwithstanding that the Joint Liquidators had commenced proceedings in Quebec and Ontario on August 22, 2011, no service on TD Bank of the Joint Liquidators' claims occurred at that time.

44. The Joint Liquidators did not immediately serve our claims on TD Bank due to (i) our understanding of our duties and responsibilities as court-officers tasked with prudently taking all steps necessary to maximize recovery for SIB and, ultimately, for SIB's creditors, and, on a related note, (ii) the fact that, despite our then-current investigative efforts, the Joint Liquidators were of the view that further investigation was needed to determine the viability of our claims.

45. In these circumstances, I viewed it as my duty and responsibility as a court-officer to take further steps to investigate whether facts supporting the viability of our claims could be



discovered, particularly facts in respect of whether TD Bank may have in fact acted or failed to act in a manner that caused or contributed to the losses or damages of SIB. In turn, whether or not such facts could be discovered was relevant to the Joint Liquidators' determination of whether the pleadings in the Joint Liquidators' actions in Quebec or Ontario should be served and whether those actions should be pursued. This was particularly important given that the Antiguan estate of SIB controlled by the Joint Liquidators had only limited funds available to it and, in any event, that any funds unnecessarily expended by the Joint Liquidators would directly diminish the ultimate recover of SIB and its creditors. In other words, it was the Joint Liquidators duty and responsibility to confirm, given what they knew and the limited funds available to SIB's Antiguan estate, whether a proceeding against TD Bank in Canada was an appropriate means to seek to remedy the loss or damages that had been suffered by SIB and its creditors.

46. Accordingly, following the commencement of the Joint Liquidators' actions in Quebec and Ontario, the Joint Liquidators aggressively continued our investigation into whether facts relevant to our claims against TD Bank, including in particular those facts demonstrating whether TD Bank had in fact acted or failed to act in a manner that caused or contributed to the losses or damages of SIB.

47. At that time, and as had been the case at all times since the Joint Liquidators' appointment, it was clear that the most relevant facts in respect of whether TD Bank caused or contributed to the losses or damages of SIB remained primarily in the control of TD Bank and that those facts would not be made available to the Joint Liquidators unless the discovery process of the actions in Quebec or Ontario was undertaken. In particular, TD Bank almost fully controls the information concerning what knowledge personnel internal to TD Bank obtained about SIB's

affairs during the period that correspondent banking services were provided to SIB and the information concerning what TD Bank did or failed to do as a result of that knowledge.

48. The information accessible by the Joint Liquidators also did not include that information which was under the control of the U.S. Receiver. As detailed in the various other affidavits to be delivered by the Joint Liquidators in response to TD Bank's summary judgment motion, and has been confirmed by the Joint Liquidators, SIB's relationship with TD Bank was almost exclusively managed by a distinct corporate entity, the U.S.-based Stanford Financial Group ("SFG"). Accordingly, virtually all records in respect of the correspondent banking services provided to SIB by TD Bank were held by SFG in the U.S. Accordingly, the majority of the records relevant to the relationship between SIB and TD Bank were under the exclusive control of the U.S. Receiver, who was responsible for the estate of SFG and had not yet agreed to cooperate with the Joint Liquidators.

49. In any event, around the time that they commenced their actions in Quebec and Ontario, the Joint Liquidators determined that all of SIB's relevant physical and electronic records in Antigua should be gathered and made searchable, and that the SIB's Antiguan estate had the funds necessary to pay for this. This task had not been undertaken by the Former Officeholders. In my experience, and considering the circumstances faced by the Former Officeholders, this was reasonable given the Former Officeholders' priorities and the fact that, given the huge volume of SIB's physical and electronic records, making those records searchable would have been highly time-consuming and expensive. However, in the improved circumstances faced by the Joint Liquidators, it was our view that doing so would be potentially helpful not only with our claims against TD Bank, but also with many other of our efforts on behalf of SIB's estate.

50. As a result, the Joint Liquidators set out to identify and acquire a means to gather and make searchable SIB's records in Antigua. After months of reviewing the available methods and negotiating the associated costs, the Joint Liquidators ultimately acquired a sophisticated and secure online database in November 2011 (the "**Recommind Database**"). The Recommind Database provides a platform for physical and electronic records to be hosted and allows for those documents to be searched, reviewed and categorized.

51. Before inputting the physical records located in Antigua into the Recommind Database, the Joint Liquidators were required to conduct a broad review of those physical records to develop an understanding of which physical records were potentially relevant. This was necessary because of the extensive number of physical records in Antigua and the fact that inputting clearly irrelevant physical records into the Recommind Database would result in wasted time and resources, including throughout the subsequent utilization of the Recommind Database.

52. Once the potentially relevant physical records were identified, in order to place them in the Recommind Database, those physical records were scanned, run through a quality control process to ensure that the integrity of the records had been maintained through the scanning process, and then subject to an "optical character recognition" process. The optical character recognition process entails the digital detection of the text of records, with the result being that the content of the newly scanned records is rendered fully searchable. This process alone took a team of various Recommind employees three weeks. The records that were originally in electronic format and appeared potentially relevant were also placed in the Recommind Database and were fully searchable.

53. While preliminary searches began in late 2011, the Recommind Database was only fully setup and operational for the first time in January 2012. It now contains over three terabytes of data comprising nearly 5 million fully searchable records. The total cost of acquiring and setting up the Recommind database was approximately \$640,000. This amount does not include the costs associated with actually reviewing the contents of the Recommind Database, which has proven to be a time-consuming and expensive task.

54. Once the Recommind Database became searchable in late 2011, the Joint Liquidators began conducting targeted searches and reviews of records contained therein that were potentially relevant to a claim against TD Bank. For instance, the Joint Liquidators searched the Recommind Database for terms such as "TD Bank", "Toronto-Dominion Bank" and "Toronto".

55. The targeted searches in respect of claims against TD Bank conducted in the initial months after the Recommind Database became searchable revealed certain limited information directly relevant to whether TD Bank had acted or failed to act in a manner that caused or contributed to the losses or damages of SIB. For instance, the searches of the Recommind Database revealed records that appeared to indicate that certain TD Bank personnel had attended at SIB's headquarters in Antigua on a few occasions and the types of information that those personnel acquired during such visits. The searches also appeared to reveal that TD Bank had provided various banking services to other entities owned by SIB's owner, Robert Allen Stanford. These facts are relevant to the nature and extent of the knowledge about SIB's affairs held by TD Bank, which in turn dictated how TD Bank should have acted or failed to act in connection with SIB.

56. However, consistent with the fact that the relationship between SIB and TD Bank was managed by SFG in the U.S., the initial searches of the Recommind Database revealed only limited information relevant to what knowledge about SIB's affairs was held by personnel internal to TD Bank and what TD Bank did or failed to do as a result of that knowledge. Also, the limited records in the Recommind Database relevant to SIB's relationship with TD Bank were cumbersome to search and review due to the massive volume of data, and therefore not all such records could be reviewed in the initial months following the commencement of the Joint Liquidators' actions in Quebec and Ontario.

57. One thing that the initial targeted searches of the Recommind Database did reveal were the names of certain individuals who potentially had information about what knowledge concerning SIB's affairs was held by personnel internal to TD Bank and what TD Bank did or failed to do as a result of that knowledge (and other relevant information). Therefore, following the initial targeted searches of the Recommind Database, the Joint Liquidators were able to begin conducting interviews of some such individuals, some of which also resulted in the names of further relevant individuals being identified.

58. Most notably, the individuals identified through the Recommind Database searches included former employees of TD Bank who had been personally involved in the provision of correspondent banking services to SIB. The identities of those former TD Bank employees were buried in the historical records of SIB and were previously unknown to the Joint Liquidators. These identities of those former TD Bank employees were also unknown by the SIB personnel who were available to the Joint Liquidators. This was the case due to the fact that the identified former TD Bank employees ceased their involvement with SIB long before SIB's collapse in 2009 and due to the fact that those SIB personnel had limited involvement with TD Bank in any

event. For instance, as confirmed in their respective affidavits, neither Beverly Jacobs nor Omari Osbourne had knowledge of the names of the former TD Bank employees. For these reasons, the identities of the former TD Bank employees would also have been impossible for the Former Officeholders to determine during the Limitations Timeframe.

59. As confirmed to the Joint Liquidators by both the Former Officeholders and the former TD Bank employees that were interviewed, this information concerning TD Bank's internal knowledge of SIB's affairs was not provided to or otherwise discovered by the Former Officeholders at any time. This information concerning TD Bank's internal knowledge is key to the question of whether TD Bank acted or failed to act in a manner that caused or contributed to the losses or damages suffered by SIB.

60. Finally, in the months immediately following the commencement of their actions in Quebec and Ontario, the Joint Liquidators also retained various experts. For instance, the Joint Liquidators retained an expert to advise on the standards and laws applicable to TD Bank's provision of correspondent banking services to SIB throughout the period that those services were provided, as well as to advise on the nature and extent of the information that TD Bank was required to identify and review in connection with its provision of those services. Further, the Joint Liquidators also retained an expert who specializes in the development and execution of programs to prevent fraud and money laundering, including by identifying relevant information about financial institutions' clients. This expert was able to identify the information that was available to, and required to be accessed and reviewed by, TD Bank throughout the period that it provided correspondent banking services to SIB.

61. As a result of the investigative efforts undertaken by and expert assistance provided to the Joint Liquidators in the months following the commencement of their actions in Quebec and Ontario, the Joint Liquidators amended their pleading in Quebec and served that amended pleading on TD Bank in February 2012. This was the first time that any service on TD Bank occurred in either of the Joint Liquidators' actions in Quebec and Ontario.

62. On June 12, 2012, a case conference was convened before the Honourable Justice Claude Auclair in respect of various preliminary issues in the Joint Liquidators' action in Quebec. At that case conference, Justice Auclair ordered that if TD Bank intended to challenge (i) whether the Quebec court had jurisdiction to hear the Joint Liquidators' claim against TD Bank, (ii) whether Quebec was the appropriate forum to hear the Joint Liquidators' claim against TD Bank, or (iii) the validity of the Authorization Order, it must do so by June 30, 2012, failing which TD Bank would be precluded from bringing such challenges in the future. A copy of the original and translated minutes of the June 12, 2012 case conference before Justice Auclair are attached as **Exhibit "J"** to this affidavit.

63. On June 30, 2012, TD Bank served a motion challenging whether the Quebec was the appropriate forum to hear to the Joint Liquidators' claim against TD Bank. However, TD Bank declined to challenge whether the Quebec court had jurisdiction to hear the Joint Liquidators' claim and the validity of the Authorization Order. In accordance with the June 30, 2012 order of Justice Auclair, TD Bank thereby accepted the validity of the Authorization Order and the capacity it provided to the Joint Liquidators.

64. On January 28, 2014, Justice Auclair allowed TD Bank's motion challenging whether Quebec was the appropriate forum to hear the Joint Liquidators' claim against TD Bank. As a

result, on May 15, 2014, the Honourable Justice Michael Penny of the Ontario Superior Court of Justice ordered that the Joint Liquidators' action in Ontario should proceed. At the same time, Justice Penny granted the Joint Liquidators leave to file a fresh as amended statement of claim in their Ontario action. A copy of Justice Penny's order of May 15, 2014 is attached as **Exhibit "K"** to this affidavit.

65. The Joint Liquidators' fresh as amended statement of claim in their action in Ontario includes allegations that have resulted from their ongoing investigation. This investigation has been furthered by the fact that, in March 2013, the Joint Liquidators entered into an agreement with the U.S. Receiver (and other interested parties) pursuant to which the Joint Liquidators gained access to the records and information controlled by the U.S. Receiver. This includes extensive records pertaining to the relationship between SIB and TD Bank that were not previously available to the Former Officeholders or the Joint Liquidators. A copy of the Joint Liquidators' March 2013 agreement with the U.S. Receiver is attached as **Exhibit "L"** to this affidavit.

66. The Joint Liquidators' ongoing investigative efforts have also revealed certain other claims that may be held by the Joint Liquidators. Most notably, the Joint Liquidators are in the process of attempting to determine whether to pursue an action against another of SIB's correspondent banks, HSBC Bank PLC ("**HSBC**"), in the United Kingdom. Like in respect of our claim against TD Bank, the Joint Liquidators have found it difficult to determine whether a claim exists against HSBC due to the fact that most of the facts that may give rise to a claim against HSBC are exclusively held by HSBC. As a result, the Joint Liquidators are currently engaged in a pre-action discovery process with HSBC that is provided for by the applicable laws of the United Kingdom. If the information produced by HSBC during that process indicates that



HSBC may also bear some liability for the losses or damages suffered by SIB, the Joint Liquidators anticipate that we will pursue a claim against HSBC.

#### IV. THE JOINT LIQUIDATORS CONTROL THE DYNASTY ACTION

67. In approximately November or December 2011, the Joint Liquidators entered into an agreement with Dynasty Group regarding their action against TD Bank whereby the Joint Liquidators were assigned any and all proceeds that may arise under the that action. The Joint Liquidators will pursue the Dynasty Group's action to trial regardless of the result of TD Bank's motion for summary judgment seeking dismissal of the Joint Liquidators' action on the basis that it is limitations barred. A copy of the agreement whereby the Dynasty Group assigned the proceeds of their action to the Joint Liquidators is attached as **Exhibit "M"** to this affidavit.

#### V. TD BANK HAS PREVIOUSLY TAKEN A POSITION ON THE DISCOVERABILITY OF THE FRAUD

68. On August 27, 2009, James M. Davis ("**Davis**"), the Chief Financial Officer of SFG, pleaded guilty to the various criminal charges against him in the U.S. At that time, Davis was the only individual criminally convicted in connection with the fraud committed on SIB. Although I did not do so at that time of its filing in August 2009, I have now reviewed the Davis' plea agreement. A copy of Davis' plea agreement is attached as **Exhibit "N"** to this affidavit.

69. Subsequently, the U.S. Court of Appeal for the Firth Circuit confirmed that the nature and duration of the fraud committed on SIB was not discoverable until August 27, 2009 when Davis entered his guilty plea. This occurred in the course of an action that was brought by the U.S. Receiver against various political campaign committees styled as *Janvey v Democratic Senatorial Campaign Committee, Inc.* Copies of the Fifth Circuit's decision in that case and the evidence relied upon by the U.S. Receiver in support of his position were acquired by Bennett

Jones LLP through public records searches and correspondence with the U.S. Receiver's counsel and I have reviewed these documents. Copies of the Fifth Circuit's decision and the U.S. Receiver's evidence (without exhibits) are attached to this affidavit as **Exhibits "O" and "P"** respectively.

70. In respect of the discovery of the fraud committed on SIB, and on the basis of the evidence filed by the U.S. Receiver, the Fifth Circuit held, among other things:

The evidence reflects that upon the Receiver's appointment on February 16, 2009, it was not readily evident to him or to anyone not privy to the inner workings of the Stanford corporations that these entities were part of a massive Ponzi scheme perpetrated by Stanford beginning as early as 1999. Accordingly, the Receiver, immediately upon his appointment, took possession of the books and records of the Stanford corporations, retained Van Tassel, a certified public accountant, and her firm, FTI Consulting, Inc., and requested that they analyze the corporations' books and records, discover evidence from other sources, and determine whether Stanford and his corporations had engaged in such a Ponzi scheme and, if so, to trace the assets of the corporations that had been diverted and dissipated in the operation of the scheme. In her December 17, 2010 and March 11, 2011 declarations, Van Tassel concluded that Stanford and his corporations were operating as a Ponzi scheme from at least 1999 forward; SIBL was insolvent from at least 1999 forward; the Committees received funds from Stanford, Davis, and Stanford's corporations between February 17, 2000 and May 21, 2008; and Stanford's reported income from at least 1999 forward was composed almost exclusively of income derived from the Stanford entities, including proceeds from SIBL's sale of fraudulent CDs.

[...]

According to the SEC's complaint, Stanford and Davis, the only individuals who knew of the true nature of Stanford's operations and the whereabouts of the vast majority of the SIBL's supposedly multi-billion-dollar investment portfolio, had refused to appear and give testimony in the SEC's investigation. It was not until August 27, 2009 that Davis pleaded guilty to federal securities-, mail-, and wire-fraud offenses and in connection therewith disclosed facts indicating the true nature and duration of Stanford's operation of a massive Ponzi scheme.

71. Since the Fifth Circuit rendered its decision, TD Bank has taken various positions in reliance on that decision in the course of a class action styled as *Rotstain et al. v. The Toronto-*

*Dominion Bank et al.* that is being pursued in Texas on behalf of the creditors of SIB (the “**Texas Class Action**”).

72. For instance, in December 2011, an organization composed of SIB creditors (or their representatives) known as the “Official Stanford Investors Committee” (“**OSIC**”) sought to intervene in the Texas Class Action. TD Bank resisted OSIC’s efforts to intervene. In support of its position that OSIC should not be permitted to intervene in the Texas Class Action, TD Bank filed a “Memorandum and Response in Opposition to the Official Stanford Investor Committee’s Motion to Intervene” on December 22, 2011, which has been acquired from the online U.S. federal court filing system (Pacer) for the Texas court by Bennett Jones LLP and which I have reviewed. A copy of this Memorandum and Response is attached as **Exhibit “Q”** to this affidavit.

73. TD Bank’s Memorandum and Response acknowledged the complexity of the circumstances resulting from SIB’s collapse. In particular, in response to OSIC’s motion to intervene, TD Bank took the following position:

... At first, the alleged international Ponzi scheme involved here may appear to create “unusual circumstances,” especially when viewed from February 2009, when this Court first issued its original orders. Today, however, the view is very different, as one might expect after nearly three years of significant activity.

The “circumstances” must be viewed as of now, when the Motion to Intervene was actually filed and is pending before the Court. It is now some thirty-four months since the Receivership was initiated. Assets have been identified, and tens of thousands of documents and other records have been obtained and secured. Witnesses have been interviewed and deposed, dozens of fraudulent transfer actions have been initiated. Significant legal and forensic resources have been made available: the Receiver, his counsel and the Examiner have been paid millions in fees, plus significant expenses for various consultants and experts, as well as coordination with government agencies and their lawyers. A number of private law firms, working on yet to be paid contingencies, are also sharing the work. All of these personnel have access to all of the available Stanford records,

as well as to extensive documentation from a multitude of third parties, including most of the defendant banks. While this is a large and complex case, over time it has been organized and staffed with the necessary resources approved by the Court.

74. This position taken by TD Bank concerning the circumstances resulting from SIB's collapse appears to acknowledge the chaos resulting from that collapse and the lengthy and expensive work required to discover third party claims (such as a claim against TD Bank) that resulted.

75. Despite TD Bank's resistance, OSIC successfully intervened in the Texas Class Action. Subsequently, in July 2013, TD Bank filed a "Motion to Dismiss the Official Stanford Investors Committee's Intervenor Complaint" and, in December 2013, filed a "Reply in Support Its Motion to Dismiss the Intervenor Complaint", both of which have been acquired from the online U.S. federal court filing system (Pacer) for the Texas court by Bennett Jones LLP and which I have reviewed. Copies of TD Bank's Motion to Dismiss and Reply are attached as **Exhibits "R" and "S"** to this affidavit respectively.

76. TD Bank's Motion to Dismiss and Reply both contain TD Bank's position in the Texas Class Action as to the date that the fraud on SIB became discoverable. Among others, in its Motion to Dismiss and Reply, TD Bank took the following positions:

- (a) "In this multi-district litigation, the Fifth Circuit has now fixed the reasonable discovery date for fraudulent transfers as August 27, 2009, based on James Davis's guilty plea [and] it is the law of the case on this point";

- (b) “In sum, the Fifth Circuit fixed James Davis’s guilty plea on August 27, 2009 as providing reasonable notice of the fraudulent nature of the Stanford related transactions and entities”; and
- (c) “In the Stanford scheme, the Court specifically held that James Davis’s guilty plea, on August 27, 2009, wherein he publicly acknowledged a Ponzi scheme, is the proper Stanford discovery date ... and the Fifth Circuit has now fixed a clear discovery date that OSIC surely missed.”

77. In addition, TD Bank also noted two of OSIC’s proposed tort claims – (i) aiding, abetting or participation in conversion and (ii) civil conspiracy – and took a position on “the applicable statutes of limitation as to each claim.”

78. As OSIC purported to have been assigned its tort claims by the U.S. Receiver, TD Bank took positions in respect of when such claims were discoverable by the U.S. Receiver. With respect to the two OSIC tort claims (both of which TD Bank acknowledges have a two year limitation date from when they were discoverable), TD Bank took the following position: “Statute expired on August 27, 2011 (2 years from James Davis Guilty plea)”.

79. Accordingly, TD Bank has taken the position for its benefit that claims against TD Bank arising from SIB’s collapse requiring knowledge of the fraud committed on SIB became discoverable only on August 27, 2009.

80. Like the claims TD Bank has addressed in the Texas Class Action, my understanding is that the facts giving rise to the Joint Liquidators’ claim include, as a starting point, the fact that a fraud was committed on SIB. The fact that a fraud was committed on SIB and the manner in

which and duration of that fraud has also been central to the Joint Liquidators' various investigative efforts in respect of our claim against TD Bank. This has been the case because, until the fraud was identified and understood, it would not have been possible to coherently identify potential third party claims and investigate how those third parties participated in or otherwise facilitated the fraud and, in turn, caused SIB's losses or damages.

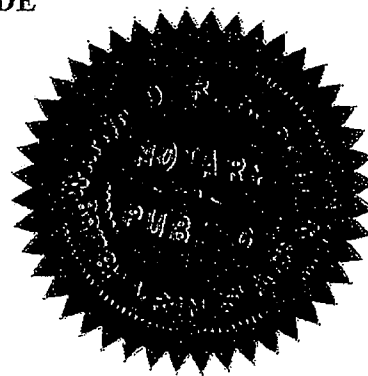
81. As August 27, 2009 is after the Limitations Timeframe, TD Bank has taken a position that appears to me to require the conclusion that the Joint Liquidators' claim was not discoverable during the Limitations Timeframe. Based on all of our knowledge and understanding concerning the abilities of and circumstances faced by the Former Officeholders during the Limitations Timeframe, the Joint Liquidators agree that this was the very earliest date upon which the nature, extent and duration of the fraud could possibly have been discovered.

SWORN before me at the City of )  
Road Town, in the Country of )  
BVI, this 28<sup>th</sup> day of )  
 November, 2014. )

\*  
 A Commissioner, notary, etc.

W.

MARCUS A. WIDE



MARCUS A. WIDE, et al.  
Plaintiffs

v.

THE TORONTO-DOMINION BANK  
Defendant

Court File No. CV-12-9780-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at Toronto

**AFFIDAVIT OF MARCUS A. WIDE  
(Sworn November 28<sup>th</sup>, 2014)**

**BENNETT JONES LLP**  
Barristers and Solicitors  
One First Canadian Place  
Suite 3400, P.O. Box 130  
Toronto, Ontario  
M5X 1A4

Lincoln Caylor (LSUC # 37030L)  
Maureen M. Ward (LSUC #44065Q)  
Nathan J. Shaheen (LSUC #60280U)

Tel: 416.777.6121/4630/7306  
Fax: 416.863.1716

Lawyers for the plaintiffs