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

AMENDED RESPONDING MOTION RECORD OF THE PLAINTIFFS
(motion for an order temporarily staying the action pending the outcome of the appeal of the *Livent* decision to the Supreme Court of Canada, *returnable October 6, 2016*)

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TAB 1

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Plaintiffs

- and -

THE TORONTO-DOMINION BANK

Defendant

AFFIDAVIT OF MARCUS A. WIDE
(Sworn September 22, 2016)

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. This affidavit is sworn in response to the motion of TD Bank seeking an order staying the Joint Liquidators' action against TD Bank pending the Supreme Court of Canada's decision in *Livent Inc. v Deloitte & Touche* (***Livent***).

I. BACKGROUND

3. Almost exactly five years ago, in August 2011, the Joint Liquidators commenced the within action against TD Bank. A chronology chart summarizing notable events in the action is attached as **Exhibit "A"**.

4. In April 2014, the Joint Liquidators delivered an amended statement of claim. Copies of the Joint Liquidators' original and amended statement of claim are attached as **Exhibits "B"** and **"C"** respectively.

5. In September 2014, TD Bank delivered its original statement of defence. TD Bank's statement of defence exclusively addressed TD Bank's position that the Joint Liquidators' claim was limitations barred. It did not contain any defence on the merits. A copy of TD Bank's original statement of defence is attached as **Exhibit "D"**.

6. Later in September 2014, the Joint Liquidators delivered their reply to TD Bank's statement of defence. A copy of the Joint Liquidators' reply pleading is attached as **Exhibit "E"**.

7. In October 2014, TD Bank delivered a motion record in support of a motion for summary judgment based exclusively on TD Bank's position that the Joint Liquidators' claim was limitations barred. A copy of TD Bank's notice of motion is attached as **Exhibit "F"**.

8. TD Bank's motion for summary judgment was heard in September 2015. In November 2015, the court released a decision dismissing TD Bank's motion. A copy of the court's decision dismissing TD Bank's motion is attached as **Exhibit "G"**.

II. DOCUMENTARY PRODUCTIONS AND TD BANK'S FIRST STAY MOTION

9. On December 1, 2015, counsel for the Joint Liquidators and TD Bank appeared in chambers before The Honourable Justice Conway. I am advised by Lincoln Caylor of Bennett Jones, who was present at the chambers appointment, that the parties did not anticipate any further preliminary motions at that time. Justice Conway therefore directed the parties to proceed with the following timetable for the upcoming steps in the action, which was attached to her endorsement (the **Original Timetable**):

Step	Deadline
Joint Liquidators to deliver letter outlining their proposed approach to documentary productions and providing comments on the appropriate approach to documentary productions to be adopted by TD Bank so that preliminary steps are ongoing regarding productions.	December 14, 2015
The parties will meet to discuss the proposed production of documents based on the Joint Liquidators' letter.	January 15, 2016
Delivery of Amended Statement of Defence in the Joint Liquidators' action.	February 29, 2016
Delivery of the Amended Reply in the Joint Liquidators' action.	March 18, 2016
Parties to agree to a discovery plan.	May 6, 2016
Production of documents	In accordance with the discovery plan.

10. The timetable attached to Justice Conway's endorsement contained the following statement: "All steps relating to production of documents will cover both the Joint Liquidators' action and the Dynasty Action." A copy of Justice Conway's endorsement of December 1, 2015 with attached timetable is attached as **Exhibit "H"**.

11. In accordance with the Original Timetable, on December 14, 2015, the Joint Liquidators' counsel, Bennett Jones, delivered a letter outlining the Joint Liquidators' proposed approach to documentary productions and providing comments on the appropriate approach to documentary productions to be adopted by TD Bank. A copy of Bennett Jones' letter without schedules is attached as **Exhibit "I"**.

12. Notwithstanding the Original Timetable and that no further motions were anticipated, on December 22, 2015, TD Bank's counsel delivered a letter to Justice Conway indicating, among other things:

> ...TD Bank must first bring a motion for an order that: (i) the damages sought by the Joint Liquidators, namely the losses of SIB's creditors, are not recoverable in an action brought on behalf of SIB; and (ii) the appropriate procedural vehicle to assert the claims of SIB's customers is an action under the *Class Proceedings Act, 1992*, in which a representative plaintiff is identified and the action is certified under section 5 of the Act.

13. A copy of TD Bank's counsel's letter is attached as **Exhibit "J"**.

14. On January 8, 2016, TD Bank's counsel delivered a notice of motion "for an order staying the action and directing the Plaintiffs to reconstitute as a class proceeding in accordance with the *Class Proceedings Act, 1992*" (**TD Bank's First Stay Motion**). A copy of TD Bank's notice of motion is attached as **Exhibit "K"**.

15. On January 11, 2016, counsel for the Joint Liquidators and TD Bank appeared in chambers before Justice Conway to address the scheduling of TD Bank's First Stay Motion. Justice Conway's endorsement from the chambers appointment is attached as **Exhibit "L"**.

16. On January 13, 2016, TD Bank's counsel wrote in response to Bennett Jones' letter of December 14, 2015. The responding letter contained TD Bank's comments on the nature and scope of documentary productions in the Joint Liquidators' action and the related action of five Canadian creditors of SIB against TD Bank (the **Dynasty Action**). A copy of TD Bank's counsel's letter is attached as **Exhibit "M"**.

17. On February 1, 2016, TD Bank's counsel delivered TD Bank's motion record in support of TD Bank's First Stay Motion. They also delivered TD Bank's factum and authorities. A copy of TD Bank's factum in support of TD Bank's First Stay Motion is attached as **Exhibit "N"**.

18. On February 5, 2016, Bennett Jones delivered the Joint Liquidators' comments on TD Bank's counsel's January 13th letter regarding the nature and scope of documentary productions. It did so by embedding the Joint Liquidators' comments directly into the January 13th letter and delivering the "marked up" letter to TD Bank's counsel. A copy of the letter with the Joint Liquidators' comments is attached as **Exhibit "O"**.

19. On February 29, 2016, TD Bank delivered its amended statement of defence, which contained TD Bank's defence on the merits for the first time. A copy of TD Bank's amended statement of defence is attached as **Exhibit "P"**.

20. TD Bank's First Stay Motion was heard on March 11, 2016. On April 8, 2016, counsel for the Joint Liquidators and TD Bank wrote jointly to Justice Conway outlining terms on which

the parties would resolve TD Bank's First Stay Motion. In light of TD Bank's First Stay Motion, the letter also indicated that the Joint Liquidators' action would proceed in accordance with the following schedule, which amended the Original Timetable (the **Second Timetable**):

Step	Deadline
The Joint Liquidators to deliver an amended statement of claim.	April 11, 2016
TD Bank will deliver an amended statement of defence.	April 25, 2016
The Joint Liquidators will deliver an amended reply to TD Bank's defence.	May 9, 2016.

21. A copy of counsels' joint letter to Justice Conway is attached as **Exhibit "Q"**.

22. On April 11, 2016, in accordance with the Second Timetable, Bennett Jones delivered the Joint Liquidators' fresh as amended statement of claim. A copy of the Joint Liquidators fresh as amended statement of claim is attached at **Exhibit "R"**.

23. On May 9, 2016, TD Bank's counsel delivered TD Bank's fresh as amended statement of defence. A copy of TD Bank's fresh as amended statement of defence is attached as **Exhibit "S"**.

24. On June 14, 2016, the following two events occurred:

(a) Bennett Jones delivered the Joint Liquidators' fresh as amended reply to defence. A copy of the Joint Liquidators' fresh as amended reply to defence is attached as **Exhibit "T"**.

(b) TD Bank's counsel sent an email to Justice Conway, which had been reviewed, revised and approved by Bennett Jones, concerning the progress made by the parties on the discovery agreement. A copy of TD Bank's counsel's email is attached as **Exhibit "U"**.

III. TD BANK'S SECOND STAY MOTION

25. On June 16, 2016, without prior notice, TD Bank's counsel delivered a motion record in support of TD Bank's "motion for an order temporarily staying the action pending the outcome of the appeal of the *Livent* decision to the Supreme Court of Canada" (**TD Bank's Second Stay Motion**).

26. On September 6, 2016, counsel for the Joint Liquidators and TD Bank appeared in chambers before Justice Conway. At that time, Justice Conway rendered an endorsement providing that "in the event the stay sought by TD Bank is not granted, documentary productions by both parties shall be completed within 6 months of the release of my decision on the stay motion." A copy of Justice Conway's endorsement is attached as **Exhibit "V"**.

27. On September 15, 2016, the Joint Liquidators and TD Bank, through their respective counsel, executed a finalized discovery agreement (the **Discovery Agreement**). A copy of the Discovery Agreement is attached as **Exhibit "W"**.

IV. DOCUMENTARY PRODUCTION OUGHT NOT TO BE DELAYED

28. In its notice of motion in support of TD Bank's Second Stay Motion, TD Bank takes the position that it would be "a waste of the parties' and the Court's time and resources to proceed with the merits of a claim" in light of the *Livent* appeal and submits:

> This is particularly true given that the action is proceeding to documentary discovery on the merits imminently. The parties are in the midst of negotiating the details of a documentary discovery process which contemplates a search and review of records selected from over 18,000 *boxes* of documents and two electronic databases controlled by SIB's estate, and no less than half a million records collected by TD Bank. [emphasis original by TD Bank]

29. However, under the Discovery Agreement, the Joint Liquidators and TD Bank have already agreed to a process to select and review documents, and that process is not nearly as onerous as TD Bank's submission suggests. Among other things:

(a) Section 8.2.4 of the Discovery Agreement addresses the approximately 18,000 boxes of documents held in Houston, Texas (Exhibit "W"). As indicated in the Discovery Agreement, the Joint Liquidators previously undertook a process aimed at identifying relevant documents and extracted such documents from the boxes. The extracted records are now contained in just two boxes located in Toronto. The Discovery Agreement provides that those records are to be reviewed by the Joint Liquidators and relevant, non-privileged documents produced to TD Bank in electronic form. TD Bank does not need to take any steps in respect of the two boxes of documents.

(b) Section 8.2.1 of the Discovery Agreement confirms that the Joint Liquidators control two electronic databases of documents and have agreed with TD Bank on search terms to run into those databases (Exhibit "W"). In accordance with the Discovery Agreement, the Joint Liquidators are actively reviewing the documents contained in the two databases in preparation for production to TD Bank later this year. TD Bank does not need to take any steps in respect of the documents contained in the Joint Liquidators' databases.

(c) As stated in the January 13th letter of TD Bank's counsel, TD Bank preserved approximately 500,000 documents soon after SIB's collapse in February 2009 but then "determined that about 25,000 of the 500,000 records contained in these accounts are potentially relevant to Stanford" (see (Exhibit "M", page 3). Under the Discovery Agreement, TD Bank has agreed to run certain additional search terms into the 500,000 documents to potentially identify further documents to be reviewed. However, as demonstrated by TD Bank's previous review, only some limited number of those documents is expected to be identified as potentially relevant and reviewed. In any event, the number of documents TD Bank may be required to review to complete its documentary productions is, in the Joint Liquidators' view, relatively limited and reasonable given the nature and scope of the Joint Liquidators' action and the Dynasty Action. This is particularly true in light of sections 8.2.2 and 9.2.5 of the Discovery Agreement, which is discussed in the next subparagraph.

(d) At sections 8.2.2 and 9.2.5 of the Discovery Agreement, the Joint Liquidators and TD Bank have agreed that if a party runs a search term that returns a number of "hits" the party deems to be disproportionate, then "[t]he parties will meet and confer in order to agree to a method for narrowing the hits to be reviewed. In the event that the Parties are unable to agree on such a method, or dispute the proportionality of the number of hits returned by any search term, they will seek the assistance of the Honourable Colin L. Campbell in order to resolve the dispute (Exhibit "W")." As such, the parties have already agreed to a process for ensuring

the number of documents required to be reviewed is not excessive or disproportionate.

30. TD Bank also takes the position in its notice of motion for TD Bank's Second Stay Motion that even if the Supreme Court "so much as modifies the [damages] formula on which the JLs rely, much of the documentary discovery process will need to be revisited and redone, at great expense to the parties."

31. However, the evidentiary basis of the Joint Liquidators' damages claim is documents held by the Joint Liquidators and it is the Joint Liquidators (not TD Bank) who will need to review such documents in order to undertake documentary productions relevant to damages. Further, even if the Supreme Court were to modify the damages "formula" that TD Bank suggests the Joint Liquidators rely on (notwithstanding the Joint Liquidators have never taken such a position), it is difficult to see how the source documents relevant to damages would change, or any need to "revisit or redo" the review process would be required.

32. In addition, the Joint Liquidators have taken an assignment of the proceeds of the Dynasty Action, which:

(a) was commenced in August 2009;

(b) is proceeding in tandem with the Joint Liquidators' action;

(c) previously survived two motions to strike by TD Bank and the appeal of the second unsuccessful motion; and

(d) will proceed to trial on its merits regardless of the outcome of the Joint Liquidators' action.

33. A copy of the fresh as amended statement of claim in the Dynasty Action is attached as **Exhibit "X"**.

34. The documents to be produced by the parties in the Joint Liquidators' action and the Dynasty Action are the same, with the potential exception of certain limited documents relevant to damages. In this regard:

(a) TD Bank's counsel stated in their letter of January 13, 2016 (Exhibit "M", page 6): "TD Bank agrees with the Joint Liquidators' and the Dynasty plaintiffs' position that its productions in both of their actions should be the same."

(b) Justice Conway stated in her endorsement of December 1, 2015 (Exhibit "H"): "All steps relating to production of documents will cover both the Joint Liquidators' action and the Dynasty Action."

35. TD Bank has not sought a stay of the Dynasty Action and there is no basis for such stay on the basis of *Livent*. Accordingly, the documentary production process will proceed in the Dynasty Action in any event and the parties would effectively achieve no benefit from any stay of the Joint Liquidators' action.

V. THE JOINT LIQUIDATORS WILL BE PREJUDICED BY A STAY

36. The Joint Liquidators believe they will be prejudiced by any stay of their action against TD Bank, and that such prejudice is unlikely to be compensated by any costs award. This belief is based on, among other things:

(a) The Joint Liquidators' action relates to events dating back to at least 1991. Evidence relevant to the action is less likely to be available with the passage of time. Documents held by third parties could be lost, memories could fade, and relevant witnesses' ability to testify may otherwise diminish.

(b) The Joint Liquidators' action was commenced in 2011 and has been proceeding since an original stay was lifted May 2014. TD Bank has already brought an unsuccessful summary judgment motion and an unsuccessful motion to stay (TD Bank's First Stay Motion). TD Bank's current attempt to stay the motion appears to confirm the Joint Liquidators' belief that TD Bank's strategy is to deliberately delay the action.

(c) The *Livent* appeal hearing has been scheduled for February 15, 2017. TD Bank estimates that the Supreme Court will render its decision approximately 6 months after the date on which the appeal is heard. Even applying that potentially conservative estimate, a decision would not be rendered until August 2017, almost one year from now. However, the length of time before the decision is reached is unpredictable and, given the complexity of the issues in *Livent*, may take longer than TD Bank estimates.

37. In addition, on this motion, TD Bank's position is that certain of the issues to be addressed on the *Livent* appeal may be dispositive of the Joint Liquidators' action. Notably, however, TD Bank has at no time pleaded any allegations relevant to those issues in its statement of defence and is therefore not even defending the Joint Liquidators' action on the basis of such issues. This is the case notwithstanding that TD Bank delivered its fresh as amended statement of defence in May 2016 (Exhibit "S"), at the very time that leave to appeal to the Supreme Court was being sought in *Livent*.

38. In light of the foregoing, the Joint Liquidators' position is that there is no basis to stay their action against TD Bank pending the Supreme Court's decision in *Livent*. The Joint Liquidators ought to be entitled to proceed with their action on the merits. In the event that a decision from any Canadian court is rendered which may impact the Joint Liquidators' or TD Bank's prospects of success (which is always possible), the Joint Liquidators expect that both they and TD Bank will evaluate the merits of continuing the action and TD Bank's defence at that time.

SWORN before me at Road Town, Tortola)
in the Territory of the British Virgin Islands,)
this 22 day of September, 2016.)

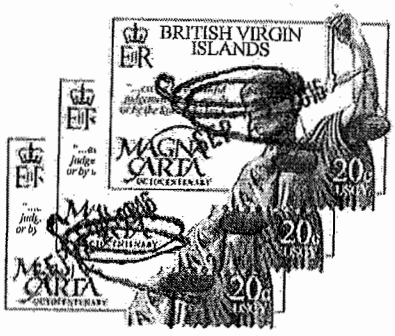
A Commissioner, notary, etc.

MARCUS A. WIDE

TAB A

This is **Exhibit "A"** referred to in the
affidavit of Marcus A. Wide
sworn before me, this 22nd day of September, 2016.

A Commissioner for taking affidavits



Summary of Notable Events in the SIB v TD Bank Action

Date	Event	Exhibit
August 2011	Joint Liquidators commenced action against TD Bank.	B
April 2014	Joint Liquidators delivered their amended statement of claim.	C
May 2014	Stay lifted following determination that action would proceed in Ontario.	
September 2014	TD Bank delivered its original statement of defence. The only pleaded defence was that the Joint Liquidators' action was limitations barred.	D
September 2014	Joint Liquidators delivered their original reply to defence.	E
October 2014	TD Bank delivered a motion record in support of a motion for summary judgment based exclusively on its position that Joint Liquidators' claim was limitations barred.	F
September 2015	TD Bank's summary judgment motion was heard.	
November 2015	The Court dismissed TD Bank's summary judgment motion.	G
December 1, 2015	Justice Conway directed the parties to proceed in accordance with a schedule, the events of which are set out below (the **Original Timetable**). The parties did not anticipate any further preliminary motions at this time.	H
December 14, 2015	**Per the Original Timetable:** Joint Liquidators to deliver letter outlining their proposed approach to documentary productions and providing comments on the appropriate approach to documentary productions by TD Bank.	
December 14, 2015	In accordance with the Original Timetable, Joint Liquidators delivered their letter outlining their proposed approach to documentary productions and providing comments on the appropriate approach to documentary productions by TD Bank.	I
December	Notwithstanding the Original Timetable and that no further motions were anticipated, TD Bank wrote to Justice Conway indicating that	J

Date	Event	Exhibit
22, 2015	TD Bank intended to bring a motion for an order that: "(i) the damages sought by the Joint Liquidators, namely the losses of SIB's creditors, are not recoverable in an action brought on behalf of SIB; and (ii) the appropriate procedural vehicle to assert the claims of SIB's customers is an action under the *Class Proceedings Act, 1992*, in which a representative plaintiff is identified and the action is certified under section 5 of the Act."	
January 8, 2016	TD Bank delivered a notice of motion "for an order staying the action and directing the Plaintiffs to reconstitute as a class proceeding in accordance with the *Class Proceedings Act, 1992*" (**TD Bank's First Stay Motion**).	K
January 11, 2016	Counsel for the parties appeared before Justice Conway to address the scheduling of TD Bank's First Stay Motion.	L
January 13, 2016	TD Bank wrote in response to the Joint Liquidators' December 14th letter regarding the nature and scope of documentary productions.	M
January 15, 2016	**Per the Original Timetable:** Parties to meet to discuss the produced production of documents based on Joint Liquidators' letter.	
February 1, 2016	TD Bank delivered its motion record and factum in support of TD Bank's First Stay Motion.	N
February 5, 2016	Joint Liquidators delivered comments on TD Bank's January 13th letter. The comments are embedded directly into TD Bank's letter.	O
February 29, 2016	**Per the Original Timetable:** TD Bank to deliver amended statement of defence.	
February 29, 2016	In accordance with the Original Timetable, TD Bank delivered amended statement of defence.	P
March 11, 2016	TD Bank's First Stay Motion is heard.	
March 18, 2016	**Per the Original Timetable:** Joint Liquidators to deliver amended reply to defence.	
April 8, 2016	Counsel jointly wrote to Justice Conway outlining the terms on which the parties would resolve TD Bank's First Stay Motion and providing a new schedule for upcoming steps in the action, which amended the Original Timetable (the **Second Timetable**). The	Q

Date	Event	Exhibit
	events of the Second Timetable are set out below.	
April 11, 2016	**Per the Second Timetable:** Joint Liquidators to deliver amended statement of claim.	
April 11, 2016	In accordance with the Second Timetable, Joint Liquidators delivered amended statement of claim.	R
April 25, 2016	**Per the Second Timetable:** TD Bank to deliver amended statement of defence.	
May 6, 2016	**Per the Original Timetable:** Parties to agree to a discovery plan.	
May 9, 2016	**Per the Second Timetable:** Joint Liquidators to deliver amended reply to defence.	
May 9, 2016	TD Bank delivered its amended statement of defence, which was not in accordance with the Second Timetable.	S
May 13, 2016	Justice Conway rendered an endorsement providing that (i) the deadline for completing the discovery agreement is extended from May 6, 2016 to June 10, 2016, and (ii) counsel are to report to Justice Conway by email on June 15, 2015 regarding the discovery agreement **(Conway J.'s May 13th Endorsement).**	U (attachment)
May 30, 2016	TD Bank delivered a first draft of a discovery agreement. The draft provided that (i) the parties will tentatively work towards exchanging productions by October 28, 2016 and (ii) the parties will tentatively work towards completing examinations for discovery by April 30, 2016 (together, the **Original Production and Examination Dates**).	
June 10, 2016	As per Conway J.'s May 13th endorsement, parties are to complete the discovery agreement.	
June 14, 2016	Joint Liquidators delivered their amended reply to defence in response to TD Bank's amended statement of defence, which was delivered on May 9th.	T
June 14, 2016	Joint Liquidators delivered a revised draft of the discovery agreement, which continued to contain the Original Production and Examination Dates.	
June 14,	TD Bank's counsel sent an email to Justice Conway that reported that progress had been made towards finalizing the discovery	U

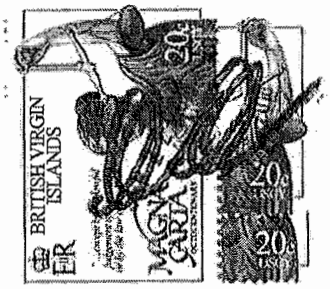
Date	Event	Exhibit
2016	agreement.	
June 16, 2016	TD Bank delivered, without prior notice, a motion record in support of its "motion for an order temporarily staying the action pending the outcome of the appeal of the *Livent* decision to the Supreme Court of Canada."	
June 29, 2016	TD Bank delivered a further revised draft of the discovery agreement, which continued to contain the Original Production and Examination Dates.	
June 30, 2016	Counsel for Joint Liquidators and TD Bank appeared in chambers before Justice Conway. Copies of the Joint Liquidators' and TD Bank's letters regarding the events of the chambers appointment are at Exhibit "V".	V
July 27, 2016	TD Bank delivered a further revised draft of the discovery agreement. For the first time, the draft did not contain the Original Production and Examination Dates. Instead, it provided: At section 12.3: "TD Bank has filed a motion for a temporary stay of the action, currently returnable on October 5, 2016 (the "Stay Motion"). The Parties agree that they will begin undertaking the steps set out in Sections 8 and 9 [i.e. commence taking any steps to identify potentially relevant documents] within 21 days of the earlier of i) if the Stay Motion is granted, the date on which the stay terminates; and ii) if the Stay Motion is dismissed, the date on which the Stay Motion is dismissed (the "Start Date") [i.e. June 2017 at the earliest]. The Parties will thereafter meet and confer in order to agree to a schedule pursuant to which the exchange of Affidavits of Documents and Schedule A productions takes place approximately eight months after the Start Date. If the Parties are unable to resolve any dispute with respect to the scheduling of the exchange of Affidavits of Documents and Schedule A productions, they will seek the assistance of the Honourable Colin L. Campbell in order to resolve the dispute." At section 14.2: "After the Start Date, the Parties will meet and confer in order to agree to a schedule pursuant to which Examinations for Discovery take place approximately 14 months after the Start Date [i.e. December 2017 at the earliest]. If the Parties are unable to resolve any dispute with respect to the scheduling of Examinations for Discovery, they will seek the assistance of the Honourable Colin L. Campbell in order to resolve the dispute."	

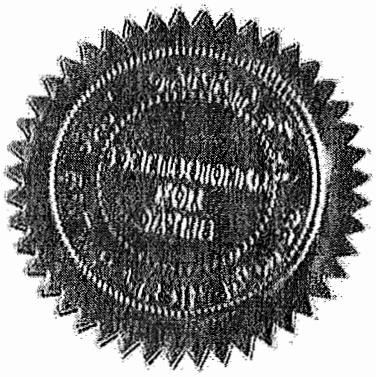
Date	Event	Exhibit
August 25, 2016	Joint Liquidators and TD Bank finalized the discovery agreement subject to the ongoing dispute regarding the aforementioned sections 12.3 and 14.2 of the discovery agreement.	W

TAB B

This is **Exhibit "B"** referred to in the
affidavit of Marcus A. Wide
sworn before me, this 22nd day of September, 2016.

A Commissioner for taking affidavits





Court File No: CV-11-433385

ONTARIO
SUPERIOR COURT OF JUSTICE

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 -

TORONTO-DOMINION BANK

Defendant

STATEMENT OF CLAIM

Notice of Action issued on August 22, 2011

1. The plaintiffs claim from the defendant, Toronto-Dominion Bank ("TD Bank"):

(a) damages of $20,000,000 and further amounts to be determined prior to trial;

(b) an accounting and disgorgement of profits in amounts to be determined prior to trial;

(c) prejudgment and post-judgment interest on the foregoing amounts pursuant to the *Court of Justice Act*;

(d) costs of this action plus H.S.T.; and

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

Overview

2. Stanford International Bank Limited ("SIB"), an international banking company based in Antigua, offered opportunities to customers around the world to purchase certificates of deposit ("CDs").

3. Billions of dollars of CDs were sold to more than 21,000 customers in approximately 113 different countries.

4. However, Robert Allen Stanford ("Stanford"), SIB's CEO and Chairman of the Board of Directors, and others breached their fiduciary duties owed to SIB and converted and/or misappropriated the vast majority of funds that SIB received from customers to other uses, including to benefit themselves (the "CD Scheme").

5. The defendant, TD Bank, acted as correspondent bank for SIB. In particular, TD Bank received and/or held investments, opened and maintained multiple bank accounts for SIB and disbursed SIB's funds around the world. In fact, in the year before regulators discovered and terminated the CD Scheme, $9.5 billion was credited to SIB's TD Bank accounts.

6. TD Bank knew that, as a director and officer of SIB, Stanford owed fiduciary duties to SIB. TD Bank also knew or was recklessly or willfully blind to the CD Scheme and Stanford's breaches of his fiduciary duties. Despite its knowledge, TD Bank continued to provide correspondent banking services to SIB and thereby participated in Stanford's breach of fiduciary duty. TD Bank's correspondent banking services enabled Stanford to maintain the CD Scheme and to continue to convert and/or misappropriate SIB's funds.

7. In the alternative, TD Bank was negligent in providing banking services to SIB. Suspicious circumstances surrounded Stanford's activities. TD Bank ought to have known of the CD Scheme but it failed to detect it. If it did detect the CD Scheme, it failed to take any steps to prevent SIB and its customers from suffering harm. In so doing, TD Bank fell below the standard of care required of a reasonable banker and failed in the duty it owed to SIB.

8. In the further alternative, TD Bank knew that Stanford and SIB held monies in trust for SIB's customers. TD Bank also knew or was recklessly or willfully blind to the CD Scheme and of Stanford's and SIB's breaches of trust. Despite its knowledge, TD Bank continued to provide correspondent banking services to SIB, which enabled the CD Scheme to continue, and thereby participated in the breaches of trust.

9. In the further alternative, TD Bank was negligent and breached its duty of care to SIB's customers, thereby causing their losses.

10. Given TD Bank's privileged vantage point as SIB's correspondent banker it had a window into the affairs of SIB unavailable to others and should have acted long before regulatory agencies intervened and effectively ended the CD Scheme in early 2009.

The Parties

11. Marcus A. Wide and Hugh Dickson of Grant Thornton LLP were appointed as joint liquidators of SIB (in liquidation) ("Joint Liquidators") by Order of the Eastern Caribbean Supreme Court, the High Court of Justice in Antigua and Barbuda on May 12, 2011 (the "Appointment Order").

12. The Appointment Order, among other things, vested all the assets of SIB in the Joint Liquidators and empowered the Joint Liquidators to sue entities in relation to SIB in any jurisdiction where they believe assets or property of SIB may be located.

13. The Joint Liquidators are taking steps around the world, including this action, for the benefit of SIB and its more than 21,000 creditors. More than 99.9% of SIB's creditors are the ultimate victims of the CD Scheme.

14. The Joint Liquidators are the successors of the previous joint liquidators, Nigel Hamilton-Smith and Peter Wastell (the "Outgoing Officeholders"). The High Court of Justice Antigua and Barbuda had appointed the Outgoing Officeholders as joint liquidators of SIB on April 15, 2009 but then removed them by Order dated June 8, 2010. Between the removal of the Outgoing Officeholders and the appointment of the Joint Liquidators, the estate of SIB was unable to act.

15. Pursuant to a Judgment of the Quebec Superior Court (Commercial Division) (the "Quebec Court"), dated August 19, 2011, the Joint Liquidators were authorized and empowered to institute and litigate, in place and stead of the Interim Receiver (appointed by the Quebec Court pursuant to the *Bankruptcy and Insolvency Act* (Canada) on September 11, 2009), proceedings against TD Bank, whether in the Province of Quebec and/or any other appropriate jurisdiction(s). In addition, the August 19, 2011 Judgment specifically recognized the Joint Liquidators as having "the equivalent or substantially similar powers and capacities than [sic] those of a trustee in bankruptcy or other insolvency holder within Canada" and authorized the Joint Liquidators to exercise those powers and capacities for the purposes of the institution and litigation by the Joint Liquidators of the proposed action against TD Bank.

16. Accordingly, the Joint Liquidators are acting with the express authority of a Canadian Court in the same capacity as an interim receiver or trustee in bankruptcy under Canada's federal *Bankruptcy and Insolvency Act*, for the benefit of the creditors of SIB.

17. TD Bank is a Schedule I bank under the *Bank Act*, R.S.C. 1991, c. 46. Its head office is in Toronto.

18. TD Bank provided banking services to SIB and, ultimately held investment funds related to the purchase of the CDs. TD Bank also acted as correspondent bank for SIB.

19. By Order of the Superior Court of Justice dated April 24, 2009 (and subsequently extended) in Court File No. CV-09-8154-00CL (*Attorney General of Ontario v. The Contents of Various Accounts Held with TD Bank and TD Waterhouse in rem*), TD Bank was ordered to pay into court the monies it held on behalf of SIB.

Background of SIB

20. SIB (now in liquidation) was a private international bank with a head office in St. John's, Antigua, West Indies.

21. SIB operated in approximately 113 countries and reported that it held approximately U.S. $8 billion in assets under management. It had a Canadian office at 3010-1800 av. McGill College Montréal. SIB's Annual Report for 2007 stated that it had 50,000 clients.

22. Unlike a commercial bank, SIB did not loan money. Rather, SIB sold CDs to customers directly and indirectly, among other ways, through:

(a) a related entity, Stanford Financial Group ("SFG"). SFG was described as a privately-held group of companies that had in excess of U.S. $50 billion "under advisement";

(b) a related entity, Stanford Group Company ("SGC"). SGC was an investment dealer and broker dealer. It registered with the Securities and Exchange Commission ("SEC") in 1995; and

(c) the facilities of its correspondent banks, including the defendant TD Bank.

23. SIB sought to provide customers with opportunities to earn a profit and used TD Bank as a correspondent bank in this endeavor.

Stanford's Fiduciary Duties owed to SIB

24. As CEO, director and Chairman of the Board of Directors of SIB, Stanford owed fiduciary duties to SIB. These obligations required Stanford (among other things) to:

(a) act with loyalty, good faith, and honesty;

(b) avoid conflicts of interest and duty;

(c) use all of his energy, ability, and imagination in the best interests of SIB;

(d) develop business opportunities for the sole benefit of SIB; and

(e) not conceal any information from SIB.

25. However, in breach of his fiduciary duties as further particularized herein, Stanford converted funds used to purchase CDs from SIB for improper purposes, including for his own

use, and implemented and orchestrated the CD Scheme to defraud SIB and its customers of their funds.

26. During his orchestration of the CD Scheme, Stanford led a lavish lifestyle financed primarily through SIB's funds that he had converted to his own use. Among other things, he enjoyed the use of a $10 million Florida mansion and a fleet of private jets (valued at approximately $100 million). He also took extravagant and expensive vacations costing up to $100,000 and would often rent $100,000/week yachts.

Operation of the CD Scheme

27. SIB sold billions of dollars of CDs. SIB's customers were told that they could expect high rates of return in respect of their purchased CDs and that their CDs were safe.

28. In accordance with the story told to customers, SIB's annual reports, prepared at Stanford's direction, consistently disclosed that SIB's unique global diversified portfolio produced annual returns of over 10%. Only Stanford and a few others close to him knew the contents of SIB's portfolio.

29. Remarkably, SIB also disclosed, at Stanford's direction, that it had incurred a loss of only 1.3% amidst one of the worst financial crises in history in 2008. In that same year, the S&P 500 lost 39% and the Dow Jones STOXX Europe 500 Fund lost 41% of their respective values.

30. Stanford attracted customers to SIB through affiliated companies that he controlled, such as SGC. SGC financial advisors induced customers to purchase SIB's CDs using information prepared at Stanford's direction, such as the inflated return figures. SGC and others also assured customers that their money was safe and invested in liquid securities.

31. In return for referring ordinary customers to the CDs, Stanford caused SIB to pay SGC referral fees of 3.75% of all amounts SGC referred to SIB. This formula produced disproportionately large "commissions" of $291.7 million in 2007 (up from $211 million and $161 million in 2006 and 2005 respectively).

32. These "commissions" would have been in addition to the rates of return promised to customers. Thus, the rates of return SIB would have to produce to pay the fees promised SGC and the interest promised to customers would have been extraordinary.

33. Yet as late as 2007, Stanford continued to represent in SIB's 2007 annual report that SIB's portfolio was a "well-diversified portfolio of highly marketable securities issued by stable governments, strong multi-national companies and major international banks".

34. In fact, Stanford's investment strategy and the rates of return he promised to customers were not as claimed. Instead of investing funds received by SIB as represented, Stanford and others largely diverted the invested funds to other unsafe investments, to themselves personally and/or to other improper uses. The vast majority of the portfolio that was actually invested was invested in illiquid investments, namely real estate and private equity.

35. In February 2009, regulators took enforcement steps against Stanford and others with respect to the CD Scheme. Stanford and others (but not SIB itself) were ultimately indicted on several criminal charges for their involvement in the CD Scheme.

TD Bank provides Correspondent Banking services to SIB

36. Correspondent banking is the provision of banking services by one bank to another bank. It enables banks to conduct business and provide services for their customers in jurisdictions where the banks have no physical presence.

37. SIB required correspondent banking services because it did not have branch locations in Canada or other countries through which it could offer banking services to its customers. Instead, it contracted with TD Bank to provide these services as SIB's correspondent bank. As an international banking corporation formed under the laws of Antigua and Barbuda, SIB had no legal right, and was prohibited, from taking deposits from local Antiguan citizens or residents. It was thus not a traditional deposit-taking bank in Antigua where it was headquartered. It thus needed to effectively 'rent' many of the facilities of a traditional onshore bank in order to operate and to accept deposits from non-Antiguan customers. Thus, the need for correspondent banking relationships abroad with institutions such as TD Bank.

38. Since at least 1991, TD Bank has acted as the correspondent bank for SIB. Over the course of the relationship between SIB and TD Bank, TD Bank opened and maintained approximately 14 separate accounts for SIB.

39. As correspondent bank, TD Bank accepted deposits into the SIB accounts directly from customers from all over the world and from SIB entities that were paid out to, among others, SIB customers.

40. Since SIB's TD Bank accounts were opened in or about 1991, considerable sums have been transferred through those accounts. For instance, between January 2008 and February 2009, $9.5 billion was credited to SIB's TD Bank accounts.

41. Among other things, as SIB's correspondent bank, TD Bank processed wire payments to or from SIB accounts pursuant to wire transfer instructions and served as an intermediary between SIB, its customers, and SIB's other investments.

42. In 2001, TD Bank also provided financing to Stanford personally (or another company he controlled), including to finance an airline Stanford acquired.

Known Risks associated with Correspondent Banking

43. Regulators and organizations focused on combating money laundering have warned that correspondent banking relationships with foreign financial institutions often facilitate money laundering and create a risk of participation in criminal activity. They warned that correspondent accounts merit particular care and heightened due diligence and monitoring, especially those that involve the provision of services in jurisdictions known to have relaxed regulatory standards for banks, since failure to do so may result in the bank holding and/or transmitting money linked to corruption, fraud or other illegal activity.

44. At the relevant time, regulators specifically identified Antiguan financial institutions as potential risks for money laundering and other criminal activities.

45. International regulators and government authorities commented publicly that Antigua needed to improve its banking regulations to prevent money laundering and criminal activity. In particular, in April, 1999, the U.S. Treasury Department issued an extraordinary advisory advising banks to scrutinize all financial transactions routed into or out of Antigua for evidence of money laundering (the "U.S. Treasury Department Advisory"). The U.K. issued a similar advisory in April, 1999.

46. In 2000, the Organization for Economic Cooperation and Development published a list of countries whose regulations were deemed designed to help people avoid paying taxes in their home countries. Antigua was on that list.

47. In 2001, the U.S. Senate's Minority Staff of the Permanent Subcommittee on Investigations' delivered a report entitled "Report on Correspondent Banking: A Gateway for Money Laundering" dated February 5, 2001 ("U.S. Senate Report"). It specifically identified TD Bank's correspondent banking relationship with an Antiguan financial institution, the American International Bank (AIB). AIB had fallen into liquidation after it laundered millions of dollars and collapsed from insider abuse, insufficient capital and the sudden withdrawal of deposits. TD Bank's involvement in this fraudulent scheme appeared as a case study in the U.S. Senate Report which identified that:

(a) Correspondent accounts are particularly vulnerable to money laundering and provide corrupt foreign banks access to the U.S. financial system and the freedom to move money around the world. With respect to TD Bank's relationship with AIB, it concluded, *inter alia*, that:

(i) TD Bank was used to receive wire transfers from fraud victims and/or to disburse the illicit funds to accounts controlled by the criminals; and

(ii) TD Bank was a major conduit for AIB funds in to the U.S. banking system and that between June 1996 and January 1997, $20.9 million was wired to the AIB correspondent account from the account at TD Bank in Canada.

48. It was apparent from the U.S. Senate Report, that TD Bank representatives were interviewed and asked to produce documents regarding TD Bank's relationship with AIB. These requests occurred while Stanford orchestrated the CD Scheme and while TD Bank provided correspondent banking services to SIB.

Financial Industry Standard Practice for Correspondent Banking

49. The accepted industry standard procedure for entering into correspondent banking relationships is a combination of best practice and legislative and statutory duties.

50. Since at least 1991, it was customary procedure for financial institutions to reassess existing correspondent accounts to ensure they met required standards and to close accounts and decline to provide service to correspondent banks that were not in compliance once they had been put through these steps. For instance, in 2001 several major American banks testified before a Senate subcommittee that their practices in respect of correspondent banking included heightened due diligence, heightened monitoring, and strict "know your client" procedures. More specifically, these practices included:

(a) evaluating the overall adequacy of banking supervision in the jurisdiction of the respondent bank;

(b) reviewing media reports for information on an applicant;

(c) establishing a detailed understanding of the customer's ownership structure;

(d) establishing an understanding the customer's cash flows; and

(e) regularly preparing memoranda summarizing contacts with the bank and information about its staff and operations.

51. Notably, one bank testified that it reviewed individual accounts, particularly Antiguan accounts, and would close the account if the review was unsatisfactory.

52. Likewise, in 2000, representatives of TD Bank testified before the Canadian Parliament's Standing Committee on Finance. TD Bank described similar procedures it and other Canadian banks followed to detect and prevent money laundering. These included:

(a) maintaining the right to refuse financial transactions suspected of being proceeds of crime;

(b) requiring a declaration of source of funds be signed by customers for financial transactions involving $10,000 or more;

(c) requiring bank employees to report any financial transactions judged to be suspicious, regardless of amount;

(d) emphasizing the "know your customer" rule; and

(e) auditing branch compliance with anti-money laundering policies.

53. In 2007, the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 (the "*Proceeds of Crime Act*") codified many of these industry practices. For instance, section 9.4(1) of the *Proceeds of Crime Act* required TD bank to:

> take the following measures before entering into a correspondent banking relationship with a prescribed foreign entity:

(a) obtain prescribed information about the foreign entity and its activities;

(b) ensure that the foreign entity is not a shell bank as defined in the regulations;

(c) obtain the approval of senior management;

(d) set out in writing their obligations and those of the foreign entity in respect of the correspondent banking services; and

(e) any prescribed measures.

54. Additional prescribed measures are set out in the General Regulation to the *Proceeds of Crime Act*, SOR/2002-184 (the "Regulations"). Under s. 15.1 of the Regulations, TD Bank must:

(2) [...] keep a record in respect of the foreign financial institution containing the following information and documents:

(a) the name and address of the foreign financial institution;

(b) the names of the directors of the foreign financial institution;

(c) the primary business line of the foreign financial institution;

(d) a copy of the most recent annual report or audited financial statement of the foreign financial institution;

(e) a copy of the foreign financial institution's banking licence, banking charter, authorization or certification to operate from the relevant regulatory agency or certificate of corporate status or a copy of another similar document;

(f) a copy of the correspondent banking agreement or arrangement, or product agreements, defining the respective responsibilities of each entity;

(g) the anticipated correspondent banking account activity of the foreign financial institution, including the products or services to be used;

(h) a statement from the foreign financial institution that it does not have, directly or indirectly, correspondent banking relationships with shell banks;

(i) a statement from the foreign financial institution that it is in compliance with anti-money laundering and anti-terrorist financing legislation in its own jurisdiction; and

(j) the measures taken to ascertain whether there are any civil or criminal penalties that have been imposed on the foreign financial institution in respect of anti-money laundering or anti-terrorist financing requirements and the results of those measures.

(3) The financial entity shall take reasonable measures to ascertain whether the foreign financial institution has in place anti-money laundering [...] policies and procedures, including procedures for approval for the opening of new accounts and, if not, shall, for the purpose of detecting any transactions that are required to be reported to the Centre under section 7 of the Act, take reasonable measures to conduct ongoing monitoring of all transactions conducted in the context of the correspondent banking relationship.

55. Further, under s. 55.1 of the Regulations, TD Bank must:

(a) ascertain the name and address of the foreign financial institution by examining a copy of the foreign financial institution's banking licence, banking charter, authorization or certification to operate from the relevant regulatory agency or certificate of corporate status or a copy of another similar document; and

(b) take reasonable measures to ascertain, based on publicly available information, whether there are any civil or criminal penalties that have been imposed on the foreign financial institution in respect of anti-money laundering or anti-terrorist financing requirements and, if so, to conduct, for the purpose of detecting any transactions that are required to be reported under section 7 of the Act, ongoing monitoring of all transactions in the context of the correspondent banking relationship.

56. The monitoring of financial transactions required by subsections 15.1(3) and 55.1(2) is for the purpose of section 7 of the *Proceeds of Crime Act*. Section 7 required TD Bank to:

report to the Centre [...] every financial transaction that occurs or that is attempted in the course of their activities and in respect of which there are reasonable grounds to suspect that:

(a) the transaction is related to the commission or the attempted commission of a money laundering offense;

[...]

57. Under s. 462.31(1) of the *Criminal Code,* anyone commits a "money laundering offense" for the purposes of the *Proceeds of Crime Act* who uses, transfers possession of, sends, delivers, transports, transmits, alters, disposes or otherwise deals with, in any manner and by any means, any property or any proceeds or any property with intent to conceal or convert that property or those proceeds, knowing or believing that all or a part of that property or of those proceeds was obtained as a result of fraud. Any transaction in respect of which there were reasonable grounds for TD to suspect any of these activities automatically required TD Bank to report to the Centre.

58. Section 9.6 of the *Proceeds of Crime Act* further required TD Bank to establish and implement a compliance program for correspondent banking relationships such as SIB. Under subsection 9.6(2):

> (2) The program shall include the development and application of policies and procedures for the person or entity to assess, in the course of their activities, the risk of a money laundering offence [...]

59. Under paragraph 71(1)(c) of the Regulations, TD Bank was required to assess and document these policies and procedures:

> [...] in a manner that is appropriate for the person or entity, the risk referred to in subsection 9.6(2) of the Act, taking into consideration
>
> (i) the clients and business relationships of the person or entity,
>
> (ii) the products and delivery channels of the person or entity,
>
> (iii) the geographic location of the activities of the person or entity, and
>
> (iv) any other relevant factor

60. Any analysis conducted by TD Bank under these required considerations should have reasonably concluded that the risk of a money laundering offense in a correspondent banking

relationship with SIB was high. Section 9.6(3) of the *Proceeds of Crime Act* required TD Bank to take the following measures under the Regulations in a high risk situation:

> 71.1 The prescribed special measures that are required to be taken by a person or entity referred to in subsection 9.6(1) of the Act for the purpose of subsection 9.6(3) of the Act are the development and application of written policies and procedures for
>
> [...]
>
> (b) taking reasonable measures to conduct ongoing monitoring for the purpose of detecting transactions that are required to be reported to the Centre under section 7 of the Act; and
>
> (c) mitigating the risks identified in accordance with subsection 9.6(3) of the Act.

TD Bank Fails to Meet the Standard of Care

61. TD Bank was uniquely positioned by reason of the services it provided as correspondent bank, its access to SIB banking records, and the information within its knowledge as a sophisticated financial institution, to uncover the CD Scheme and recognize it for what it was. Its past relationships with an Antiguan financial institution involved in money laundering should have alerted it to the clear and present need that its other Antiguan correspondent bank customers required additional scrutiny.

62. In these circumstances, TD Bank knew or ought to have known that:

(a) the auditing of any financial statements obtained from Stanford as required under paragraph 15.1(2)(d) of the *Proceeds of Crime Act* was not reliable;

(b) the anticipated correspondent banking activity outlined as required under paragraph 15.1(2)(g) of the *Proceeds of Crime Act* was inconsistent with the advertised activities of SIB;

(c) any statement of compliance with anti-money laundering legislation in Antigua obtained as required under paragraph 15.1(2)(i) and subsection 15.1(3) of the *Proceeds of Crime Act* was a questionable assessment of actual practices; and

(d) any consideration of SIB's cash flows would have demonstrated to an honest or reasonable banker that the directors of SIB were engaged in grand acts of mis-application and/or misappropriation of SIB funds.

63. The transactions carried out in SIB's accounts had many of the hallmarks of suspicious transactions that ought to be detected and reported by financial institutions under the proceeds of crime legislation. As correspondent bank for SIB, TD Bank ought to have taken action in order to comply with the industry standards of a reasonable banker, including the *Proceeds of Crime Act*.

64. Despite its obligations, TD Bank failed to take steps that a reasonable banker would have taken in the circumstances. For instance, TD Bank did not conduct a proper risk assessment of SIB in accordance with section 9.6 of the *Proceeds of Crime Act*. Any analysis of SIB's operations, advertised services, and location should have reasonably concluded that the risk of money laundering was high. Accordingly, TD Bank should have conducted diligent monitoring of all correspondent transactions to detect those that were related to a money laundering offense.

65. However, TD Bank failed to take this and additional required steps such as:

(a) reporting suspicious transactions and large electronic funds transfers;

(b) setting policies that set out due diligence standards such as a definition of enhanced due diligence applicable to higher risk clients;

(c) implementing business rules defining what are unusual transactions and which unusual transactions are suspicious;

(d) conducting a risk assessment of dealing with Antigua and reviewing whether SIB was properly regulated in Antigua;

(e) implementing a process to monitor transactions in order to identify patterns of activity that may be suspicious;

(f) acting in accordance with (i) customary bank practices, (ii) standard banking industry policies and procedures, and (iii) its own internal policies and procedures, including its "Know Your Client" policy;

(g) notifying authorities of the suspicious banking activities as required by the *Proceeds of Crime Act*;

(h) meeting the standards prescribed for these steps by other recommendations and guidelines prescribed by other regulatory bodies such as the Financial Action Task Force, the Basel Committee on Banking Supervision and the Canadian Government's Office of the Superintendant of Financial Institutions;

(i) making enquiries into the nature of SIB's accounts at the time of account opening or afterwards;

(j) making enquiries concerning the use of funds by certain of the directors of SIB; and

(k) investigating the accounts and transactions of SIB and certain of its directors that were suspicious, unusual or indicative of unusual activity.

66. In addition, TD Bank did not take appropriate, or any, measures to remove the suspicion or any steps in order to prevent misdealing in the SIB accounts. In particular, TD Bank, in suspicious circumstances that required action and investigation, as set out herein, did the following:

(a) provided banking services for over 20 years for compensation that facilitated the operation of the CD Scheme;

(b) accepted billions of dollars from customers who were buying CDs, and transferred substantial portions of those funds out of the country and around the world;

(c) provided financing to Stanford; and

(d) provided banking services for compensation to SIB in a manner where a reasonable banker would conclude that such banking services were assisting in Allen Stanford's unlawful activities and breaches of the fiduciary duties that he owed to SIB and were likely to result in losses to SIB and its customers.

67. TD Bank did not report suspicious transaction activity as required by section 7 of the *Proceeds of Crime Act*. Instead, TD Bank facilitated frequent and numerous transactions in the SIB accounts that a reasonable banker in the circumstances would consider to be suspicious and related to a money laundering offense. TD Bank continued to enable Stanford to orchestrate the CD Scheme by providing correspondent banking services to SIB.

68. In fact, TD Bank took absolutely no steps whatsoever to limit SIB's banking activities or to report to any regulatory authority at all until receiving the freezing order dated March 12, 2009 from the SEC.

TD Bank's knowledge of the CD Scheme

69. At all materials times, TD Bank knew of, ought to have known of, or was reckless or willfully blind to, the CD Scheme and Stanford's role in it. The information available to TD Bank includes, but is not limited to the following:

(a) In or around 1990, SIB (then known as Guardian International Bank Limited "Guardian") moved from Montserrat to Antigua, after the former strengthened its offshore banking restrictions. Stanford reincorporated Guardian in Antigua (which had a less regulated offshore banking industry) in 1990 and then renamed it SIB in 1994.

(b) SIB disclosed, at Stanford's direction, *identical* rates of return for 1995 and 1996 of exactly 15.71%. A diversified portfolio returning identical results in consecutive years is highly improbable. TD Bank as a sophisticated participant in the financial market would have recognized this.

(c) In or around 1999, media reports indicated that Stanford, a major contributor to the election of the then Antiguan Prime-Minister, was named, along with another prominent Antiguan banker, to sit on the new government board that supervised the offshore banking sector. This is after Antigua enacted new banking rules that were drafted by a lawyer paid by Stanford.

(d) In April 1999, the U.S. Treasury Department Advisory recommended that banks scrutinize all financial transactions routed into or out of Antigua. It was apparent that this advisory was specifically referring to Stanford when it warned that the Antiguan International Financial Sector Authority's board of directors included "representatives of the very institutions the Authority is supposed to regulate" and that the "Authority is neither independent nor otherwise able to conduct an effective regulatory program in accordance with international standards".

(e) In or around 2000, media reports indicated that James Johnson, the U.S. Treasury Department's Undersecretary of Enforcement, had complained in a letter to then Antiguan Prime Minister, Lester Bird, that "Antigua had compromised its laws against money laundering and created a conflict of interest by allowing Stanford and other banking officials to sit on the regulatory board." He noted in the letter that the Financial Sector Authorities' seizure of bank documents from a civil servant "raises substantial questions as to Antigua and Barbuda's commitment to provide effective supervision of its offshore sector".

(f) Beginning in or around 2001 and continuing until at least 2008, Stanford employees regularly filed individual cases with FINRA (or its predecessor)

claiming that they had been wrongfully dismissed and alleging fraudulent business practices in violation of U.S. securities laws.

(g) In or around 2005, two investors filed a lawsuit in a Florida District Court accusing Stanford of operating a Ponzi scheme.

(h) In or around 2006, Stanford's former employee sued in Florida and claimed that Stanford was operating a Ponzi scheme. He also claimed that Stanford was bribing Antiguan regulators to keep them from passing money laundering legislation.

(i) In or around 2007, two top executives filed a wrongful dismissal claim against SGC. The claim alleged that SGC required employees to engage in illegal and unethical methods to market and sell its financial products. The executives also accused SGC of falsifying returns, lying to investors, and destroying critical documents related to an on-going SEC inquiry.

(j) In or around 2007, FINRA fined Stanford $10,000 for distributing misleading, unfair and unbalanced information about the CDs.

(k) In or around 2008, FINRA fined Stanford $30,000 for failing to adequately disclose the research methods used to report certain securities valuations.

(l) In or around 2008, media reports indicated that former employees that had left SIB publicly alleged that Stanford was operating a Ponzi scheme.

(m) In or around 2008, a major international clearing house, Pershing LLC, announced that it could not verify Stanford was not involved in fraud of some nature.

(n) By 2008, media reports indicated that the SEC was investigating the activities of the Stanford Group.

(o) SIB's Annual Reports identified SIB's auditors but it was apparent that they did not possess sufficient competence to adequately audit a financial institution the size and scale of SIB. In addition, because they were based in Antigua, they were not subject to significant regulatory oversight.

(p) SIB represented that a senior portfolio manager from TD Asset Management, Perry Mercer, sat on an advisory board for SIB. If indeed Mercer sat on the advisory board, this relationship provided TD Bank with access to information concerning the CD Scheme. If he did not, and SIB represented that he did, TD Bank ought to have been aware of this. Such a misrepresentation would have been a red flag, to say the least, to TD Bank that required it to investigate and take action.

(q) The SIB promotional brochure prepared by Stanford, which induced prospective customers to invest in the CD Scheme, advertised rates of return in excess of those offered by traditional banks, including TD Bank, without explaining how those rates of return were earned or could be paid.

(r) SIB's Annual Reports, prepared at Stanford's direction, disclosed rates of return far higher than those offered by traditional banks, including TD Bank. Since 1994, SIB claimed to achieve returns of over 10% each year (apart from 2008), with returns ranging from 11.5% in 2005 to 16.5% in 1993. Even when financial markets fell dramatically in 2008, SIB disclosed, at Stanford's direction, that its diversified portfolio lost only 1.3%. In contrast, the S&P 500 lost 39% and the Dow Jones STOXX Europe 500 Fund lost 41% over the same period.

(s) SGC and other entities selling CDs represented that monies invested through SIB were held in safe and liquid securities. This representation is at odds with the promised high rate of return, which TD Bank as a sophisticated participant in the financial market would have recognized. Safe, liquid investments typically produce low rates of return.

(t) The pattern of the banking activities orchestrated by Stanford was marked by a large number of transfers of funds belonging to customers to offshore accounts outside the ordinary course.

(u) TD Bank held millions of dollars of customers' funds which should have been invested to ensure payment of the substantial rates of return promised to in the brochure.

(v) The accounts that were opened for SIB were for the purpose of receiving deposits from customers all over the world. There was no legitimate business reason for non-Canadians to direct their monies to TD Bank, or for TD Bank to hold

international customers' or Canadian customers' funds sent from SIB to TD Bank in Canada.

(w) The accounts that were opened for SIB were also for the purpose of moving funds all over the world, and in particular out of Canada. Hundreds of millions of dollars of funds were in fact moved around the world and out of Canada.

(x) TD Bank conducted internal investigations and generated internal reports regarding the SIB accounts, including audit reports prepared by audit teams TD Bank sent to Antigua to investigate and audit SIB and its operations.

(y) TD Bank conducted corporate security and/or risk management investigations and generated internal reports and emails regarding those investigations which should have indicated the existence of the CD Scheme and other suspicious activities and risks.

(z) TD Bank conducted further investigations and prepared further internal reports concerning its dealings with Stanford once allegations were made by the SEC in or about February 2009 that Stanford was engaged in a fraudulent scheme.

(aa) The pattern of SIB's banking activities constituted suspicious circumstances.

70. As a result of this and other information, the CD Scheme was widely known in the law enforcement and anti-money laundering and banking community, including TD, from at least 1997. However, as described in the Report of Investigation of the SEC Office of Inspector General dated March 31, 2010, lack of enforcement action resulted not from a failure to recognize the CD Scheme for the fraud that it was but from a myriad of other factors. TD Bank

representatives active in the anti-money laundering community would have known of the CD Scheme.

TD Bank's Liability to SIB for Knowing Assistance in Breach of Fiduciary Duty

71. TD Bank is liable for knowing assistance in Stanford's breach of fiduciary duty. TD Bank knew that Stanford was a director and corporate officer of SIB and thus owed fiduciary duties to SIB. TD Bank had sufficient information such that it also knew of, or was reckless or willfully blind to, the CD Scheme and of Stanford's breaches of his fiduciary duties owed to SIB through his orchestration of the CD Scheme. Despite such knowledge, TD Bank continued to provide correspondent banking services to SIB which enabled Stanford to maintain the CD Scheme and to continue to misappropriate SIB's funds. TD Bank thereby participated in Stanford's breach of fiduciary duty.

72. SIB ultimately became insolvent and was put in to liquidation. Having knowingly assisted in Stanford's breach of fiduciary duty to SIB, TD Bank is liable for the damages caused by Stanford's breach. Such damages include the full amounts improperly diverted from SIB by Stanford and others through the CD Scheme, after TD Bank had sufficient information such that it also knew of, or was reckless or willfully blind to, the CD Scheme. The plaintiffs estimate that the amounts for which TD Bank is liable are at least $20 million and likely much higher. The full extent of the damages caused to SIB will be further particularized prior to trial.

73. Given its misconduct as pleaded herein, TD Bank is also liable to provide a full accounting of all revenues and profits from its dealings with SIB and to disgorge and make full restitution of all such revenues and profits.

TD Bank's Liability to SIB for Negligence

74. In the alternative, the plaintiffs plead that TD Bank owed SIB duties, as particularized above. TD Bank's duties included a duty, by virtue of its position as SIB's correspondent banker, to discover and disclose the CD Scheme or the risk of its existence where its existence was discoverable through the application of reasonable care and skill as appropriate in the circumstances.

75. TD Bank breached its duties to SIB through the acts and omissions described herein in which it failed to meet the standard of care required of a reasonable banker.

76. It was reasonably foreseeable that SIB and its customers would suffer the damages described herein as a result of the acts and omissions of TD Bank described herein.

77. TD Bank's acts and omissions described herein are the proximate cause of the harm suffered by SIB. As a result of TD Bank's breaches of duty, it missed repeated opportunities to uncover and reveal the CD Scheme being orchestrated by Stanford. The CD Scheme was allowed to continue and Stanford allowed to continue misappropriating funds. The plaintiffs plead that if TD Bank had performed its duties to SIB as required, the discovery of the CD Scheme at an earlier date would have reduced or eliminated the losses, liabilities and damages incurred after that date.

TD Bank's Liability to SIB's customers for Knowing Assistance in Breach of Trust

78. In the alternative to the claims made on behalf of SIB, the plaintiffs plead that as Joint Liquidators with the powers and capacities of a trustee in bankruptcy and charged to recover funds for SIB's customers, the ultimate victims of Stanford's CD Scheme, they may appropriately

advance the claims SIB's customers may have against TD Bank. If required, the plaintiffs plead that they are entitled to a representative order pursuant to Rule 10 of the *Rules of Civil Procedure*.

79. TD Bank is liable for knowing assistance in Stanford's and SIB's breaches of trust to SIB's customers. TD Bank knew that SIB's customers purchased the CDs from SIB expecting to receive a return on their purchase. TD Bank knew that Stanford and SIB held the monies used to purchase the CDs in trust for SIB's customers. TD Bank had sufficient information such that it also knew of, or was reckless or willfully blind to, the CD Scheme and of Stanford's and SIB's breaches of trust through the CD Scheme. Despite such knowledge, TD Bank continued to provide correspondent banking services to SIB which enabled the CD Scheme to continue. TD Bank thereby participated in Stanford's and SIB's breaches of trust.

80. SIB ultimately became insolvent and was put in to liquidation resulting in a loss to SIB's customers. Having knowingly assisted in Stanford's and SIB's breaches of trust, TD Bank is liable for the damages caused by their breaches. The plaintiffs estimate that the amounts for which TD Bank is liable are at least $20 million and likely much higher. The full extent of the damages caused to SIB's customers will be further particularized prior to trial.

81. Given its misconduct as pleaded herein, TD Bank is also liable to provide a full accounting of all revenues and profits from its dealings with SIB and to disgorge and make full restitution of all such revenues and profits to SIB's customers.

TD Bank's Liability to SIB's customers for Negligence

82. In the alternative to paras 78-81, the plaintiffs plead that TD Bank owed its customers duties, as particularized above.

83. TD Bank breached its duties to SIB's customers through the acts and omissions described herein in which it failed to meet the standard of care required of a reasonable banker.

84. It was reasonably foreseeable that SIB's customers would suffer the damages described herein as a result of the acts and omissions of TD Bank described herein.

85. TD Bank's acts and omissions described herein are the proximate cause of the harm suffered by SIB's customers. As a result of TD Bank's breaches of duty, the CD Scheme was allowed to continue. The plaintiffs plead that if TD Bank had performed its duties to SIB's customers as required, the discovery of the CD Scheme at an earlier date would have reduced or eliminated the losses, liabilities and damages incurred after that date.

86. The plaintiffs propose that this action be tried in Toronto, having regard to the comments in paragraph 2 of the notice of action.

Date: September 21, 2011

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Lawyers for the plaintiffs

MARCUS A. WIDE, et al.
Plaintiffs

v.

TORONTO-DOMINION BANK
Defendant

Court File No. CV-11-433385

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

STATEMENT OF CLAIM

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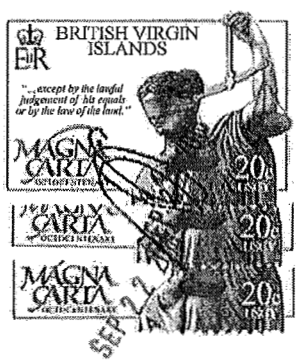
Lawyers for the Plaintiffs

TAB C

This is **Exhibit "C"** referred to in the
affidavit of Marcus A. Wide
sworn before me, this 22nd day of September, 2016.

A Commissioner for taking affidavits



AMENDED THIS May 16-14 PURSUANT TO
MODIFIÉE CE CONFORMÉMENT À
☐ RULE/LA RÈGLE 26.02 (C)
☐ THE ORDER OF Justice Penny
L'ORDONNANCE DU
DATED/FAIT LE May 15th 2014
LOCAL REGISTRAR GREFFIER LOCAL
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

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

FRESH AS AMENDED STATEMENT OF CLAIM

Notice of Action issued on August 22, 2011

1. The plaintiffs claim from the defendant, The Toronto-Dominion Bank ("TD Bank"):

(a) damages in the Canadian dollar amount equivalent to US$5.5 billion and further amounts to be determined prior to trial;

(b) an accounting and disgorgement of profits in amounts to be determined prior to trial;

(c) prejudgment and post-judgment interest on the foregoing amounts pursuant to the *Court of Justice Act*;

(d) costs of this action on a substantial indemnity basis plus H.S.T.; and

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

I. OVERVIEW

2. The plaintiffs seek to recover damages arising from the defendant's negligence, knowing assistance, recklessness and failure to act as a reasonable bank in response to a multi-billion dollar fraud perpetrated against its customer, Stanford International Bank Limited ("SIB"), an Antiguan bank now in liquidation, and SIB's customers.

3. SIB, an international banking company based in Antigua, offered opportunities to customers around the world to purchase certificates of deposit ("CDs").

4. Approximately US$10 billion in CDs were sold by SIB to more than 21,000 customers in approximately 113 different countries. Taking into account amounts paid or repaid to SIB depositors in interest or CD redemption payments, SIB had a core capital loss of approximately US$5.5 billion by the time SIB collapsed in February 2009. Purchasers of SIB CDs and SIB employees were led to believe that sums deposited with SIB would be and were invested using a low-risk investment strategy concentrating on maximum liquidity in a well-balanced, widely diversified global portfolio that would provide generous returns.

5. Instead of investing funds received by SIB customers as represented, Robert Allen Stanford ("Stanford") and a small cabal of other insiders (the "Other Insiders") orchestrated a scheme to loot SIB of several billion dollars of its assets (the "SIB Looting"). The Other Insiders consisted of, most notably, James Milton Davis ("Davis"), SIB's Chief Financial Officer.

6. To perform the SIB Looting, Stanford and the Other Insiders misappropriated and misapplied the vast majority of SIB's assets. They placed SIB's assets into speculative, largely illiquid investments, diverted them to other companies owned by Stanford, made approximately US$2 billion in concealed and unsecured SIB shareholder loans to Stanford and used them to

fund their own lavish lifestyles. As a result, Stanford and the Other Insiders breached their fiduciary duties owed to SIB and acted to the detriment of SIB and its customers for their own financial gain. On June 12, 2012, Stanford was sentenced to 110 years in prison for orchestrating the SIB Looting. The Other Insiders have also been convicted in connection with the SIB Looting.

7. Beginning in the early 1990s, TD Bank acted as correspondent bank for SIB. In particular, TD Bank opened and maintained multiple correspondent bank accounts for SIB through which flowed the vast majority of all investor funds for the purchase of SIB CDs and payments from SIB to investors and others in multiple jurisdictions around the world. For instance, in the January 1, 2008 to February 2009 period which preceded the date when regulators discovered and terminated the SIB Looting, approximately US$2,539,762,421.22 was credited to SIB's TD Bank account number 360012161670. As a result, SIB was a significant source of revenue for TD Bank. In fact, as the SIB Looting grew, so too did TD Bank's revenue, so much so that SIB became TD Bank's largest correspondent banking customer in the world. In addition, TD Bank provided trade financing and treasury services to SIB.

8. TD Bank also acted as correspondent bank for Bank of Antigua Limited ("BOA"), a Stanford-owned onshore bank based in Antigua, and provided other banking services to Caribbean Star Airlines Ltd. and Caribbean Sun Airlines Inc., both entities owned by Stanford (together, "Caribbean Star Airlines"). Further, TD Asset Management Inc. and TD Waterhouse Private Investment Counsel Inc., both of which were wholly-owned subsidiaries of TD Bank (together, "TD Waterhouse"), managed discretionary investment portfolios for both SIB and BOA.

9. TD Bank opened SIB's correspondent bank accounts without conducting any "know your client" ("KYC") or anti-money laundering ("AML") due diligence. It did so notwithstanding that correspondent banking is the highest risk service provided by banks. In addition, there was clearly no legitimate business purpose for SIB to require correspondent banking services in Canada. For among other reasons, this was because SIB initially did not have any Canadian customers and all of the funds wired to SIB's accounts at TD Bank were in U.S. dollars. Accordingly, TD Bank never should have accepted SIB as a client in the first place.

10. In legitimate circumstances, SIB would have sought and received correspondent banking services from a U.S. bank. However, due to the clear risk occasioned by SIB, U.S. banks had refused to provide correspondent banking services to SIB, a fact that TD Bank was required to be aware of. In fact, throughout the period that TD Bank provided correspondent banking services to SIB, U.S. banks generally refused to provide correspondent banking services to any offshore or Antiguan-based banks or required such banks to be part of a reputable banking group, a quality SIB clearly did not have.

11. TD Bank negligently opened SIB's correspondent bank accounts and compounded its negligence by operating those accounts for nearly 20 years. It was also required under the laws of Canada and mandatory banking industry standards to perform due diligence reviews of SIB's affairs, SIB's use of TD Bank's correspondent banking services, Stanford and the Other Insiders, and other relevant information. These obligations gave rise to the requirement that TD Bank ask for and obtain information from SIB, Stanford and the Other Insiders that would have enhanced TD Bank's exclusive window into SIB's affairs. In the circumstances, such inquiries and the resulting information should have indicated to TD Bank that it was required to terminate SIB's

access to TD Bank's facilities, report the conduct of Stanford and the Other Insiders to the appropriate authorities and freeze SIB's accounts.

12. For instance, if TD Bank undertook even the basic required due diligence reviews, it would have determined that, during the period of time that TD Bank provided banking services to SIB, Antigua's banking regulations and AML practices were subject to extensive, sustained and public condemnation, all of which related to Antigua's known facilitation of fraud and money laundering. It also would have discovered that Stanford himself undertook various well-publicized manipulations of Antigua's regulatory regime.

13. TD Bank had direct experience with the risks occasioned by providing correspondent banking services to an Antiguan-based offshore bank. For instance, in 1996, it closed the correspondent bank accounts of another Antiguan-based offshore bank, American International Bank Limited ("AIB"). It did so after a senior TD Bank executive responsible for TD Bank's relationship with AIB determined that the amounts moving through the AIB account at TD Bank were too large for a legitimate bank in Antigua.

14. Notwithstanding that the volume of funds moving through SIB's correspondent accounts was significantly larger than that moving through AIB's account, TD Bank maintained its relationship with SIB. In fact, by at least 2008, SIB had become TD Bank's single largest correspondent banking customer, not just in the Caribbean, but worldwide. Notably, as virtually all investments with SIB flowed through TD Bank, the exponential growth of SIB's balance sheet created a significant source of revenue for TD Bank.

15. TD Bank was also required to diligently conduct ongoing monitoring of publicly-available information pertaining to SIB and SIB's business operations. During the almost twenty

years that TD Bank provided correspondent banking services to SIB, such publicly-available information repeatedly disclosed clear warning signs with respect to SIB and Stanford. For example, in 1984, just prior to entering the offshore banking industry, Stanford was declared a bankrupt by a Texas court with personal debts in excess of US$13 million. This fact alone should have precluded TD Bank from providing banking services to SIB, as banking industry standards clearly provide that a previously-bankrupt individual should be ineligible to run a bank. Among other issues, World-Check, a reputable organization that gathers information globally on heightened risk individuals and entities, officially deemed Stanford a politically exposed person (a "PEP") in 2004 and designated one of Stanford's companies a financial institution that posed a high risk in 2007.

16. As a result of publicly-available information, even without the benefit of the window into SIB's affairs such as the one enjoyed by TD Bank, other banks and regulators discovered seriously adverse information regarding SIB and Stanford. This information revealed that business should not have been conducted with SIB and/or that the SIB Looting was taking place.

17. For instance, in September 2000, a U.K. consulting firm issued a due diligence report in respect of BOA to the predecessor of Société Générale Private Banking (Suisse) S.A. ("SocGen"), which provided SIB with banking services in Switzerland. That report, which was completed in the course of only a few hours and at a cost of only £500, commented on both SIB and Stanford. In particular, it identified various "red flags" in respect of Stanford and SIB and concluded that "SIB has had a somewhat dubious reputation for many years", that "it is an accepted fact that Stanford International Bank has been used by Mexican drug cartels to launder considerable volumes of criminally obtained funds" and that SocGen should be concerned about

entering into business relationships with SIB or Stanford as "it would be very difficult for [SocGen] to defend itself or its reputation should any problems arise in the future."

18. Even earlier, in 1997, after just six days of field research, the U.S. Securities and Exchange Commission (the "SEC") was even more definitive: red flags about Stanford's operations indicated a likely "Ponzi" scheme. The SEC's failure to act on such conclusions has now been the subject of a comprehensive report that in no way disavowed the conclusion that publicly accessible information revealed Stanford's fraud more than ten years prior to SIB's collapse.

19. Similarly, when international clearing house Pershing LLC ("Pershing") sought to verify SIB's assets in connection with its provision of services to another Stanford-owned entity, it was refused access to any documentation regarding SIB's balance sheet and the supporting paperwork that reflected SIB's assets. Due to the lack of transparency into SIB's portfolio, Pershing withdrew its services and by December 2008 announced publicly that it could not verify that Stanford was not involved in fraud of some nature. Several others also came to the same conclusion, including various U.S. banks, an international clearing house, a private due diligence firm, a prominent U.S. law firm and the National Association of Securities Dealers.

20. TD Bank not only had access to the publicly-available information relied on by other entities that identified the SIB Looting and/or refused to provide services to SIB, but also had extensive additional information as a result of its unique vantage point as SIB's correspondent bank, as well as its other business relationships with SIB, BOA and Caribbean Star Airlines. For instance, in addition to the fact that there was no legitimate business purpose for SIB to have

accounts in Toronto, TD Bank knew that the rates of return purported to be generated by SIB were completely at odds with the rates of return actually generated for SIB by TD Waterhouse.

21. TD Bank not only ignored the information available to it, but did so in the face of a 2001 U.S. Senate report in respect of correspondent banking that specifically named TD Bank. That report indicated that TD Bank had provided correspondent banking services to AIB and confirmed that, as a result, TD Bank had directly acted as a major conduit for improper access to the U.S. financial system. At the very time of the U.S. Senate report and for several years afterward, TD Bank continued unabated in its provision of banking services to SIB and access to the U.S. financial system.

22. In the face of its knowledge about SIB's affairs and the publicly-available information in respect of SIB and Stanford, by at least 2000, the TD Bank executive responsible for the SIB correspondent banking relationship admitted internally that TD Bank did not understand SIB's business and concluded that he was uncomfortable with TD Bank's relationship with SIB and that due diligence under strict KYC and AML standards was required as "something did not seem right". In addition, by at least July 2008, different executives at TD Bank were "nervous" about TD Bank's relationship with SIB. However, TD Bank continued unabated in its provision of banking services to SIB until being ordered by a court to cease doing so nearly a month after SIB's collapse.

23. TD Bank, as a member of the international banking community, should have acted long before regulatory agencies intervened and effectively ended the SIB Looting in early 2009. In opening and maintaining its relationship with SIB, TD Bank was negligent. By its acts and omissions described herein, TD Bank failed to act as a reasonable bank would have acted when

confronted with the same suspicious circumstances. At all times, it had sufficient information such that it knew or ought to have known of, or was recklessly or willfully blind to, the SIB Looting. Despite this knowledge, TD Bank continued to provide correspondent banking services to SIB (as well as the other aforementioned services) until after SIB's collapse.

24. In addition, TD Bank also assisted Stanford and the Other Insiders in breaches of fiduciary duties owed to SIB and breaches of trust owed to SIB's customers.

25. TD Bank was required to take reasonable measures to avoid causing loss to SIB and its customers. By failing to do so, TD Bank caused significant injuries and losses to SIB and SIB's customers, all of whom are now creditors of SIB's estate.

II. THE PARTIES

A. The Plaintiffs

26. Nigel Hamilton-Smith and Peter Wastell (the "Former Liquidators") were appointed as joint liquidators of SIB by order of an Antiguan Court on April 15, 2009 (entered on April 17, 2009), which determined that it was just and convenient that SIB be liquidated and dissolved under its supervision pursuant to the *International Business Corporations Act*, Cap. 222 of the laws of Antigua and Barbuda (as amended) (the "*IBC Act*").

27. The Former Liquidators were removed further to a removal order of the High Court of Justice Antigua and Barbuda dated June 8, 2010.

28. Marcus A. Wide and Hugh Dickson of Grant Thornton LLP were appointed as joint liquidators of SIB (in liquidation) ("Joint Liquidators") by order of the Eastern Caribbean Supreme Court dated May 12, 2011 (entered on May 13, 2011) (the "Appointment Order").

29. The Appointment Order, among other things, vested all the assets of SIB in the Joint Liquidators and empowered them to sue entities in relation to SIB in any jurisdiction where they believe assets or property of SIB may be located.

30. Pursuant to an Order of the Superior Court of Québec (Commercial Division) dated September 11, 2009, Ernst & Young Inc. ("E&Y") was appointed pursuant to the *Bankruptcy and Insolvency Act* (Canada) as interim receiver of the Canadian assets SIB and authorized to initiate and pursue proceedings in respect of SIB (the "E&Y Order").

31. The E&Y Order expressly precluded the Former Liquidators and subsequently the Joint Liquidators from acting in Canada. However, on August 19, 2011, in light of E&Y's failure to commence claims against TD Bank (or any other third parties), the Joint Liquidators moved before the Superior Court of Québec (Commercial Division) for an Order permitting them to act in the place of E&Y in respect of claims against TD Bank.

32. As a result, on August 19, 2011, the Superior Court of Québec authorized and empowered the Joint Liquidators to institute and litigate, in the place and stead of E&Y, proceedings against TD Bank in any appropriate jurisdiction (the "Authorization Order"). In addition, the Authorization Order specifically recognized the Joint Liquidators as having "the equivalent or substantially similar powers and capacities than those of a trustee in bankruptcy or other insolvency holder within Canada" and authorized the Joint Liquidators to exercise those powers and capacities for the purposes of the institution and litigation of the within action against TD Bank.

33. Accordingly, since obtaining the Authorization Order, the Joint Liquidators are acting with the express authority of a Canadian Court in the same capacity as a trustee in bankruptcy under Canada's federal *Bankruptcy and Insolvency Act* for the benefit of SIB and its creditors.

34. Upon obtaining the Authorization Order, the Joint Liquidators were granted the capacity to pursue claims against TD Bank in Canada for the first time.

35. The Joint Liquidators have commenced these proceedings both in their capacity as representatives of SIB and in their capacity as representatives of the 21,000 SIB creditors. In these capacities, the Joint Liquidators seek damages on behalf of SIB and its creditors. Any damages awarded to SIB will form part of SIB's estate and be disbursed to SIB's creditors.

B. Robert Allen Stanford and SIB

36. Stanford was born in the United States on March 24, 1950. He is a citizen of the U.S. and Antigua.

37. Stanford wholly owned Stanford International Bank Holdings Ltd., an Antiguan corporation which itself directly and wholly owned SIB. There were no other equity owners of SIB. Stanford was the Chairman of the Board of SIB.

38. SIB was at relevant times the largest private international or "offshore" bank in Antigua. By the time of its collapse in 2009, SIB employed approximately 100 individuals at its headquarters in Antigua and thousands of others were employed at other Stanford-owned entities around the world.

39. Stanford was on SIB's Board of Directors, as were his father, James A. Stanford, Davis, Sir Courtney N. Blackman, O.Y. Goswick, Kenneth C. Allen and Robert S. Winter. At relevant

times, Stanford was Chairman of the Board of Directors and Sir Courtney N. Blackman, an independent director and former Governor to the Central Bank for Barbados, served as the Vice Chairman.

40. SIB's Board of Directors met regularly and was comprised of various sub-committees. For instance, Sir Courtney N. Blackman served as Chairman of the Audit Committee and presented audit committee reports to SIB's Board of Directors on behalf of the other audit committee members.

41. SIB and its affiliates also had an advisory board that was comprised primarily of former politicians and international business persons, most of whom were independent from SIB. It has been reported that a TD Bank executive, Perry Mercer, served on this advisory board, as did Blaise Friedli of SocGen.

C. The Defendant

42. TD Bank is a Schedule I bank, duly constituted by letters patent under the authority of the *Bank Act*, R.S.C. 1991, c. 46, with a head office located in Toronto, in the Province of Ontario.

43. As detailed herein, TD Bank provided correspondent banking, lending, trade financing and treasury services to SIB, BOA, another Antiguan bank owned by Stanford, and at least one other Stanford-owned entity.

III. HISTORY OF SIB'S OPERATIONS AND AFFAIRS

44. TD Bank was required to know the history of SIB, SIB's products and services, the factors giving rise to SIB's collapse and information in respect of Stanford personally. Such history and information is detailed below. It is full of "red flags".

A. Stanford Purchases BOA and Establishes SIB

45. In 1985, with no previous involvement in the banking industry, Stanford incorporated Guardian International Bank Limited ("Guardian") in the British Overseas Territory of Montserrat. At that time, Stanford and his father owned all of the share capital of Guardian.

46. In order to support sales of Guardian CDs, Stanford established representative offices for Guardian in Miami, Florida and Houston, Texas under the name "Guardian International Investment Services".

47. From 1985 until 1990, Stanford operated Guardian in Montserrat with his former college roommate, Davis. They operated Guardian as an "offshore" bank and, as such, it catered almost exclusively to customers outside of Montserrat.

48. Guardian primarily targeted Latin American customers and offered CDs with interest rates of double the then-current standard rate of return. Using this strategy, by the end of 1989, Guardian claimed US$55.5 million in accounts, a number which grew to over US$100 million by the following year.

49. Notwithstanding its apparent success, Guardian came under the scrutiny of bank regulators. By 1989, the Texas Department of Banking had warned Stanford about operating a foreign bank representative office in Texas "without authority under either state or federal law."

50. Thereafter, following investigations by bank regulators in Texas, Florida and California, the U.S. Office of the Comptroller of Currency issued a Banking Circular regarding Stanford's unauthorized banking activities in the U.S. The Texas Department of Banking went further, ordering Guardian to immediately cease its Texas operations or "the Texas Attorney General will

be requested to promptly file charges against the bank, its board of directors and its management for apparent willful and continuing violations of the Texas Banking Code."

51. Around the same time, the banking system in Montserrat at large came under investigation by the Federal Bureau of Investigation and the U.K.'s Scotland Yard. Consequently, Guardian itself came under scrutiny for possible drug money laundering.

52. As a result of reports from those law enforcement agencies, the government of Montserrat determined that Stanford no longer met bank ownership requirements on the island and informed Stanford that Guardian's banking license was going to be revoked. Among other reasons provided, Montserrat informed Stanford this decision was due to the fact that (i) Guardian was operating in a manner "detrimental to its depositors", (ii) Guardian failed to supply adequate details as to its liquidity, and (iii) Stanford was formerly a bankrupt.

53. In response, and before Montserrat could formally revoke Guardian's license, on December 7, 1990, Stanford caused Guardian to migrate its domicile to Antigua and re-incorporate under Antigua's *IBC Act*. Following Guardian's arrival in Antigua, it shared headquarters with BOA.

54. On December 8, 1990, the day after Stanford reincorporated Guardian in Antigua, Stanford completed his acquisition of all of the share capital of BOA in exchange for Eastern Caribbean ("EC") $469,700.80 through his holding company, Guardian Bank Group Holdings Limited (as it was then called). The sellers of BOA's share capital were a group of Antiguan citizens and the Government of Antigua.

55. BOA was originally incorporated on February 10, 1981. As a domestic Antiguan bank, BOA offered banking services primarily to citizens of Antigua, in EC dollars, the local currency.

56. On December 20, 1994, Guardian changed its name to SIB.

57. As an offshore international banking company, and pursuant to s. 240 of the *IBC Act*, SIB was prohibited from knowingly accepting deposits in the legal tender of Antigua or of other countries of the CARICOM region. As the legal tender in Antigua is the EC dollar, SIB was effectively barred from doing business with residents of Antigua. Instead, its deposits derived from customers located in foreign jurisdictions.

58. Since SIB was an offshore Antiguan bank which had no way to receive wire transfers or other payments on its own, it needed to gain access to an onshore bank's facilities as a means for SIB customers to transfer funds to SIB. This was accomplished by way of SIB's procurement of correspondent bank accounts.

59. The term "correspondent account" is defined broadly for banking organizations and includes any account or formal relationship established by a financial institution to receive deposits from, make payments to or other disbursements on behalf of a foreign financial institution, or to handle other financial transactions related to the foreign financial institution. By analogy, SIB needed to "rent" the services of one or more onshore banks in order for it to operate and access the U.S. financial system. Absent such correspondent arrangements, it would have been paralysed operationally.

60. By relying on correspondent banks such as TD Bank, SIB eventually operated in approximately 113 countries and by late 2008 reported that it held approximately US$8.5 billion

in assets under management. SIB's 2007 Annual Report stated that SIB had in excess of 50,000 clients. When any customer of SIB wished to make a U.S. or Canadian dollar deposit with SIB by electronic funds transfer, they were directed to remit their value electronically to SIB's correspondent accounts at TD Bank.

61. In addition to TD Bank, SIB was also provided the following banking services:

(a) correspondent banking services by HSBC Bank PLC ("HSBC") in the United Kingdom. HSBC received all EURO and British Pound Sterling wire transfer payments from SIB's depositors;

(b) Republic Banchsares of Texas, Inc., which was later acquired by Trustmark National Bank (together, "Trustmark"), received U.S. dollar cheque deposits as correspondent bank to SIB, but refused to accept any wire transfers on behalf of SIB. Such cheques were sent by SIB customers to SIB in Antigua, which in turn bundled and delivered them for deposit into SIB's accounts held at Trustmark in Houston; and

(c) SocGen provided what have been referred to as secret "slush fund" accounts for SIB. It has been alleged that bribes to SIB's auditor, to Leroy King of the Financial Services Regulatory Commission of Antigua (the "FSRC"), and to others were funded from accounts at SocGen.

B. SIB's Products and Services

62. SIB offered six different deposit products to customers: fixed CDs, flex CDs, index linked CDs, premium accounts, performance accounts and express accounts. SIB customers

almost exclusively purchased CDs. SIB also offered other products to customers, but the availability of such products was tied to the need for customers to hold accounts with SIB, almost always in the form of CDs. Such products included Visa, Mastercard and American Express credit card services, as well as loan facilities, letters of credit, letters of guarantee and private banking services. Thus, for example, SIB required customers to maintain a CD with SIB as security in order to acquire a credit card and SIB placed holds on customers' CDs in an amount twice that of their credit card limits.

63. In addition, SIB engaged in various investment banking services. Such services included multi-million dollar public equity dealings, private placements, mergers and acquisitions and debt financings, all of which were undertaken for an array of clients in various locations around the world. SIB assembled a team of professionals from various industry-leading financial firms to provide its investment banking services.

64. SIB primarily sold its CDs through SIB-affiliated companies. Most notably, these companies included:

(a) the Stanford Financial Group ("SFG"), which was based in Houston, Texas and reported to have more than US$50 billion "under advisement";

(b) the Stanford Group Company ("SGC"), which was an investment dealer and broker dealer based in Houston, Texas. It registered with the SEC in 1996;

(c) the Stanford Trust Company, Ltd. ("STC"), a trust company organized under the laws of Antigua that as of 1998 operated a foreign trust representative office in

Miami, Florida and carried on business as "Stanford Fiduciary Investory Services";

(d) SIB itself through its Montreal, Quebec office; and

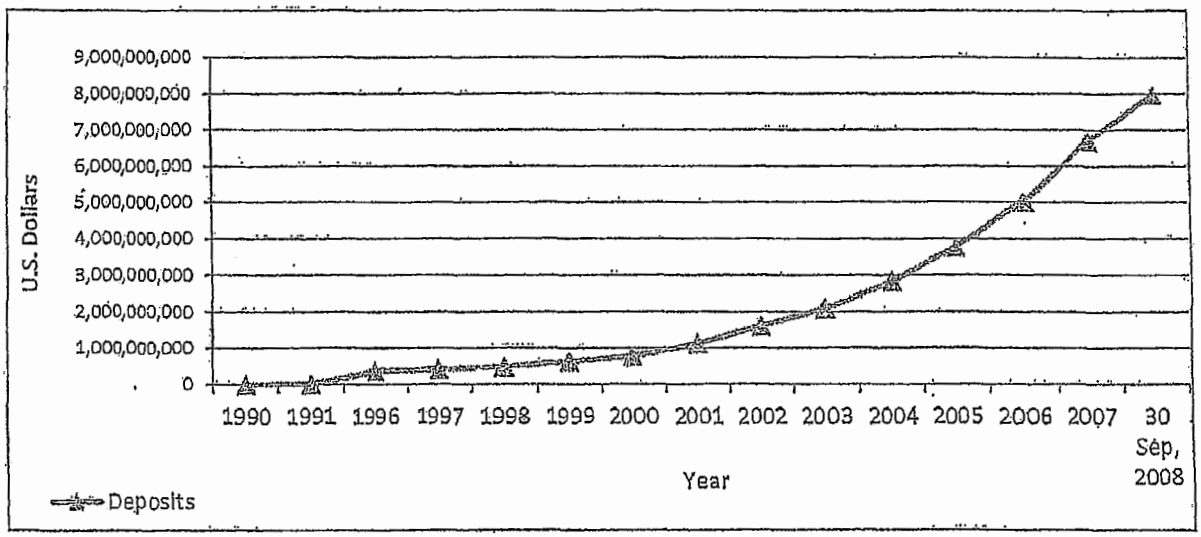
(e) Numerous affiliated company offices in Latin and Central America, as well as in Zürich, Switzerland.

65. SIB's annual reports consistently disclosed that SIB had a portfolio that produced returns of over 10 percent.

66. SIB's Annual Reports disclosed that SIB's auditors were C.A.S. Hewlett & Co. Ltd., a small accounting firm based in Antigua.

67. Financial advisors and SIB employees sold SIB CDs using information such as investment return figures and promotional materials that had been provided or were based on information prepared by Stanford and the Other Insiders. Thus, on the basis of the representations that Stanford and the Other Insiders caused to be made, SIB sold billions of dollars of CDs.

68. As illustrated by the graph below, between approximately 1990 and 2009, SIB grew its business exponentially from approximately US$14 million in CD investments while operating as Guardian in Montserrat to approximately US$8 billion in CD investments by 2009.



C. TD Bank Provided Services to Stanford-Owned Entities

1. TD Bank Improperly Opened the SIB Accounts

69. In approximately 1992, TD Bank acquired some of the Bank of New York's interests in Canada. These interests included the Bank of New York's then existing correspondent banking relationships with approximately 20 banks located throughout the Caribbean. Three of these banks were based in Antigua, namely (i) the Stanford-owned domestic Antiguan bank, BOA, (ii) the domestic Antiguan bank, Antigua Overseas Bank, the share capital of which was owned by William Cooper ("Cooper") and (iii) another Antiguan domestic bank, Antigua Barbuda Investment Bank ("ABIB"). TD Bank thus acquired its way into becoming the correspondent bank for BOA.

70. As domestic Antiguan banks, BOA, Antigua Overseas Bank and ABIB primarily used TD Bank's correspondent banking services to provide limited services to Antiguans who required services in Canada to conduct transfers or effect foreign currency exchanges involving minimal amounts of money. Because TD Bank was not the originator of these correspondent accounts (in that Bank of New York had established them), TD Bank never conducted any KYC or AML due

diligence inquiries in respect of the counter-party banks in the Caribbean. TD Bank thus "grandfathered" the noted three Antiguan banks' correspondent banking relationships. The BOA, Antigua Overseas Bank and ABIB correspondent accounts showed relatively minor activity.

71. Following TD Bank's acquisition of some of the Canadian interests of the Bank of New York, Cooper asked TD Bank to establish a correspondent bank account for AIB, the Antiguan domiciled international banking company also owned by Cooper. The "grandfathering" of Antigua Overseas Bank by TD Bank's acquisition of some of the Bank of New York's Canadian interests thus allowed Cooper to present AIB as an affiliate of a pre-existing correspondent customer of TD Bank. Since TD Bank was already doing business with a Cooper-owned bank, TD Bank agreed to allow AIB to establish its own correspondent account. No KYC or AML due diligence inquiries were completed by TD Bank in respect of AIB or Cooper. AIB and Cooper thus entered into TD Bank's Caribbean correspondent banking division through a "side door" and not the "front door".

72. If it adhered to the KYC and AML compliance standards of a reasonable bank, TD Bank would have insisted that AIB come through the "front door" and, in turn, TD Bank would have properly vetted AIB and Cooper and refused to accept AIB as a customer. TD Bank did not do so. The activities of AIB and Cooper subsequently gave rise to a number of successful criminal prosecutions in the late 1990s by U.S. law enforcement authorities for laundering the proceeds of certain advance fee and other frauds. Cooper remains a fugitive of U.S. Justice.

73. The same explanation for how AIB got to enjoy correspondent banking privileges at TD Bank applies to SIB.

74. Around the same time that TD Bank acquired its correspondent relationship with BOA, SIB (the successor of Guardian, which just previously had its license revoked in Montserrat) attempted to use various U.S.-based banks for its correspondent banking purposes. This made sense, as the vast majority of purchases of SIB CDs were made with U.S. dollars. However, after conducting due diligence, each of these banks ultimately declined to provide correspondent banking accounts to SIB or quickly closed such accounts due to concerns over money laundering or other impropriety. As a result of its inability to acquire correspondent banking services from a U.S.-based bank, SIB applied for such services from TD Bank in Canada.

75. TD Bank did not conduct KYC or AML due diligence inquiries when SIB applied for correspondent bank accounts. Instead, because TD Bank already had a correspondent banking relationship with the Stanford-owned BOA, TD Bank allowed SIB to "piggyback" onto BOA's antecedent relationship for KYC and AML compliance purposes. In other words, like with AIB, TD Bank allowed SIB to access its services through the "side door" and not the "front door".

76. Consistent with this sloppy approach (and according to TD Bank itself), TD Bank has no record of account opening applications being completed by SIB or there being any written contracts in respect of SIB's correspondent bank accounts. In fact, it appears the only written contracts that at any time purported to govern the TD Bank's provision of correspondent banking services to SIB were TD Bank's standard form unilateral contracts in respect of correspondent banking that did not address SIB in any specific manner. Such unilateral contracts arose for the first time only in 1998 but did not contain any substantive legal terms until less than two years prior to SIB's collapse.

77. If TD Bank adhered to the KYC and AML compliance standards of a reasonable bank, it would have insisted that SIB come through the "front door" and would have also properly vetted SIB and Stanford and refused to accept SIB as a customer. TD Bank did not do so.

78. The reasons that TD Bank was required to refuse to accept SIB as a customer are extensive and are detailed further below. Most simple and straightforward, however, was that Stanford was formally declared bankrupt in 1984 with personal debts in excess of US$13 million. It is widely accepted in the banking community that an individual who has been personally bankrupted is not a fit and proper person to own or manage a bank.

79. Stanford's personal bankruptcy was a matter of public record. Therefore, a basic public records database search would have revealed Stanford's lack of fitness to own or manage SIB. In fact, this was one of the very reasons that led Montserrat to revoke Guardian's banking license. Similarly, when Guardian sought a license from the Eastern Caribbean Central Bank (the "ECCB") to own a trust company, the ECCB determined that Guardian was not permitted to hold such a license due to Stanford's bankruptcy.

80. Another significant factor indicating that TD Bank should never have provided services to SIB was that there was clearly no legitimate purpose for SIB to hold correspondent bank accounts in Toronto. Among other reasons, this was because, at the time the TD Bank-SIB relationship commenced, SIB had no Canadian customers and thus transacted no business in Canadian dollars. Instead, at that time and throughout the period that TD Bank provided banking services to SIB, the vast majority of investor funds transacted were in U.S. dollars.

81. Wire transfers were critical to the operation of SIB and, in turn, the SIB Looting. Without them, SIB would have had no means to quickly or efficiently complete any transaction, a clearly

necessary feature of modern commerce. Without access to wire transfers, SIB, as an offshore Antiguan bank, would have been dependent on delivery of physical cash or cheques to complete any transaction, a commercially untenable situation particularly since SIB's customers were located around the world.

82. Normal practice is that U.S. dollar correspondent bank accounts are provided by U.S. banks. Although, as a Canadian bank based in Toronto, TD Bank was permitted to undertake U.S. dollar transactions, it was not permitted to clear U.S. dollar wire transfers in Canada. This was significant because the vast majority (if not all) U.S. dollar deposits into SIB's correspondent bank accounts were received by wire transfer. Instead, TD Bank was required to rely on U.S. banks to serve as intermediaries to clear U.S. dollar wire transfers.

83. Accordingly, TD Bank at all relevant times required and relied upon the clearing services of a U.S. bank to complete most basic transactions for SIB. For instance, for at least part of the period that TD Bank provided correspondent banking services to SIB, U.S. wire transfers were routed through and cleared by Bank of America in New York City. This is rather ironic given that Bank of America had previously refused to continue providing correspondent banking services to SIB. Such arrangements were maintained by SIB and TD Bank notwithstanding that reliance on U.S. intermediary banks resulted in fees being incurred by SIB and/or SIB customers that would not have been incurred had SIB simply relied on a U.S. bank for its U.S. dollar correspondent banking services. Using such arrangements, TD Bank provided access to the U.S. financial system that otherwise was unavailable to SIB.

2. The Provision of Banking Services by TD Bank

84. From the time the SIB TD Bank accounts were opened, TD Bank and TD Waterhouse together opened and maintained approximately 11 separate accounts for SIB and other Stanford-owned entities. Among other things, those accounts facilitated all of SIB's U.S. dollar wire transfers. When SIB eventually obtained Canadian customers, TD Bank also provided such services for Canadian dollar transfers. However, in total, SIB only had 159 Canadian customers who together invested less than CAD$50 million with SIB. In contrast, SIB at large had in excess of 21,000 customers that invested approximately US$10 billion, primarily in U.S. dollars.

85. The provision of correspondent banking services is both a competitive and lucrative business for banks. Banks seek out valuable correspondent banking relationships because they can generate substantial "fee from free balances" revenue overnight for the bank that is the provider of the relevant services. Transaction fee revenue is also a source of income from correspondent banking relationships.

86. During the 1990s and early 2000s, TD Bank's largest correspondent bank customers were generally properly capitalised and regulated banks from the United States. In 1999, the total revenue generated by TD Bank from the provision of correspondent banking services to banks in the Caribbean did not exceed CAD$1 million. At that time, SIB's reported assets were also limited. For instance, at the end of 1999, SIB reported having US$676,236,000 in assets and US$623,560,000 in liabilities to depositors.

87. However, the exponential growth of SIB's balance sheet from approximately 2002 until late 2008 (during which time approximately US$9 billion of SIB CDs were sold to depositors)

altered the profile of SIB from that of a relatively minor source of business into that of a major correspondent bank customer and a significant source of revenue for TD Bank.

88. For instance, between December 31, 2005 and December 31, 2007, TD Bank reported annual increases of corporate banking revenue of 8% (for 2006) and 17% (for 2007), which reflected annual corporate banking revenue rising from CAD$266 million in 2005 to CAD$287 million and CAD$337 million in 2006 and 2007, respectively. In both years, these increases in corporate banking revenue were reported by TD Bank as being "largely due to higher net interest income from correspondent banking deposits and higher lending volumes." At the same time, between December 31, 2005 and December 31, 2007, SIB's reported assets grew from US$4.1 billion to US$7.1 billion. By the last year of SIB's operations – between January 2008 and February 2009 – approximately US$2,539,762,421.22 was credited to SIB's TD Bank account number 360012161670.

89. As a result, by 2008, SIB had become TD Bank's single largest correspondent banking customer not just in the Caribbean, but worldwide. This was the case notwithstanding that TD Bank had hundreds if not thousands of correspondent banking relationships, including with major U.S. banks and other globally-recognized banks from around the world. Until the growth of SIB, such banks constituted TD Bank's largest correspondent banking customers.

90. Notably, in 1996, TD Bank closed AIB's correspondent account. This decision was based on, among other things, the fact that the amounts moving through the AIB account at TD Bank were too large to be associated with a legitimate bank in Antigua. TD Bank determined that an offshore bank in Antigua that generated a large sum of money was a "red flag".

91. At that same time, the amounts running through SIB's correspondent bank accounts at TD Bank were comparable to the amounts running through AIB's account and soon after escalated dramatically. This escalation occurred during the period that the risk of doing business with Antiguan financial institutions also greatly increased in notoriety, which is detailed below. However, unlike with AIB, TD Bank continued to provide correspondent banking services to SIB.

92. In addition, TD Bank provided banking services including credit to the Stanford-owned Caribbean Star Airlines. SIB secured the credit provided to these entities through a U.S. dollar account held by SIB at TD Bank.

93. Further, TD Waterhouse managed discretionary investment portfolios for both SIB and BOA throughout the period that TD Bank provided correspondent banking services to SIB. The investment strategy employed by TD Waterhouse was the same for both the SIB and BOA portfolios.

94. TD Bank also provided trade financing and treasury services to SIB. In addition, in connection with loans, advances and other obligations that SIB had with TD Bank, SIB pledged to TD Bank its security holdings with TD Waterhouse.

95. During the years that SIB and BOA maintained investment portfolios with TD Waterhouse, those portfolios were managed by John Pepperell, who was the Vice Chairman of TD Waterhouse, and Perry Mercer.

96. From 2002 until SIB's collapse in 2009, James Zachariah Davis ("Zack Davis"), who is the son of Davis, was a research analyst at SFG. Zack Davis' job as a research analyst at SFG

entailed monitoring and providing instructions with respect to the SIB and BOA portfolios that were managed by TD Waterhouse. He dealt directly with Perry Mercer (who according to Zack Davis was a long-time friend of Davis) and others at TD Bank and TD Waterhouse.

D. Stanford and the Other Insiders Looted SIB

97. As CEO, director and Chairman of the Board of Directors of SIB, Stanford owed fiduciary duties to SIB, as did the Other Insiders, including Davis.

98. Section 95 of the *IBC Act* provides that Stanford and the Other Insiders had a duty to "act honestly and in good faith with a view to the best interests of the corporation" and to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."

99. In addition, Stanford and the Other Insiders owed common law fiduciary duties to SIB. Such duties paralleled those owed by Canadian corporate executives and included, among other things, the duty to:

(a) act with loyalty, good faith, and honesty;

(b) avoid conflicts of interest and duty;

(c) use all of their energy, ability, and imagination in the best interests of SIB;

(d) develop business opportunities for the sole benefit of SIB; and

(e) not conceal any information from SIB.

100. However, in breach of their fiduciary duties, Stanford and the Other Insiders converted customer funds used to purchase CDs from SIB for improper purposes, including for their own use, and implemented and orchestrated the SIB Looting to defraud SIB and its customers.

101. In particular, the investment strategy and rates of return promised to SIB customers by Stanford and the Other Insiders were not as claimed. Under the direction and at the instigation of Stanford and the Other Insiders, several billion dollars of funds provided to SIB were diverted for the personal benefit of Stanford and the Other Insiders. As a result, SIB was the victim of acts of larceny and breaches of the fiduciary duties owed to it by Stanford and the Other Insiders.

102. Stanford and the Other Insiders separated the funds received by SIB from its customers into three tiers. Tier I contained cash or cash equivalents, while Tier II consisted of various portfolios of investments that were managed at arm's length by third party financial institutions, including TD Waterhouse, together with a small amount of cash or cash equivalents.

103. By maintaining Tiers I and II and allowing SIB employees and executives to undertake discrete tasks with respect to them, Stanford and the Other Insiders were able to deceive honest SIB employees and others. This deception allowed Stanford and the Other Insiders to use Tier III to effect the SIB Looting.

104. Tier III was the most financially-significant tier at SIB, consisting of the vast majority of SIB's funds. It was managed by Stanford and the Other Insiders and they kept its true contents secret.

105. SIB employees, executives and directors either did not know of the existence of Tier III or, if they did know, had no knowledge whatsoever of its contents and were under the impression

it was being legitimately managed. In fact, information relevant to the true contents of Tier III was not even kept on SIB's computer systems and Stanford and the Other Insiders used forged documents to deceive SIB employees, executives and directors as to the true nature of SIB's underlying assets. The real information in respect of Tier III was stored on an external drive that Stanford and the Other Insiders commonly called "the football" and kept with them at all times.

106. Once Stanford and the Other Insiders had directed SIB's funds into Tier III, instead of investing them as represented to SIB customers, employees, officers, executives and others (the "SIB Stakeholders"), they misappropriated and misapplied the funds by placing them into speculative, largely illiquid investments (namely real estate and private equity), diverting them to other companies owned by Stanford, using them to fund their own lavish lifestyles, and making large concealed and unsecured SIB shareholder loans to Stanford, none of which were repaid. Accordingly, Stanford and the Other Insiders acted to the detriment of SIB and the SIB Stakeholders for their own financial gain.

107. In addition, Tier III funds were used to hide the SIB Looting. In particular, Stanford and the Other Insiders diverted Tier III funds generated by SIB from the sale of CDs to pay purported interest on and redemptions of the CDs as required, thereby deceiving SIB customers, employees, executives and others, and allowing the continuation of the SIB Looting. Concealing the fraud in this manner resulted in the SIB Looting taking on the characteristics of a "Ponzi" scheme.

108. During his orchestration of the SIB Looting, Stanford in particular led a lavish lifestyle financed exclusively with SIB's funds that he had converted to his own use. Among other things, he enjoyed the use of a US$10 million Florida mansion and a fleet of private jets (valued at

approximately US$100 million). He also took extravagant and expensive vacations costing up to US$100,000 and would often rent US$100,000/week yachts.

109. In order to conceal the SIB Looting from the SIB Stakeholders, Stanford and the Other Insiders routinely caused false entries to be made in SIB's accounts. Specifically, Stanford and the Other Insiders caused, among other things:

(a) false entries to be made into SIB's ledgers for the purpose of reporting false or unjustifiably inflated revenues and/or false or unjustifiably inflated investment portfolio balances and asset values, and:

(i) such false entries to be submitted to SIB's regulator in Antigua, the FSRC, and/or

(ii) such false entries to be represented to potential investors in SIB's CDs in order to encourage investments in CDs;

(b) copies of SIB bank statements to be forged; and

(c) false and/or unjustifiably inflated increases in assets to be recorded in SIB's annual reports and promotional materials.

110. As a result of Stanford and the Other Insiders' directions, SIB's annual reports falsely claimed increases in the value of SIB's assets from approximately US$760 million in 2000 to US$8.5 billion in December 2008. In reality, SIB only had approximately US$500 million in identifiable or traceable assets at the time of SIB's collapse only two months later in February 2009.

IV. THE COLLAPSE OF SIB

111. By the Fall of 2008, owners of SIB CDs began demanding redemptions of those CDs in increasing numbers. At the same time, SIB was increasingly experiencing difficulties generating new sales of SIB CDs. This scenario was prompted by the financial crisis in 2008.

112. As a result, by October 2008, SIB was left with no choice but to liquidate its accounts held at TD Bank and TD Waterhouse, among others, in order to pay interest and redemption rates owed to customers. TD Bank facilitated this liquidation primarily at the instruction of the Chief Investment Officer of SFG, Laura Pendergest-Holt ("Pendergest-Holt") and Zack Davis. The liquidation included both SIB and BOA assets. TD Bank did not take any steps to investigate why the liquidations were occurring or alter the services it provided to SIB or BOA except to monitor the situation from the perspective of its own credit risk.

113. By at least January 2009, the SEC began subjecting SIB to intense scrutiny. It demanded that SIB provide an itemized list of all assets in SIB's portfolios and all of SIB's financial and accounting documents. The SEC also informed various SIB executives and officers that it sought their testimony.

114. Soon thereafter, in early February 2009, Davis called a meeting with all of SIB's top executives in Miami, Florida. At that meeting, at which Stanford was not present, Davis informed the executives of the SIB Looting. The executives had no idea about the SIB Looting or the contents of Tier III prior to the meeting. According to Davis, upon hearing of the SIB Looting, the SIB executives' reaction was one of "shock".

115. On February 16, 2009, the SEC filed civil charges against SIB and its related entities, and against Stanford, Davis and Pendergest-Holt. In doing so, the SEC alleged "massive ongoing

fraud" involving SIB CDs. That same day, the SEC obtained an injunction preventing SIB and its related entities from carrying on business and the appointment of an equity receiver from the U.S. District Court in Dallas, Texas.

116. Similarly, on February 19, 2009, the FSRC appointed receiver-managers of SIB. This appointment was continued by the High Court of Justice of Antigua on February 26, 2009, which thereafter determined that SIB should be liquidated and dissolved under the supervision of the Antiguan court pursuant to the *IBC Act*. The Former Liquidators were thereby appointed.

117. Despite the unique window into SIB provided by the extensive banking services it provided and the duty that TD Bank had to understand the true nature of SIB's affairs, until the SEC issued a freezing order on March 12, 2009, TD Bank took absolutely no steps whatsoever to limit SIB's banking activities, to report SIB's numerous irregularities to any regulatory authority or to take any other action that would have prevented the losses suffered by SIB and its customers in connection with the SIB Looting.

118. By Order of the Ontario Superior Court of Justice (Commercial List) dated April 24, 2009 (and subsequently extended) in Court File No. CV-09-8154-00CL (*Attorney General of Ontario v. The Contents of Various Accounts Held with TD Bank and TD Waterhouse* in rem), TD Bank was ordered to pay into court all of the monies it held on behalf of SIB.

119. On June 18, 2009, a federal grand jury returned a 21-count indictment against, among others, Stanford and Pendergest-Holt. The grand jury indictment charged Stanford and Pendergest-Holt with various offences including conspiracy to commit mail, wire and securities fraud, wire fraud, mail fraud, conspiracy to commit money laundering and conspiracy to obstruct an SEC investigation.

120. On March 6, 2012, Stanford was convicted of 13 of the 14 counts remaining against him, including those in relation to his fraud and conspiracy. On June 14, 2012, he was sentenced by U.S. District Judge David Hittner who commented that Stanford had orchestrated "one of the most egregious frauds ever presented to a trial jury in federal court." Stanford was sentenced to 110 years in prison and ordered to forfeit US$5.9 billion.

121. On June 21, 2012, Pendergest-Holt pled guilty to obstructing the SEC's investigation into the misconduct of Stanford and the Other Insiders. However, the other counts against Pendergest-Holt were withdrawn after the SEC's investigation revealed that she did not know of Tier III or the fraud on SIB until Davis disclosed them at the February 2009 meeting in Miami, Florida referred to at paragraph 113. This was the case notwithstanding Pendergest-Holt's role as the Chief Investment Officer of SGF and her close personal relationships with Stanford and Davis. On September 13, 2012, Pendergest-Holt was sentenced to three years in prison and three years of supervised release.

122. On August 27, 2009, Davis entered into a plea arrangement whereby, in exchange for his co-operation, he was convicted of conspiracy to commit mail, wire and securities fraud, and conspiracy to obstruct an SEC investigation. Davis was sentenced to five years of prison, three years of supervised release and had a judgment of US$1 billion ordered against him.

123. SIB has at no point been indicted or charged with any offense in connection with the SIB Looting. Similarly, other than Stanford, members of SIB's Board of Directors have at no point been indicted or charged with any offence in connection with the SIB Looting, nor have any other senior executives of SIB such as its Presidents. SIB and the SIB Stakeholders were deceived by Stanford and the Other Insiders.

V. FURTHER RED FLAGS

A. Banking Services Should Not Have Been Provided to an Offshore Antiguan Bank

124. During the period that TD Bank provided correspondent banking services to SIB, international regulators and government authorities publicly identified that Antigua needed to improve its banking regulations to prevent money laundering and criminal activity.

125. At least as early as 1996, the U.S. State Department's International Narcotics Control Strategy Report ("INCSR") highlighted weaknesses in Antigua's banking system related to money laundering. The report noted inadequate regulation and a surge in questionable banking operations in Antigua. These findings were reiterated in the INCSRs of the subsequent years. The 2003 Report indicated that money laundering in Antigua was related to fraud schemes and that money laundering occurs more often in the offshore sector than in the domestic finance sector.

126. Although the Antiguan government subsequently passed the *Money Laundering (Prevention) Act* of 1996, the U.S. criticism of Antiguan banking laws persisted.

127. Consequently, the Antiguan government formed the Antiguan Offshore Financial Sector Planning Committee to advise the government and recommend additional changes to its banking laws. Despite being likely the most prominent individual in the very industry the Committee was designed to evaluate, and the owner of the largest offshore bank in Antigua, SIB, Stanford was appointed Chairman of the Committee in 1997. Stanford was appointed by then Antiguan Prime Minister Bird, whose election campaign Stanford had been a major contributor to.

128. As Chairman of the Committee, Stanford created a "task force" that was charged with considering improvements to Antigua's banking laws. Stanford paid the expenses of establishing

the task force out of his own pocket, creating a clear conflict of interest. In addition, members of the task force were based in the U.S. and were historically connected with and had received funds from Stanford.

129. Ultimately, the task force recommended removing various offenses from Antigua's banking laws, including "false accounting" and "fraud", all activities that Stanford himself was actively involved in through his operation of the SIB Looting. As a result of the recommendations of the task force, in November 1998, the government of Antigua amended the *Money Laundering (Prevention) Act*. The changes substantially weakened the Act's ability to address money laundering.

130. In addition, the government changed the supervision of its offshore financial sector by vesting authority over that sector in a new International Financial Sector Authority (the "IFSA"). Incredibly, Stanford was appointed Chair of the IFSA and one of Stanford's U.S. lawyers also served on the IFSA along with Stanford's Antiguan lawyer, Errol Cort, who was also the Attorney General of Antigua at that time. In essence, Stanford had been appointed to run the regulator that was tasked with overseeing the very industry that Stanford did business in.

131. The aforementioned process of banking reforms was intensely and publicly criticized, with Stanford's involvement in the process playing a central role in the criticisms. Notably, it also prompted the U.S. Treasury Department, through its Financial Crimes Enforcement Network ("FinCEN"), to issue an extraordinary advisory in April 1999 (the "FinCEN Advisory"), as appears from the FinCEN Advisory No. 11 dated April 1999. The FinCEN Advisory stated, among other things, that:

(a) "In November 1998, the government of Antigua and Barbuda amended its Money Laundering (Prevention) Act in a manner that significantly weakened that Act";

(b) "The [new International Financial Sector Authority's] Board of Directors includes representatives of the very institutions the Authority is supposed to regulate, thus raising serious concerns that those representatives are in fact in control of the Authority, so that the Authority is neither independent nor otherwise able to conduct an effective regulatory program in accordance with international standards";

(c) "The amendment of the Money Laundering (Prevention) Act, combined with changes in Antigua and Barbuda's treatment of its offshore financial services sector, are likely to erode supervision, stiffen bank secrecy, and decrease the possibility for effective international law enforcement and judicial cooperation";

(d) the combination of these actions "raise questions about the purposes of transactions routed into or out of Antigua and Barbuda or involving entities organized or domiciled, or non-resident persons maintaining accounts in Antigua and Barbuda"; and

(e) "Enhanced scrutiny is especially important for transactions involving Antigua and Barbuda offshore banks, transactions involving both Antigua and Barbuda offshore banks and the nine commercial banks licensed to do business in Antigua and Barbuda, and transactions in which one or more of such nine commercial banks act for one or more Antigua and Barbuda offshore institutions."

132. The FinCEN Advisory was significant. It constituted only the second time in history the U.S. Treasury Department had released an advisory targeting a specific country. The United Kingdom also issued a similar advisory in April 1999.

133. Further, it was apparent that the FinCEN Advisory was specifically referring to Stanford when it warned that the Antiguan International Financial Sector Authority's Board of Directors included "representatives of the very institutions the Authority is supposed to regulate" and that the "Authority is neither independent nor otherwise able to conduct an effective regulatory program in accordance with international standards."

134. In May 1999, U.S.-based attorney Carlos E. Loumiet, who was one of Stanford's lawyers and an architect of Antigua's AML laws, publicly responded to the FinCEN Advisory. While ultimately refuting the FinCEN Advisory, Loumiet conceded that there was "considerable, indisputable merit" to the U.S. concerns about the "inherent potential conflicts of interest" with respect to having private banking representatives such as Stanford on Antigua's International Financial Sector Authority.

135. Around the same time, Jonathan Winer, then the head of the U.S. State Department's Bureau for International Narcotics and Law Enforcement Affairs publicly stated that Antigua was "one of the most attractive financial centres in the Caribbean for money launderers."

136. In or around 2000, James Johnson, the U.S. Treasury Department's Undersecretary of Enforcement, complained in a letter to then Antiguan Prime Minister Bird, that Antigua had compromised its laws against money laundering and created a conflict of interest by allowing Stanford and other banking officials to sit on the regulatory board. He noted in the letter that the Financial Sector Authorities' seizure of bank documents from a civil servant "raises substantial

questions as to Antigua and Barbuda's commitment to provide effective supervision of its offshore sector."

137. In 2000, the Organization for Economic Cooperation and Development published a report containing a list of countries whose regulations were deemed designed to help people avoid paying taxes in their home countries and Antigua was on that list.

138. In 2001, the U.S. Senate's Minority Staff of the Permanent Subcommittee on Investigations' issued a report entitled "Report on Correspondent Banking: A Gateway for Money Laundering" dated February 5, 2001 ("U.S. Senate Report"). The U.S. Senate Report specifically named TD Bank as having provided correspondent banking services to AIB, an Antiguan financial institution that had been found to be engaged in fraud.

139. The U.S. Senate Report identified that AIB had fallen into liquidation after it laundered millions of dollars and collapsed from insider abuse, insufficient capital and the sudden withdrawal of deposits. TD Bank's involvement in this fraudulent scheme appeared as a case study in the U.S. Senate Report which identified that correspondent accounts are particularly vulnerable to money laundering and provide corrupt foreign banks access to the U.S. financial system and the freedom to move money around the world. With respect to TD Bank's relationship with the Antiguan AIB, it concluded, among other things, that:

(a) TD Bank was used to receive wire transfers from fraud victims and/or to disburse the illicit funds to accounts controlled by the criminals; and

(b) TD Bank in Canada was a major conduit for AIB funds in to the U.S. banking system and that between June 1996 and January 1997, US$20.9 million was wired to the AIB correspondent account from the account at TD Bank in Canada.

140. It was apparent from the U.S. Senate Report that TD Bank representatives were interviewed and asked to produce documents regarding TD Bank's relationship with AIB. These requests occurred while Stanford orchestrated the SIB Looting and while TD Bank provided correspondent banking services to SIB. Despite this, TD Bank apparently failed to adequately review, investigate or monitor its other Antiguan based correspondent bank accounts, including those of SIB and BOA. In addition, at the same time, TD Waterhouse continued to manage investment portfolios for SIB and BOA.

141. In 2003, and continuing at least until 2007, the U.S. State Department's INCSRs listed Antigua as a "jurisdiction of major concern" on its list of Major Money Laundering Countries.

142. In or around February 2007, Antiguan Prime Minister Baldwin Spencer accused Stanford of "political interference" after Stanford stated he would be touring the 17 constituencies in Antigua outlining his proposals for future development. Stanford also met with a committee of the Antiguan Cabinet and leaders of the opposition party to outline his investment program.

143. Further, at relevant times, the FSRC employed only three individuals to examine the affairs of all Antiguan banks. This was the case despite the fact that Antigua's Gross Domestic Product amounted to only a fraction of the assets claimed to be deposited at SIB alone during the same period.

144. TD Bank was aware of the extensive and public condemnation of Antigua's banking regulations and AML practices, as well as Stanford's well-publicized involvement with and manipulation of Antigua's regulatory regime.

145. The FinCEN Advisory was particularly relevant to TD Bank's relationships with SIB and BOA. This was because, at the time of the FinCEN Advisory, TD Bank had only two correspondent banking relationships with Antigua-based banks: SIB and BOA. The FinCEN Advisory therefore served as an express warning to TD Bank that banking services should not have been provided to SIB or BOA.

146. On September 29, 1999, Davis wrote to John Pepperell of TD Waterhouse to address "reports in the media [of] questionable banking practices, which involve transactions with financial institutions located in offshore jurisdictions"; a clear reference to the FinCEN Advisory and associated media reports. At the same time, Davis offered to have SIB's legal department "present [SIB's] comprehensive program to [TD Bank's] compliance department or others within your organization."

147. A TD Waterhouse employee responded to Davis' letter, noting simply that SIB's "cognizance of this problem and commitment to ensure your offshore bank officers know how to deal with this issue is assuring to us" and that it would "not be necessary" to have "[SIB's] legal department present your comprehensive program to our compliance department." Neither TD Bank nor TD Waterhouse took any steps to limit or review the banking services provided to SIB as a result of the FinCEN Advisory.

148. TD Bank was required to know the foregoing information in respect of Antigua and Stanford's influence there. Had TD Bank undertaken reasonable due diligence in respect of SIB

and Stanford, it would have discovered such information. That information alone indicated that banking services should not have been provided to SIB. However, even if banking services continued to be provided, the information revealed by a reasonable amount of due diligence in respect of Antigua at the very least indicated that TD Bank was required to undertake enhanced due diligence with respect to SIB, its business, Stanford and SIB's TD Bank accounts. To the extent that TD Bank did not undertake such enhanced due diligence, TD Bank failed to act as a reasonable bank would have in the same suspicious circumstances.

149. TD Bank was aware of sufficient information such that it knew or ought to have known that, or was recklessly or willfully blind to the fact that, Stanford and SIB were high risk customers that should not have been provided with the privileges and access that a correspondent banking relationship with TD Bank provides.

B. TD Bank Had an Exclusive Window Into SIB's Affairs

150. TD Bank's unique position provided it with sufficient information amounting to knowledge of the SIB Looting. This unique positioning was a result of the fact that:

(a) TD Bank provided correspondent banking services to SIB;

(b) TD Bank provided correspondent banking services to BOA;

(c) TD Bank provided banking services to Caribbean Star Airlines;

(d) TD Bank provided trade financing and treasury services to SIB;

(e) TD Waterhouse managed an investment portfolio for SIB; and

(f) TD Waterhouse managed an investment portfolio for BOA.

151. Each of these relationships required TD Bank and TD Waterhouse to obtain substantial information from a Stanford-owned entity in order to commence and continue the relationship. TD Bank was in the unique position of being able and duty bound to ask questions and require satisfactory answers from SIB, Stanford and the Other Insiders. Each relationship also uniquely positioned TD Bank to understand the transactions that were being undertaken by those Stanford-owned entities, as well as the relationship between those entities.

152. TD Bank has admitted that it had access to SIB's financial statements. It has further admitted that it did not conduct in depth reviews of those statements. This is an example of TD Bank not availing itself of its exclusive window into SIB's affairs as it was required to do.

153. In addition to having complete access to and control of all of SIB's accounts held at TD Bank and TD Waterhouse, TD Bank personnel had the opportunity to and in fact did visit, among other places, SIB's headquarters in Antigua and SFG's headquarters in Houston, Texas. The stated purpose of such visits was to conduct due diligence, including meeting senior SIB personnel and examining first hand SIB's operations.

154. For instance, in 1999 or 2000, a meeting took place between Stephen Cullen ("Cullen"), Bill Sebenski ("Sebenski") and John Leckie ("Leckie"). At that time, Sebenski had recently taken over Cullen's role as TD Bank's Managing Director of Correspondent Banking for the Caribbean and Latin America and both Cullen and Sebenski reported directly to Leckie, TD Bank's General Manager of Trade Finance and Correspondent Banking. At the meeting, Leckie inquired whether TD Bank really understood SIB's business. This inquiry was made notwithstanding that SIB had become a significant correspondent banking client of TD Bank and Leckie was responsible for overseeing the TD Bank-SIB relationship. Since both Cullen and

Sebenski answered that they in fact did not understand SIB's business, both were sent by Leckie to Houston, Texas to meet with SIB and SFG personnel.

155. After the due diligence trip to Houston, Texas, Cullen informed Sebenski that he was uncomfortable with TD Bank's continued correspondent banking relationship with SIB. Cullen further informed Sebenski that TD Bank needed to conduct a due diligence investigation of SIB and apply a strict KYC standard because "something did not seem right". However, TD Bank either did not conduct such an investigation or did so and nonetheless continued to provide correspondent banking services to SIB.

156. In fact, over the period that TD Bank provided correspondent banking services to SIB, TD Bank personnel took at least 15 trips to meet with SIB and/or SFG personnel in Antigua or Houston. TD Bank was able to and did set the agenda for such visits, including by indicating to SIB what information TD Bank would require during such visits. In addition, SIB personnel met with TD Bank personnel responsible for the SIB correspondent banking relationship in Toronto and at SIB's Montreal office on various occasions, as well as in other locations around the world including Miami, Memphis, New York, Vienna and London, England.

157. However, although TD Bank was required to take trips to meet with SIB personnel and thoroughly examine SIB's operations, the visits between TD Bank and SIB personnel consisted primarily of expensive meals, high-priced accommodations and social events such as participating in or attending at PGA golf Pro-Am tournaments and cricket tournaments hosted by Stanford. Further, to the extent that TD Bank did undertake due diligence during such visits, that due diligence was inadequate. For instance, TD Bank focused on questions concerning SIB's customers. Although TD Bank was required to ask such questions, it was also required to ask

questions and demand satisfactory answers in respect of SIB's own operations and affairs, including in respect of Stanford personally, but failed to do so.

158. The Applicable Standards (which are discussed below at paragraphs 241 to 309) required TD Bank to aggregate all of the information acquired by TD Bank and TD Waterhouse in the course of providing the aforementioned services to Stanford-owned entities and to consider that information holistically when determining whether it was appropriate to provide correspondent banking services to SIB.

159. For example, in accordance with the Applicable Standards, TD Bank was required to "know" SIB and understand its business operations prior to agreeing to act as correspondent bank. As a result, at the time that TD Bank began providing correspondent banking services to SIB, TD Bank was required to know that SIB had neither Canadian customers nor business connections to Canada. TD Bank was also required to know that, while it had agreed to accept wire transfers in both Canadian and U.S. dollars, because SIB did not have Canadian customers, the wires processed by TD Bank would be exclusively in U.S. dollars. Similarly, TD Bank should have determined if other financial institutions had denied or ceased to provide correspondent banking services to SIB.

160. Moreover, TD Bank knew that by agreeing to provide SIB with correspondent banking services, it was agreeing to facilitate the transfer of funds into the U.S. and other jurisdictions in a manner which shielded the true nature of those transfers from the recipient banks in those jurisdictions and their regulatory authorities. This very same issue was confronted in the U.S. Senate Report regarding TD Bank's participation in the AIB fraud.

161. Thus, based on the information arising from the necessary due diligence required of TD Bank with respect to SIB, which was required to be conducted in addition to and in place of any due diligence previously undertaken with respect to BOA, TD Bank knew that there was no legitimate business or economic purpose for SIB to require correspondent banking services in Canada.

162. This was even more apparent due to the fact that SIB had an existing banking relationship with Trustmark in Houston, Texas (which a reasonable bank would have determined), making the business case for any correspondent banking services even more dubious. While Trustmark processed cheques for SIB, it declined to provide wire transfer services to SIB. As a practical matter, if SIB could not utilize wire transfers, it would have been virtually impossible for Stanford and the Other Insiders to perpetrate the SIB Looting because they would been forced to rely on mailing cheques in every instance where they caused SIB and its affiliates to conduct transactions. Stanford and the Other Insiders solved this issue by relying on TD Bank. They were able to do so notwithstanding that TD Bank was required by the Applicable Standards to decline to provide correspondent banking services to SIB.

163. In addition, having chosen to establish correspondent bank accounts for SIB, TD Bank was required, in accordance with the Applicable Standards, to undertake enhanced ongoing monitoring of SIB and the appropriateness of its relationship with SIB. Among other reasons, this was particularly true in light of the fact that:

(a) SIB was located in Antigua, one of the highest risk jurisdictions in the world;

(b) TD Bank was providing correspondent banking services, the highest risk type of banking services ; and

(c) all funds transferred to and from SIB's TD Bank accounts were done by wire transfer, a method which itself constitutes a high risk.

164. However, TD Bank has admitted that it did not undertake enhanced monitoring of SIB's accounts until late 2008 and only did so then because of concerns over SIB's liquidity.

165. The ongoing monitoring of SIB that TD Bank was required to undertake should have continuously ensured that SIB was utilizing its correspondent bank accounts in a manner consistent with how TD Bank understood those accounts would be utilized when it agreed to open them, or in accordance with its updated understanding of what normal usage of SIB's accounts entailed.

166. As such, when TD Bank compared its understanding of how SIB's accounts operated to the actual use of those accounts, TD Bank should have realized either (i) that it did not have an understanding of the normal use of SIB's correspondent bank accounts, or (ii) that its understanding of how SIB should have been using its correspondent bank accounts indicated that there was no legitimate business or economic purpose for SIB to require correspondent bank accounts in Canada. Either way, TD Bank's review of SIB should have led to the conclusion that TD Bank should not continue to provide correspondent banking services to SIB.

167. Alternatively, to the extent that TD Bank failed to conduct the necessary ongoing monitoring of SIB's correspondent bank accounts, it acted in direct contravention of the Applicable Standards, acted recklessly and fell clearly below the standard of a reasonable bank.

168. As a result, every day that TD Bank provided services to SIB, it did so in reckless disregard of the fact that there was no legitimate business or economic purpose to SIB's banking

relationship with TD Bank. This recklessness only got worse as the relationship continued and TD Bank obtained further information that amounted to actual knowledge of the SIB Looting.

169. In addition to the fact that there was no legitimate economic or business purpose to SIB's banking relationship with TD Bank, as a result of the aforementioned relationships, TD Bank was also uniquely positioned to have knowledge of SIB's general history (discussed at paragraphs 44 to 109) and also knowledge of the fact that:

(a) Prior to engaging TD Bank to provide correspondent banking services, Guardian or SIB used financial institutions in the U.S. for its correspondent banking purposes, including Chase Manhattan Bank ("Chase"), First Interstate Bank and Bank of America, all of which chose to end their relationships with Guardian or SIB. For instance, Bank of America's Compliance Department repeatedly insisted to Bank of America's management that providing services to SIB constituted an intolerable risk. After one year of providing such services, Bank of America's management came to agree with the warning of the Compliance Department and ended Bank of America's relationship with SIB;

(b) TD Bank previously provided correspondent banking services to AIB, another Antiguan financial institution. TD Bank was aware that its relationship with AIB caused TD Bank to become a conduit for the transfer of significant volumes of fraudulent transfers. In fact, the very same TD Bank executive who administered AIB's TD Bank account also was responsible for the SIB and BOA correspondent bank accounts with TD Bank. As such, TD Bank was aware of the clear and

present need to subject its other Antiguan correspondent bank customers, including SIB, to particular scrutiny;

(c) TD Bank contributed to the U.S. Senate investigation into correspondent banking. That investigation resulted in the U.S. Senate Report, which not only concluded that correspondent banking was a gateway for money laundering, but specifically noted the use of TD Bank's accounts to facilitate the fraud committed by AIB and Guardian Bank and Trust (Cayman) Ltd. Since TD Bank was aware of the U.S. Senate Report, TD Bank's awareness of the risks associated with providing correspondent banking was high, including with respect to providing such services to an Antiguan financial institution;

(d) SIB represented that Mercer, who was also a long-time friend of Davis, sat on an advisory board for SIB. If indeed Mercer sat on the advisory board, this relationship also provided TD Bank with access to information concerning the SIB Looting. If he did not, and SIB represented that he did, TD Bank ought to have been aware of this. Such a misrepresentation would have been a red flag, to say the least, to TD Bank that required TD Bank to investigate and take action;

(e) The rates of return generated by TD Waterhouse were at odds with the rates of return that SIB purportedly generated; and

(f) SIB directed TD Bank to send funds held in its correspondent bank accounts to locations and to entities in a manner that clearly indicated such funds were not being used as represented to SIB's customers, a clear "red flag" within the exclusive knowledge of TD Bank.

170. TD Bank, by virtue of its banking relationship with SIB, was also uniquely positioned to demand further particulars about the publicly available information concerning SIB and Stanford, all of which TD Bank was required to be aware of. If TD Bank demanded such further particulars, those particulars were denied by Stanford and the Other Insiders or, if provided, revealed further cause for concern. Any such result should have led TD Bank to determine that banking services should not have been provided to SIB. Alternatively, Stanford and the Other Insiders provided TD Bank with further particulars that were inconsistent with the publicly available information. Such inconsistencies were themselves a "red flag" that should have been properly investigated, with the result being that TD Bank determined banking services should not be provided to SIB.

171. As a result of such information, TD Bank was uniquely situated to identify the breaches of duty owed to SIB committed by Stanford and the Other Insiders through the orchestration of the SIB Looting.

C. TD Bank Knew or Ought to Have Known of Relevant Open Source Information

172. Over the period of time that TD Bank provided correspondent banking services to SIB, it knew or ought to have known, or was recklessly or willfully blind to, information that was discoverable with even limited investigative efforts. In accordance with the Applicable Standards, TD Bank was required to diligently conduct ongoing monitoring of such publicly-available or "open source" information pertaining to SIB and its business operations. A summary of such information follows.

173. Stanford petitioned himself into personal bankruptcy on February 17, 1984 before the U.S. Bankruptcy Court (for the Western District of Texas, Waco Division) under Case No. 6-84-00263-T on the basis of personal debts of US$13,648,618.75.

174. From 1985 until 1990, Guardian operated in Montserrat, a jurisdiction which was historically known to have inadequate AML regulations.

175. By 1988, Stanford had been accused of violating banking laws in Texas by running unlicensed "feeder" sales offices in Houston for Guardian. The U.S. Office of the Comptroller of the Currency in 1988 and again in 1989 issued advisories concerning Stanford's similar violations of banking laws in Florida and California.

176. By 1989, the banking system in Montserrat came under investigation by U.S. and British authorities. Consequently, Guardian itself came under scrutiny for possible drug money laundering. When Guardian was forced to report to the Montserrat banking authorities, Stanford and Davis fabricated account statements and ledgers.

177. On November 28, 1990, the Financial Secretary of Montserrat notified Stanford that it was going to revoke Stanford's banking licenses because:

(a) Guardian's auditor, C.A.S. Hewlett & Co. Ltd., was not an approved auditor;

(b) Guardian was operating in a manner "detrimental to its depositors";

(c) Guardian failed to supply satisfactory details as to its liquidity;

(d) Stanford was formerly a bankrupt; and

(e) Guardian had failed to submit annual financial statements.

178. However, before the threatened revocation could be imposed, Stanford caused Guardian to change its domicile to Antigua.

179. Stanford moved Guardian from Montserrat to Antigua at the very time that Montserrat was scrutinizing its banks. At the same time, Antigua subjected its offshore banking industry to limited regulation and had the reputation of being the most corrupt island in the Caribbean.

180. There were extensive deficiencies in Antigua's offshore banking industry and Stanford played a major role in Antigua's actions with respect to its offshore banking industry.

181. Having moved to Antigua, Guardian/SIB reported that it was audited by C.A.S. Hewlett & Co. Ltd., which is a small firm based in Antigua that clearly did not possess sufficient competence to adequately audit a financial institution the size and scale of SIB. This was evidenced by the fact that it did not have a website and basic internet-based searches would not reveal any information on the firm. Further, on account of being based in Antigua, C.A.S. Hewlett & Co. Ltd was not subject to significant regulatory oversight. Notably, it was also the same audit firm that Montserrat had deemed to be an unapproved auditor of Guardian.

182. In 1991, the U.S. Federal Bureau of Investigation, U.S. Customs and Texas law enforcement authorities investigated Stanford's possible involvement in drug money laundering. This investigation resulted in U.S. Customs officials searching Stanford's private jet when he returned from the Caribbean.

183. In 1994, then Antiguan Prime Minister Lester Bird allowed Stanford to organize and arrange financing for a public hospital project in Antigua. Stanford purportedly funded an interim loan to the Antiguan Government to finance 100 percent of the project's architectural and

engineering costs. Eventually, Stanford lent the Antiguan Government over US$40 million through BOA, thereby heavily indebting the Antiguan Government – BOA and SIB's only regulator – to Stanford. Stanford's involvement in the hospital project prompted a 1996 U.S. congressional investigation into corruption in Antigua.

184. In both 1995 and 1996, SIB disclosed *identical* rates of return of exactly 15.71 percent, a result that was highly unusual and unlikely.

185. In addition, SIB's Annual Reports disclosed rates of return far higher than those offered by traditional banks, including TD Bank. From 1997 until 2006, SIB disclosed returns on its CDs that were, at their worst, 140 percent greater than the average return generated by U.S. banks' CDs. At their best, the returns disclosed by SIB on its CDs were 388 percent greater than the average return generated by U.S. banks' CDs.

186. The SIB promotional materials, which induced prospective customers to purchase CDs, advertised rates of return in excess of those offered by TD Bank or other major financial institutions. The promotional materials did not explain how those rates of return were earned or could be paid.

187. On April 29, 1997, a verdict was rendered against Stanford by a U.S. Tax Court in his case against the Internal Revenue Service. The Court ruled that Stanford failed to file a 1990 tax return and owed in excess of US$500,000 in taxes and penalties related to his ownership of Guardian in Montserrat.

188. In July 1998, U.S. authorities obtained a warrant to freeze funds controlled by suspected money launderers. The seizure warrant was executed by U.S. authorities and sought to freeze a

total of US$3.3 million. While the seizure warrant sought to freeze funds in U.S. financial institutions, including SGC, most of the funds – nearly US$3.2 million – were found to be in an SIB account.

189. In November 1998, Stanford caused SIB to file a Regulation D ("Reg. D") exemption with the SEC. The exemption allowed SFG, via SGC, to sell SIB CDs to U.S. "accredited investors" in the U.S. without registering them as securities. SIB's initial Reg. D filing listed SIB CD offerings totalling only US$50 million. SIB's filed an amended Reg. D in November 2001 to increase the Reg. D offering to US$150 million. SIB filed additional amendments in March and November of 2004, increasing the size of SIB's CD offerings to US$200 million and then US$1 billion, clearly evidencing the massive sales of SIB CDs taking place in the U.S. In November 2007, SIB filed yet another Reg. D amendment to increase the size of the offering to US$2 billion.

190. From 1999 to 2008, SFG spent approximately US$4.8 million on government lobbying activities — spending US$2.2 million of that in 2008 alone — and its employees and its political action committee gave US$2.4 million to federal Democratic and Republican candidates since 2000. At the same time, SFG lobbied against aspects of proposed U.S. legislation aimed at cracking down on offshore banks and money laundering.

191. Beginning in or around 2001 and continuing until at least 2008, various employees of Stanford-owned entities filed individual cases with the American Financial Industry Regulatory Authority ("FINRA"), or its predecessor, claiming that they had been wrongfully dismissed and alleging fraudulent business practices in violation of U.S. securities laws.

192. In or around 2002, media reports indicated that Stanford and employees of SFG donated US$90,350 to the legal defense fund of Robert Torricelli ("Torricelli"), then a U.S. Senator from New Jersey. This represented the largest block of contributions to Torricelli's legal defense fund in the preceding reporting period. The legal defense fund existed to pay Torricelli's legal bills stemming from a criminal investigation into his involvement with Korean-American businessman David Chang. Torricelli notably sat on the Senate Subcommittee on Investigations and the Senate Finance Committee, both of which deal with money laundering issues. Torricelli was also a member of the Senate Finance Committee's Subcommittee on the Internal Revenue Service. At that time, the Internal Revenue Service was moving to obtain records of offshore bank credit cards that U.S. officials had said may be used to avoid taxes. Those same media reports noted the accusations that had been leveled against Stanford with respect to his influence in Antigua.

193. In or around November 2003, Stanford gave two Antiguan government officials – Antiguan Tourism Minister, Molwyn Joseph, and Antiguan Planning Minister, Gaston Browne – each US$37,000. At the time, both officials were part of a team negotiating with Stanford for a proposed exchange of two properties in St John's, Antigua. Civic groups publicly urged their removal, calling the payments "apparent inducements" and saying that the two had "serious conflicts of interest".

194. In or around 2004, World-Check, a reputable organization that gathers information globally on heightened risk individuals and entities, added Stanford to its database of high risk individuals and classified him as a PEP on account of, among other things, his association with then Antiguan Prime Minister Bird. By virtue of their positions or influence they may hold, PEPs present a high risk for potential involvement in bribery and corruption.

195. In or around 2005, a civil complaint against SIB and SGC was filed in the U.S. District Court for the Southern District of Florida by two investors. The investors claimed they were the victims of a "Ponzi" scheme which targeted South Florida residents of Venezuelan origin and that SIB and SGC knowingly aided and abetted the other individual defendants in their perpetration of the scheme.

196. In or around 2006, a former employee of a Stanford-owned entity filed a private whistle-blower lawsuit against Stanford and SGC. The suit, filed in Miami-Dade County Circuit Court in Florida, charged that SGC was attracting clients by selling CDs with artificially high yields and was operating a "Ponzi" scheme. The plaintiff also alleged that he was fired for raising concerns that the firm's practices violated federal and state laws. In addition, it was alleged that Stanford was bribing Antiguan regulators to keep them from passing money laundering legislation. After the presiding judge gave the plaintiff permission to depose Stanford, SGC became interested in settling and did so in December 2007.

197. In or around June 2007, the National Association of Securities Dealers (the "NASD") censured SGC and fined it US$20,000 for failing to establish and maintain a supervisory system reasonably designed to achieve compliance with applicable securities laws, regulations and NASD rules, and failing to maintain its required minimum capital.

198. In or around June 2007, World-Check added SGC to its database as a financial institution that posed a heightened risk. The resulting World-Check report reported that SGC was connected to, among others, Stanford, Davis and Pendergest-Holt. At the time that World-Check added SGC to its database, World-Check indicated that one or more public sources had reported that SGC distributed sales literature that failed to present a fair and balanced treatment of investment

risks and benefits, and contained misleading, unfair and unbalanced information. In addition, it appears on the face of the World-Check report that, prior to SIB being shut down in February 2009, World-Check updated its database to note that FINRA had censured and fined SGC on various occasions, that SGC had failed to adopt necessary supervisory procedures with respect to public disclosure and that SGC was alleged to be involved in a US$8 billion pyramid scheme.

199. SIB's 2007 Annual Report claimed that SIB's investment portfolio consisted of 58.6 percent equity, 18.6 percent fixed income, 15.6 percent alternative investments (i.e. hedge funds) and 7.2 percent precious metals. The 2007 Annual Report thus described SIB's portfolio as a "well-diversified portfolio of highly marketable securities issued by stable governments, strong multi-national corporations and major international banks". Other than the fixed income, the typical performance of every component of this investment allocation was volatile and subject to significant risk. SIB's 2007 Annual Report was therefore internally inconsistent because the purported composition of SIB's portfolio was at odds with the consistently high rates of return that SIB claimed to generate.

200. In or around January 2008, FINRA censured SGC and fined it US$10,000 for distributing misleading, unfair and unbalanced information about the CDs, as well the fact that the relationship between SIB and SGC could create a conflict of interest.

201. In 2008, SIB also disclosed that it had incurred a loss of 1.3 percent amidst one of the worst financial crises in history. In that same year, the S&P 500 lost 39 percent and the Dow Jones STOXX Europe 500 Fund lost 41 percent of their respective values.

202. In September 2008, the U.S. Federal Reserve Board served a subpoena on the Miami office of STC. The subpoena requested documents relating to, among other things, the

relationship between STC and Stanford Trust Company Ltd. (Antigua), as well as documents related to SIB CDs between STC and other SFG entities.

203. In or around September 2008, FINRA censured SGC and fined it US$10,000. Among other things, FINRA's findings stated that SGC's supervisory system did not provide for supervision reasonably designed to achieve compliance with applicable securities laws, as appears from the September 2008 FINRA report.

204. As detailed further below, in or around 2008, a major international clearing house, Pershing, announced that it could not verify Stanford was not involved in fraud of some nature.

205. In or around January 2008, two former top executives of SGC, Mark Tidwell ("Tidwell") and Charles Rawl ("Rawl") filed a wrongful dismissal claim against SGC. The claim alleged that SGC failed to file necessary forms with the U.S. Treasury disclosing its clients' offshore holdings and did not advise clients to file those forms. It also alleged that SGC purged files and destroyed documents as early as 2007 related to what Tidwell and Rawl claimed was an ongoing SEC investigation regarding practices relating to the sale of CDs. The suit also alleged that SGC gave clients false historical performance data for its securities.

206. In or around 2008, media reports indicated that the SEC was investigating SIB's CD sales and that it had issued subpoenas to two former SGC employees, Tidwell and Rawl, who, as previously noted, had sued SGC.

207. In or around January 2009, media reports described SIB as being a fraud. These reports noted that it was a "red flag" that the interest rates on CDs were as high as they were and that SIB's business model required depositors giving funds to the bank to invest in the market. They

also noted that it was suspicious that SIB had consistently achieved above-average results in all of its investment categories.

208. In or around January 2009, FINRA censured SGC and fined it US$30,000 for failing to adequately disclose the research methods used to report certain securities valuations and that it was making a market in the company's securities.

209. On or around February 11, 2009, *Bloomberg Businessweek* reported that the SEC, the Florida Office of Financial Regulation and FINRA were all investigating SFG. The report stated that the probe's focus was on the high-yield CDs and the investment strategy behind them, as well as how SFG could afford to provide employees with large bonuses, luxury cars and expensive vacations, especially in light of the fact that selling CDs is usually a low-margin business. The report also noted that SIB was audited by a small accounting firm, the principal of which had died on January 1, 2009.

210. TD Bank was actually aware of certain of the publicly-available information in respect of SIB. For instance, in response to a July 2008 *Bloomberg* article entitled "SEC Investigating Stanford Group Offshore-Back CDs", TD Bank contacted personnel from SIB and/or SFG and indicated that its "main question and concern about the Bloomberg article is about the alleged SEC investigation into SIB's sale of CDs into the US. This is the central and more significant issue in the media reports." Soon thereafter, Davis advised another SIB employee that TD Bank "was beginning to get nervous because of all the rumors circulating about SFG."

211. Notwithstanding TD Bank's concerns and the extensive publicly-available information in respect of Antigua, SIB and Stanford, all of which TD Bank was required to be aware of and consider, TD Bank took absolutely no steps whatsoever to limit SIB's banking activities or report

to any regulatory authority at all until receiving the freeze order dated March 12, 2009 from the SEC, nearly a month after SIB's collapse.

D. Similarly Situated Entities Knew of the SIB Looting or Refused to Provide Services

212. As a result of the extensive publicly-available information, even without the benefit of the window into SIB's affairs such as the one enjoyed by TD Bank, the SIB Looting was widely known in the law enforcement, AML and banking communities from at least 1997. TD Bank is part of these communities.

213. Notably, and as described below, other entities and regulators that were part of these communities concluded that business should not have been conducted with SIB or, in some cases, that the SIB Looting was taking place.

SocGen

214. For instance, on July 5, 2000, a report in respect of BOA was provided by a U.K. consulting firm, "Proximal Consulting", to a Swiss-based bank, Compagnie Bancaire Genève, which was subsequently acquired by SocGen in 2003 (the "Proximal Report"). The Proximal Report is a due diligence report that was completed in only a few hours and at a cost of only £500. It summarizes a compliance review of the affairs of BOA. In doing so, it also commented on both Stanford and SIB. For instance, paragraphs 4.3 – 4.4 of the Proximal Report state:

> In a controversial move in 1997, Lester Bird asked Stanford to undertake the task of tightening anti money laundering regulation in Antigua as a response to international pressure. Stanford created a board with himself as President to implement the changes and over 18 months, new laws to control money laundering were implemented. Five offshore "banks" were closed and 20 more were reviewed; "know your customer" laws were strengthened. However, the US authorities viewed Stanford's financing and participation of the board and his ownership of banks on the island as a conflict of interests. Moreover, the new law is reviewed as having substantial loopholes and making it more difficult to obtain

bank records. This led to the issue of the FinCEN advisory notice that is attached to this report.

The attached FinCEN advisory appears to have been conceived by the US State Department's Bureau of International Narcotics and Law Enforcement Affairs who are particularly concerned with the role and influence of R. Allen Stanford. One senior official from another US Government agency has been quoted on Stanford as saying, "Try as we might, we have never been able to come up with anything on him."

215. At paragraph 4.5, the Proximal Report states that "in relation to SIB, court documents we have seen show that":

Juan Zepeda Mendes, an influential member of the Carlillo Fuentes organization [Mexico's largest drug cartel at the time], opened an account in his name at SIB on 6 June 1997 with a transfer of $104,000 from Bear Stearns that we [sic] followed by subsequent transfers from Bear Stearns of $400,000 (19 June 1997) and $200,000 (2 July 1997).

Jorge Bastida, another influential member of the Carlillo Fuentes organization, deposited $1,191,332 in his account at SIB that consisted of five cheques all dated 18 April 1997 with consecutive numbers all drawn on an account of a Mexican Casa de Cambio.

216. Paragraph 4.6 of the Proximal Report addresses Stanford's involvement in and departure from banking in Montserrat. It states:

It is alleged that RAS previously owned a bank in Montserrat but he relinquished the licence in 1989/90. Further claims are that his voluntary relinquishment was due to the fact that the British Police were just about to engineer the formal revoking of the licence. Based on this information, there is a widely held view that SIB has had a somewhat dubious reputation for many years, but this has never been the subject of official action.

217. Paragraphs 5.1 and 5.2 of the Proximal Report discuss Antigua. They state:

Antigua has obtained a reputation as being a jurisdiction that has done very little about money laundering and has thus been the target of (in particular) South American and Russian criminals who have used the financial infrastructure of the island to successfully launder funds. This was highlighted by the collapse of the European Union Bank.

> Following the issue of the US Government Advisory Notice (which is attached to this report in full) many financial institutions based in Antigua have found it difficult to establish or continue correspondent banking relationships particularly with US based or owned banks. Unconfirmed reports suggest that one large US bank has closed all of its correspondent relationships with banks in Antigua.

218. In light of the foregoing, the Proximal Report concludes:

> The Bank of Antigua itself as a prospective partner and/or client of [SocGen] poses no problem in itself, as the bank is a domestic one operating solely in Antigua with no direct links to money laundering or other criminal activity. However, if the Bank of Antigua is being used as a channel to introduce clients from Stanford International Bank (or other customers not resident in Antigua) to [SocGen] we have concerns as to the consequences of this. Firstly it is an accepted fact that Stanford International Bank has been used by Mexican drug cartels to launder considerable volumes of criminally obtained funds. Secondly, because of the very high level of attention given to Antigua as a money laundering centre, it would be very difficult for [SocGen] to defend itself or its reputation should any problems occur in the future.

219. Notwithstanding its actual knowledge of the fact of "widely accepted" criminal money laundering activity at SIB and in Antigua generally, SocGen continued to provide banking services to SIB and Stanford until the collapse of SIB in February 2009. However, it has been alleged by Davis that Blaise Friedli, the principal officer at SocGen, was a friend of Stanford. He also alleged that both Friedli and other unnamed officials at SocGen received bribes from Stanford to ensure that SIB and SFG would continue to receive SocGen's services.

The SEC

220. The SEC office in Forth Worth, Texas reviewed the operations of SGC and its sale of SIB CDs in 1997. At that time, after only six days of field work in examination of Stanford and his companies, the SEC came to the conclusion that Stanford was likely operating a "Ponzi" scheme. SEC examiners concluded that SIB's statements promoting SIB CDs appeared to be misrepresentations. Those examiners noted that the interest rates purportedly paid on SIB CDs, combined with the large referral payments being made to SGC and SFG, were simply too high to

be achieved through the purported low-risk investments. Taking into account these and other facts, the SEC's Fort Worth branch chief concluded that the returns on SIB CDs were "absolutely ludicrous".

221. The SEC's office in Forth Worth conducted additional investigations into SGC and SIB in 1998, 2002 and 2004. Each examination resulted in the conclusion that the SIB CDs could not have been "legitimate" and that it was "highly unlikely" that the returns Stanford claimed to generate could have been achieved with the purported conservative investment approach. The only significant difference in the SEC's findings over the years was that the fraud grew exponentially from US$250 million to US$1.5 billion.

222. The SEC brought an end to the SIB Looting in February 2009, but its failure to do so earlier was the subject of a March 2010 report by the SEC's Office of the Inspector General. That report concluded that the SEC's failure to end the fraud on SIB and bring Stanford to justice did not result from a lack of evidence that the fraud on SIB was taking place. Rather, the report found that senior officials at the SEC's Fort Worth office felt that prosecuting large novel or complex cases was disfavoured in comparison to prosecuting numerous "quick-hit" cases.

223. In addition, the report found that the former head of the enforcement branch at the SEC's Fort Worth office, Spencer Barasch, who played a significant role in the multiple decisions to quash investigations of Stanford, sought to represent Stanford as legal counsel on three separate occasions after he left the SEC and, in fact, did represent Stanford briefly in 2006 before the SEC informed him he could not do so. As a result, he received the maximum allowable fine for a violation of U.S. conflict-of-interest rules and was barred from practicing before the SEC for one year due to his actions in connection with Stanford.

Pershing LLC

224. SGC entered into a "clearing agreement" with international clearing house Pershing in December 2005. Initially, Pershing processed wire transfers from client accounts it held for the purchase of SIB CDs. However, by approximately mid-2006, Pershing became concerned about the financial reliance of SGC on SIB because SGC was losing money and a significant portion of its revenue consisted of referral payments from SIB.

225. As a result, in the summer of 2006, Pershing began to ask for verification of SIB's assets and the returns generated by the SIB portfolio. When SGC responded with only generalities about SIB's investment policy, Pershing increased its due diligence efforts in respect of SIB. These efforts included, among other things, attempting to acquire a complete SIB CD prospectus and travelling to Antigua to meet with SIB personnel and SIB's regulator, the FSRC, to see documentation regarding SIB's balance sheet and the supporting paperwork that reflected the assets. However, in each instance, Pershing was met with stonewalling and excuses by SIB personnel, as well as by Leroy King, the senior-most official at the FSRC, who Stanford had bribed.

226. Ultimately, due to its continued concerns over its inability to gain transparency into SIB's portfolio, Pershing notified SGC that it would no longer process wire transfers from SIB. In connection with doing so, in December 2008, Pershing announced that it could not verify Stanford was not involved in fraud of some nature.

Ferrier Lullin & Cie

227. At least as of 2000, Swiss-bank Ferrier Lullin & Cie (now Julius Bär Group Ltd.) ("Ferrier Lullin") acted as the custodian for SIB's investments with Axia Investments in Switzerland.

228. Ferrier Lullin commissioned and received a due diligence report in respect of SIB dated May 10, 2002. Among other things, that report noted that:

(a) in the 1990s, "Antigua's offshore sector became more worrisome as individuals believe to have ties to Russian organized crime moved in";

(b) Stanford was appointed to spearhead the effort to reform Antigua's banking laws and later appointed to the board of authority to oversee Antigua's offshore banks. This was the case notwithstanding that Stanford owned the largest bank to be supervised;

(c) the U.S. State Department issued a report calling Antigua "one of the most attractive financial centers in the Caribbean for money launderers" and later stated that "[i]ndividuals suspected of involvement in money laundering and other illicit economic activities used their considerable influence to weaken Antigua's AML legislation", a clear reference to Stanford; and

(d) the U.S. had issued the FinCEN Advisory and that U.K. and French officials soon after voiced similar concerns.

229. In July 2003, an internal Ferrier Lullin memorandum confirmed concerns about Stanford and SIB. It noted that Ferrier Lullin employees from various departments had made inquiries

about SIB and had asked, among other things, whether SIB was truly a bank and if SIB was a shell bank being used to avoid rules in the U.S.

JP Morgan Chase

230. Between 1994 and 2003, the Middle Market division of JP Morgan Chase opened 22 bank accounts for SFG. During the same period, the Private Banking division of JP Morgan Chase held bank accounts for Stanford in his personal capacity. However, as a result of monitoring Stanford's accounts, the Private Banking division of JP Morgan Chase found "significant unfitting activities occurring in the accounts of R. Allen Stanford" and therefore closed those accounts.

231. Upon being notified that the Private Banking division of JP Morgan Chase had ended its relationship with Stanford, the Middle Market division began reviewing and more closely monitoring SFG's accounts. As a result of doing so, the Middle Market divison determined that it was "unable to obtain a reasonable explanation of the customer's account activities" and subsequently filed a Suspicious Activties Report in respect of SFG transactions totaling more than $170 million between January 1, 2003 and August 29, 2003. The Suspicious Activities Report identified various transactions giving rise to concerns about violations of the U.S. *Bank Secrecy Act* and money laundering. Such transactions included those with entities in Antigua, entities related to SFG (including SIB) and with TD Bank.

Synder Kearney LLC

232. In 2008, SGC engaged Snyder Kearney LLC ("Snyder Kearney"), a prominent U.S. law firm, to perform due diligence in respect of two private fund offers that were sponsored by SGC and managed by another Stanford-owned entity, Stanford Capital Management. Synder Kearney

initially accepted the engagement and thereafter requested verification of SIB's portfolio. However, SGC refused to provide the relevant information and Snyder Kearney promptly withdrew from the engagement.

First Advantage Investigative Services

233. Due diligence in respect of SIB CDs was also undertaken by or on behalf of certain prospective investors. For instance, Randy Shain ("Shain") of the New York-based First Advantage Investigative Services was retained to conduct due diligence in respect of SIB and SIB CDs on behalf of a client.

234. In completing such due diligence, Shain identified and reviewed certain of the "open source" information in respect of SIB and Stanford outlined above. Such information pertained to, among other things, various lawsuits filed against Stanford or his companies, all of which alleged money laundering and other impropriety, Antigua's AML deficiencies and Stanford's involvement therewith, and certain of Stanford's bribes and conflicts of interest.

Fidelity Investments

235. Fidelity Investments commenced providing services to SIB and SGC. However, following its attempt to conduct certain due diligence activities, it soon thereafter terminated the relationship.

Chase Manhattan Bank

236. In its earlier years, SIB (then known as Guardian) had a correspondent banking relationship with Chase. However, Chase ended its relationship with SIB over concerns about double endorsed cheques.

First Interstate Bank

237. First Interstate Bank began providing correspondent banking services to SIB (then known as Guardian) to SIB in the late 1980s. It ended its relationship with SIB in the early 1990s. It has been reported that First Interstate Bank provided money laundering services to alleged narcotics traffickers and was placed under investigation by U.S. Federal authorities. Stanford reportedly personally knew the directors of First Interstate Bank at the time, who were themselves suspected of being involved in the alleged money laundering activities.

Citizens & Southern Bank

238. In December 1990, when BOA was purchased by Stanford, Citizens & Southern Bank ("C&S") of Atlanta, Georgia was BOA's correspondent bank. Stanford attempted to "piggyback" SIB into a correspondent banking relationship with C&S based upon BOA's pre-existing relationship. C&S, however, promptly closed the SIB U.S. dollar account of BOA and informed Stanford that he could not indirectly use BOA's correspondent banking relationship for SIB. As a result, Stanford and some of the Other Insiders flew to C&S Headquarters in Atlanta to try to convince C&S to independently approve a correspondent banking relationship with SIB. C&S did not approve SIB for a correspondent banking relationship, so the entire group travelled to Thibodaux, Louisiana in an attempt to rectify problems that SIB was also then having with its correspondent banking relationship with First Interstate Bank.

Bank of America

239. Bank of America provided SIB with correspondent banking services over the course of approximately one year, which occurred in or around 1993 and 1994. During that period, Bank of America's Compliance Department repeatedly insisted to Bank of America's management that providing services to SIB constituted an intolerable risk as a result of AML concerns. After one

year of providing such services, Bank of America's management came to agree with the warning of the Compliance Department and ended its relationship with SIB.

The NASD

240. The NASD concluded as early as 2006 that SGC violated NASD rules through "unwarranted and misleading" assertions that SIB's portfolio investments were "prudent" at a time when SGC admitted that it did not know what was in SIB's portfolio.

U.S. Customs

241. Even as far back as the early 1990s, U.S. Customs officials noted that SIB (then known as Guardian) had "constant cash flow" from foreign depositors but "no regulation of its activities" and U.S. Customs took an interest in the "possible smuggling activities of principals in the Stanford organization."

242. The aforementioned conclusions were reached by the above-listed entities, all of which did not have TD Bank's extensive access to SIB and its operations. TD Bank's approach differed from other entities that were similarly required to and did undertake due diligence on SIB. For instance, when Pershing was met with stonewalling and excuses by SIB personnel, Pershing stopped providing services to SIB. By comparison, TD Bank:

(a) did not ask questions or demand answers as it was required to do and that would have revealed the secret kept by Stanford and the Other Insiders in respect of Tier III and the SIB Looting, in which case it fell below the standard of care;

(b) asked the required questions but was denied answers and nonetheless continued to provide banking services to SIB, in which case it fell the standard of care; or

(c) asked the required questions and was provided the answers and thereby became expressly aware of the true nature of Tier III and the SIB Looting, but nonetheless continued to provide banking services to SIB, in which case it fell below the standard of care.

243. In all of the circumstances, TD Bank should not have provided banking services to SIB.

VI. APPLICABLE BANKING STANDARDS AND LAWS

244. The standard practices and procedures undertaken by Canadian financial institutions that enter into correspondent banking relationships derive from a combination of standards developed by financial regulators and relevant financial industry organizations, as well as legislative and statutory duties. The banking standards and laws that were applicable to TD Bank during the period that it provided correspondent banking services to SIB are set out below.

A. Financial Regulators and International Organizations Set the Standards

1. The Applicable Standards

245. Financial regulators and international organizations focused on the global financial system have for decades developed, monitored and implemented standards aimed at detecting, deterring and preventing money laundering. In addition to establishing standards for financial institutions concerning client identification and account monitoring, these regulators and organizations have long warned that correspondent banking relationships with foreign financial institutions often facilitate money laundering and that, as a result, correspondent accounts merit particular care, as well as enhanced due diligence and monitoring. This is especially the case with respect to accounts involving the provision of services in jurisdictions known to have relaxed regulatory standards for banks, since failure to exercise such care may result in the

correspondent bank holding and/or transmitting money linked to corruption, fraud or other illegal activity.

246. In Canada, federally regulated financial institutions ("Financial Institutions") such as TD Bank are regulated by the Office of the Superintendent of Financial Institutions ("OSFI"). Since 1990, OSFI has developed standards for Financial Institutions concerning AML compliance. These standards are contained in the following relevant documents:

(a) OSFI Best Practices: Deterring and Detecting Money Laundering, 1990 (the "1990 OSFI Standards");

(b) OSFI Guideline B-8, Deterring and Detecting Money Laundering, September 1996 (the "1996 OSFI Standards");

(c) OSFI Guideline B-8, Deterring and Detecting Money Laundering, April 2003 (the "2003 OSFI Standards");

(d) OSFI Guideline B-8, Deterring and Detecting Money Laundering, November 2004 (the "2004 OSFI Standards");

(e) OSFI Guideline B-8, Deterring and Detecting Money Laundering, November 2008 (the "2008 OSFI Standards")

(collectively, the "OSFI Standards").

247. TD Bank was consulted by OSFI when the OSFI Standards were drafted.

248. Since 2000, the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC") has been responsible for ensuring Financial Institutions' compliance with

Canadian AML standards pursuant to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 (the "PCMLTFA"). However, OSFI has continued to include AML compliance in its examinations of Financial Institutions for its own purposes, and as part of its memorandum of understanding with FINTRAC to perform AML compliance on its behalf.

249. Financial Institutions are also subject to the standards developed by the Basel Committee on Banking Supervision, which are contained in the following relevant documents:

(a) Customer Due Diligence for Banks, October 2001 (the "2001 Basel Standards");

(b) (i) General Guide to Account Opening and Customer Identification, February 2003, and (ii) Initiatives by the Basel Committee on Banking Supervision et al to combat money laundering and the financing of terrorism, June 2003 (together, the "2003 Basel Standards"); and

(c) Consolidated KYC Risk Management, October 2004 (the "2004 Basel Standards")

(collectively, the "Basel Standards").

250. Canada endorsed the Basel Standards.

251. The Financial Action Task Force (the "FATF") is an intergovernmental body that develops, monitors and evaluates countries' AML standards. The FATF has established standards applicable to Financial Institutions, which are contained in the following relevant documents:

(a) FATF 40 recommendations, 1990 (the "1990 FATF Standards");

(b) FATF 40 recommendations, 1996 (the "1996 FATF Standards");

(c) FATF 40 recommendations, 2003 (the "2003 FATF Standards"); and

(d) FATF Guidance on the Risk-Based Approach to Combating Money Laundering and Terrorist Financing, 2007 (the "2007 FATF Standards")

(collectively, the "FATF Standards").

252. Similarly, Financial Institutions are required to meet the standards developed by the Wolfsberg Group ("Wolfsberg"). Wolfsberg is an international association of banks which aims to develop financial service industry standards for, among other things, AML policies pertaining to correspondent banking. Such standards were established in AML Principles for Correspondent Banking, 2002 (the "2002 Wolfsberg Standards" or the "Wolfsberg Standards").

253. During the time period that TD Bank provided correspondent banking services to SIB, the OSFI Standards, the Basel Standards, the FATF Standards and the Wolfsberg Standards (together, the "Applicable Standards") were binding on TD Bank and informed the standard of reasonable banking that it was obliged to meet. By providing banking services to SIB, TD Bank failed to meet the Applicable Standards.

254. Notably, throughout the period that TD Bank provided correspondent banking services to SIB, it completed and submitted questionnaires to Wolfsberg. In each instance, TD Bank's completed questionnaires indicated that it had in place and adhered to strong KYC and AML policies, all of which were in compliance with the Wolfsberg Standards. However, it is clear that TD Bank was in fact not in such compliance.

2. Timeline of the Standards' Implementation

255. The Applicable Standards informed the standard of reasonable banking that TD Bank was obliged to meet during the time that it provided correspondent banking services to SIB. The Applicable Standards evolved as each of the individual standards was revised. The result of each revision to one of the OSFI Standards, the Basel Standards, the FATF Standards or the Wolfsberg Standards was that the Applicable Standards were continuously updated, strengthened and made more onerous over the time period that TD Bank provided correspondent banking services to SIB.

The 1990 Applicable Standards

256. Beginning in 1990, approximately two years prior to TD Bank beginning to act as correspondent bank for SIB, TD Bank was required to implement and follow policies and procedures that were compliant with the 1990 FATF Standards. Among other things, the 1990 FATF Standards required Financial Institutions to:

(a) undertake due diligence on all clients;

(b) develop AML policies, procedures and controls;

(c) develop screening procedures for prospective employees and provide those employees with ongoing training with respect to AML compliance;

(d) pay special attention to business relationships and transactions with clients and other financial institutions that did not sufficiently apply the FATF Standards; and

(e) report all suspicious transactions to the appropriate authorities, with particular emphasis placed on funds Financial Institutions suspected were derived from criminal activity.

257. As a result of the 1990 FATF Standards, Financial Institutions were required to take care when entering into relationships with new clients, but also to review and monitor the accounts of existing clients.

258. The 1990 FATF Standards also required Financial Institutions to gather sufficient client identification information about respondent institutions and assess respondent institutions' AML controls when acting as a correspondent bank. This was true with respect to both new and existing correspondent bank clients.

The 1996 Applicable Standards

259. By 1996, in addition to complying with the previously implemented Applicable Standards, Financial Institutions were required to comply with the 1996 OSFI Standards and the 1996 FATF Standards.

260. The 1996 OSFI Standards explicitly recognized that Financial Institutions' most important weapon against money laundering was knowledge of their clients. In keeping with this recognition, among other things, the 1996 OSFI Standards required Financial Institutions to:

(a) take special care when opening accounts for foreign deposit-taking institutions;

(b) subject the activities of all clients, regardless of their risk profile, to some form of ongoing monitoring to detect transactions or attempted transactions that may be suspicious;

(c) establish an annual self-assessment program to assess the effectiveness of their AML programs and procedures, the purpose of which was to enable management to identify areas of risk or assess the need for additional controls;

(d) have, as part of their deterrence and detection procedures, a process to promptly identify and report suspicious transactions, particularly transactions relating to pass-through accounts, such as correspondent banking accounts, both internally to senior management and to the appropriate authorities; and

(e) undertake enhanced monitoring of pass-through accounts, such as correspondent banking accounts, using high risk indicators, such as, for example, the accumulation of balances inconsistent with known revenue or turnover and subsequent transfers to accounts held overseas.

261. In addition, among other things, the 1996 FATF Standards required Financial Institutions to:

(a) identify and verify through official or other reliable documents the identity of their clients;

(b) designate compliance officers at the senior management level to ensure compliance with their AML programs;

(c) implement enhanced due diligence procedures to be utilized in higher risk situations; and

(d) pay particular attention to complex or unusual transactions with no apparent economic purpose or visibly lawful purpose and examine the background of such transactions, with the findings being documented in writing and made available to supervisors, auditors and law enforcement agencies.

The 2001 Applicable Standards

262. By 2001, in addition to complying with the previously implemented Applicable Standards, Financial Institutions were required to comply with the 2001 Basel Standards.

263. Among other things, the 2001 Basel Standards required Financial Institutions to:

(a) obtain financial statements and descriptions of clients' principal lines of business with respect to large corporate accounts;

(b) understand the normal and reasonable account activity of all clients in order to reduce risk;

(c) perform enhanced due diligence if the Financial Institution had any reason to believe that an applicant was being refused banking facilities by another bank;

(d) conduct regular reviews of existing client identification records in order to ensure that those records remained up-to-date;

(e) conduct regular reviews of a client's account whenever a significant transaction took place, client documentation standards changed or the way the account operated changed;

(f) develop KYC risk management programs that included proper management oversight, systems and controls, segregation of duties, training and other related policies;

(g) determine whether they were engaged in business relationships with any PEPs and identify any individuals or entities associated with a PEP;

(h) ensure that senior managers knew the circumstances of high risk private banking clients and, with respect to those clients, were aware of relevant third party information; and

(i) ensure that internal audit teams were adequately staffed with individuals who were well-versed in risk management policies and controls.

264. The 2001 Basel Standards also required Financial Institutions to have in place clear client acceptance policies and procedures that described the types of customers that posed a higher risk and ensured enhanced due diligence took place with respect to such higher risk clients. Where high risk clients posed problems in the banking relationship that could not be resolved, Financial Institutions were required to close the account and return money to its source.

265. The 2001 Basel Standards also recognized that certain types of transactions should alert Financial Institutions to the possibility that a client is conducting unusual or suspicious activities. Such transactions were specifically recognized to include those that did not readily appear to

make economic or commercial sense, or those that involved large amounts of cash deposits that were inconsistent with the normal and expected transactions of a particular variety of client.

266. Notably, the 2001 Basel Standards noted that very high account turnover, inconsistent with the size of the balance, may indicate that funds were being moved through the account for an improper purpose.

267. In addition, the 2001 Basel Standards specifically addressed correspondent banking. In particular, the Basel Standards required that Financial Institutions conduct appropriate levels of client identification in order to fully understand the nature of a respondent bank's business and that Financial Institutions employ enhanced due diligence procedures with respect to any transactions carried out through correspondent banking accounts.

268. Finally, pursuant to the 2001 Basel Standards, Financial Institutions were required to pay particular attention when undertaking or continuing correspondent banking relationships with a respondent bank located in a jurisdiction with poor KYC standards.

The 2002 Applicable Standards

269. By 2002, in addition to complying with the previously implemented Applicable Standards, Financial Institutions were required to comply with the 2002 Wolfsberg Standards.

270. The 2002 Wolfsberg Standards required Financial Institutions to utilize a risk-based approach to decide whether to initiate a relationship with a correspondent banking client and the level of due diligence required to continue such relationships. When conducting due diligence with respect to a correspondent banking client, among other things, Financial Institutions were required to consider:

(a) the client's domicile and organization;

(b) the client's ownership and executive management;

(c) the nature of the client's business;

(d) the products and services offered by the client;

(e) the client's regulatory status and history;

(f) the client's AML controls;

(g) whether the client had any business arrangements with shell banks; and

(h) the client's adherence to the Wolfsberg Standards.

271. The 2002 Wolfsberg Standards also required required Financial Institutions to conduct independent, risk-based reviews of all existing correspondent banking accounts to ensure compliance with the policies and procedures of the Financial Institution, and determine whether additional due diligence was required. When conducting such reviews, Financial Institutions were required to consider the same type of information as was required for new correspondent banking clients.

272. The 2002 Wolfsberg Standards required that at least one person senior to and other than the banker responsible for a particular correspondent account approve all correspondent banking relationships, including previously existing relationships. The 2002 Wolfsberg Standards also required a representative of the Financial Institution to visit the premises of correspondent banking clients in order to conduct due diligence.

273. The 2002 Wolfsberg Standards also noted that enhanced due diligence may be required for correspondent banking clients whose risk profile was higher than that of a typical correspondent banking client. This enhanced due diligence was required to focus on:

(a) ownership and management of the correspondent banking client;

(b) involvement of any PEP with the correspondent banking client;

(c) the correspondent banking client's AML controls; and

(d) any downstream correspondent clearing.

274. Finally, the 2002 Wolfsberg Standards required Financial Institutions to establish organization-wide policies and programs to address unusual or suspicious transactions. These policies and programs were required to provide examples and guidance as to what was to be considered unusual or suspicious and establish reporting protocols in accordance with applicable laws.

The 2003 Applicable Standards

275. By 2003, in addition to complying with the previously implemented Applicable Standards, Financial Institutions were required to comply with the 2003 OSFI Standards, the 2003 FATF Standards and the 2003 Basel Standards.

276. Among other things, the 2003 OSFI Standards required Financial Institutions to:

(a) ensure that senior management was responsible for the development of AML and risk management programs;

(b) keep their boards of directors adequately informed about their AML and risk management programs and those programs' effectiveness;

(c) obtain their boards of directors' approval of their AML and risk management programs at both the initial implementation stage and whenever those programs were reviewed; and

(d) report all suspicious transactions in accordance with applicable legislation.

277. Among other things, the 2003 FATF Standards required Financial Institutions to:

(a) have a risk management system in place to determine the existence of any clients or potential clients who were PEPs; and

(b) incorporate AML policies that addressed the risks associated with non-face-to-face business relationships and transactions.

278. With respect to PEPs, in addition to normal due diligence measures, according to the 2003 FATF Standards, Financial Institutions were required to ensure that senior management approval was granted before establishing the business relationship. They were also required to establish the source of any PEP's wealth and funds and to conduct enhanced, ongoing monitoring of their business relationship with any PEP.

279. With respect to correspondent banking clients, the 2003 FATF Standards also required Financial Institutions to determine from publicly available information the reputation of the respondent institution and whether it had been the subject of past money laundering or terrorist financing investigations or regulatory action.

280. Among other things, the 2003 Basel Standards required Financial Institutions to take decisions to enter into business relationships with higher risk clients, including correspondent banking clients, at the senior management level.

281. The 2003 Basel Standards also required Financial Institutions to develop risk management programs that ensured consistent client identification and account monitoring across the Financial Institutions' business lines and geographic locations.

282. Finally, the 2003 Basel Standards explicitly required that Financial Institutions implement rigorous standards for due diligence in high risk areas and develop policies and standards for handling relationships in such areas. One type of high risk relationship identified by the 2003 Basel Standards were those between a Financial Institution and a PEP.

The 2004 Applicable Standards

283. By 2004, in addition to complying with the previously implemented Applicable Standards, Financial Institutions were required to comply with the 2004 OSFI Standards and the 2004 Basel Standards.

284. Among other things, the 2004 OSFI Standards required Financial Institutions to:

(a) conduct higher levels of due diligence when dealing with clients from countries with AML requirements that were considered inadequate; and

(b) have customer identification and verification processes which were fully compliant with the PCMLTFA.

285. In addition, the 2004 Basel Standards required Financial Institutions to implement risk management policies and procedures to be applied across their various business lines and geographic locations. In particular, among other things, the 2004 Basel Standards required Financial Institutions to:

(a) develop standards on what records are to be obtained and retained for customer identification across their banking groups as a whole;

(b) maintain client identification information in a readily retrievable format that was accessible globally by their banking groups as a whole;

(c) have in place systems and processes to monitor and share information on the identity of clients and client account activity throughout their banking groups as a whole;

(d) be alert to clients that use their various business lines across different banking groups (for example, banking, securities and insurance) and undertake transaction monitoring on both a local and centralized basis;

(e) have their internal and external audits evaluate adherence to compliance with relevant standards across their banking groups as a whole; and

(f) implement policies and procedures to identify unusual account activity throughout their banking groups as a whole, regardless of how those accounts were utilized.

The 2007 Applicable Standards

286. By 2007, in addition to complying with the previously implemented Applicable Standards, Financial Institutions were required to comply with the 2007 FATF Standards.

287. Among other things, the 2007 FATF Standards required Financial Institutions to:

(a) utilize information generated by competent third parties to identify suspicious activity;

(b) exercise increased awareness of higher risk clients and any transactions such clients undertook across their various business lines; and

(c) develop policies and procedures so that senior management could independently validate the development and operation of their risk assessment and risk management processes.

The 2008 Applicable Standards

288. By 2008, in addition to complying with the previously implemented Applicable Standards, Financial Institutions were required to comply with the 2008 OSFI Standards.

289. Among other things, the 2008 OSFI Standards required Financial Institutions to:

(a) comply with all PCMLTFA requirements, including with respect to correspondent banking;

(b) take reasonable measures to obtain the names and occupations of all directors and beneficial owners of 25 percent or more of their corporate clients;

(c) report all transactions or attempted transactions that were suspicious to FINTRAC;

(d) conduct self-assessment of AML controls at least annually; and

(e) have independent auditors conduct effectiveness testing of their AML controls at least every two years, with the results thereof being reviewed by a senior officer.

290. In addition, the 2008 OSFI Standards explicitly recognized that the identity and beneficial ownership of a client can be determined using a credible public or other database and that enhanced account monitoring should include the gathering of information from open public sources.

291. The 2008 OSFI Standards also required that, where a Financial Institution determined that a foreign financial institution for which it provided correspondent banking services did not have in place AML policies consistent with the PCMLTFA, ongoing monitoring of all transactions should occur to mitigate the higher risk.

292. Further, the 2008 OSFI Standards required Financial Institutions to determine whether a client is a politically exposed foreign person ("PEFP"). When making that determination, Financial Institutions were required to consult public databases. According to the 2008 OSFI Standards, if a Financial Institution had a client who was a PEFP, the Financial Institution was required to:

(a) take measures to determine the source of the PEFP's funds;

(b) obtain senior management approval to open or maintain the PEFP's account; and

(c) conduct enhanced ongoing monitoring of the PEFP's account.

293. Similarly, where a Financial Institution was aware that a PEFP owned or control 25 percent or more of a corporate client, or if a PEFP was a director or officer of a corporate client, the 2008 OSFI Standards required the Financial Institution to assess the risk of providing banking services and apply enhanced due diligence as appropriate.

3. Financial Institutions Adopt the Standards

294. At all times, Financial Institutions were required to adhere to the Applicable Standards. As a result, it was customary for Financial Institutions to adopt the Applicable Standards into their banking practices.

295. For example, as a result of the Applicable Standards, since at least 1990, it was customary for Financial Institutions to continuously review existing correspondent accounts to ensure they met required standards and to close accounts and decline to provide service to correspondent banking customers that were not in compliance with such standards.

296. For instance, in 2001, several major American banks testified before the U.S. Permanent Subcommittee on Investigations that their practices in respect of correspondent banking included heightened due diligence, heightened monitoring and strict KYC procedures. More specifically, these practices included:

(a) evaluating the overall adequacy of banking supervision in the jurisdiction of the respondent bank;

(b) reviewing media reports for information on the respondent bank;

(c) establishing a detailed understanding of correspondent banking customers' ownership structure;

(d) establishing an understanding of correspondent banking customers' cash flows; and

(e) regularly preparing memoranda summarizing contacts with the bank and information about its staff and operations, all of which appears from the U.S. Senate Report.

297. Notably, one bank testified that it reviewed individual accounts, particularly Antiguan accounts, and would close the account if the review was unsatisfactory.

298. Further, in February 2000, the Ranking Minority Member of the Permanent Subcommittee on Investigations distributed a survey on correspondent banking to 20 banks providing correspondent banking services from locations in the U.S., at least two of which were Canadian banks. All 20 banks responded to the survey. The survey responses revealed the following:

(a) of the 12 banks that detailed their specified account opening procedures in response to the survey, all but three banks said that they evaluate the overall adequacy of banking supervision in the jurisdiction of the respondent bank and review media reports for information on the applicant; and

(b) a majority of the surveyed banks said they inquire about the applicant with the jurisdiction's bank regulator, check with local bank branches (if applicable), check

with bank rating agencies, obtain bank references and complete a customer profile.

299. The survey also specifically addressed the provision of correspondent banking services to offshore banks, such as SIB. In response, nine banks said they would not in any circumstance open a correspondent account for an offshore bank, while eight of the banks said there are times when they would open such an account, but that they would do so only when the offshore bank is part of a well-known financial group or a subsidiary or affiliate of an internationally reputable bank.

300. Responses to the survey also addressed the provision of correspondent banking services to an Antiguan respondent bank. The report in respect of the survey results states that "most banks have no relationships" with banks in Antigua. It further noted that one bank responded that it monitors every transaction involving Antigua, while another bank said that it does not accept any transfers from or to Antigua at all.

B. Canadian AML Legislation

301. In addition to complying with the Applicable Standards, Financial Institutions such as TD Bank are also required to comply with the laws of Canada which address AML and banking practices and directly incorporate the Applicable Standards. In Canada, such practices are primarily addressed by way of the PCMLTFA and its regulations.

302. The PCMLTFA, which was originally titled the *Proceeds of Crime (Money Laundering) Act*, came into force in 2000. Section 7 of the Act came into force in 2001 and required Financial Institutions to:

> report to [FINTRAC], in the prescribed form and manner, every financial transaction that occurs in the course of their activities and in respect of which there are reasonable grounds to suspect that the transaction is related to the commission of a money laundering offence or a terrorist activity financing offence.

303. In 2007, the PCMLTFA was amended to include codification of many of the aforementioned Applicable Standards. For instance, subsection 9.4(1) required Financial Institutions to

> take the following measures before entering into a correspondent banking relationship with a prescribed foreign entity:
>
> (a) obtain prescribed information about the foreign entity and its activities;
>
> (b) ensure that the foreign entity is not a shell bank as defined in the regulations;
>
> (c) obtain the approval of senior management;
>
> (d) set out in writing their obligations and those of the foreign entity in respect of the correspondent banking services; and
>
> (e) any prescribed measures.

304. In 2002, the General Regulation to the PCMLTFA, SOR/2002-184 (the "Regulations") came into force. The Regulations were amended in 2007 to include further codification of the aforementioned Applicable Standards. For instance, subsections 15.1(2) and 15.1(3) of the Regulations state:

> (2) Every financial entity shall, when it enters into a correspondent banking relationship, keep a record in respect of the foreign financial institution containing the following information and documents:
>
> (*a*) the name and address of the foreign financial institution;
>
> (*b*) the names of the directors of the foreign financial institution;
>
> (*c*) the primary business line of the foreign financial institution;

(*d*) a copy of the most recent annual report or audited financial statement of the foreign financial institution;

(*e*) a copy of the foreign financial institution's banking licence, banking charter, authorization or certification to operate from the relevant regulatory agency or certificate of corporate status or a copy of another similar document;

(*f*) a copy of the correspondent banking agreement or arrangement, or product agreements, defining the respective responsibilities of each entity;

(*g*) the anticipated correspondent banking account activity of the foreign financial institution, including the products or services to be used;

(*h*) a statement from the foreign financial institution that it does not have, directly or indirectly, correspondent banking relationships with shell banks;

(*i*) a statement from the foreign financial institution that it is in compliance with AML and anti-terrorist financing legislation in its own jurisdiction; and

(*j*) the measures taken to ascertain whether there are any civil or criminal penalties that have been imposed on the foreign financial institution in respect of AML or anti-terrorist financing requirements and the results of those measures.

(3) The financial entity shall take reasonable measures to ascertain whether the foreign financial institution has in place AML and anti-terrorist financing policies and procedures, including procedures for approval for the opening of new accounts and, if not, shall, for the purpose of detecting any transactions that are required to be reported to [FINTRAC] under section 7 of the Act, take reasonable measures to conduct ongoing monitoring of all transactions conducted in the context of the correspondent banking relationship.

305. Further, since 2007, Section 55.1 of the Regulations states the following with respect to correspondent banking relationships:

55.1 Every financial entity that enters into a correspondent banking relationship shall

(*a*) ascertain the name and address of the foreign financial institution by examining a copy of the foreign financial institution's banking licence, banking charter, authorization or certification to operate from the relevant regulatory agency or certificate of corporate status or a copy of another similar document; and

(*b*) take reasonable measures to ascertain, based on publicly available information, whether there are any civil or criminal penalties that have been imposed on the foreign financial institution in respect of AML or anti-terrorist

financing requirements and, if so, to conduct, for the purpose of detecting any transactions that are required to be reported under section 7 of the Act, ongoing monitoring of all transactions in the context of the correspondent banking relationship.

306. Section 9.6 of the PCMLTFA came into force in 2008 and required Financial Institutions to establish and implement compliance programs for correspondent banking relationships, and required enhanced due diligence in higher risk circumstances. Pursuant to section 9.6:

> (1) Every person or entity referred to in section 5 shall establish and implement, in accordance with the regulations, a program intended to ensure their compliance with this Part.
>
> (2) The program shall include the development and application of policies and procedures for the person or entity to assess, in the course of their activities, the risk of a money laundering offence or a terrorist activity financing offence.
>
> (3) If the person or entity considers that the risk referred to in subsection (2) is high, the person or entity shall take prescribed special measures for identifying clients, keeping records and monitoring financial transactions in respect of the activities that pose the high risk.

307. The requirements of section 9.6(3) of the PCMLTFA are further articulated in the 2008 amendments to Regulations. In particular, section 71 lays out the requirements that Financial Institutions must follow when implementing a compliance program:

> (1) For the purpose of subsection 9.6(1) of the Act, a person or entity referred to in that subsection shall, as applicable, implement the compliance program referred to in that subsection by
>
> (*a*) appointing a person — who, where the compliance program is being implemented by a person, may be that person — who is to be responsible for the implementation of the program;
>
> (*b*) developing and applying written compliance policies and procedures that are kept up to date and, in the case of an entity, are approved by a senior officer;
>
> (*c*) assessing and documenting, in a manner that is appropriate for the person or entity, the risk referred to in subsection 9.6(2) of the Act, taking into consideration
>
> (i) the clients and business relationships of the person or entity,

(ii) the products and delivery channels of the person or entity,

(iii) the geographic location of the activities of the person or entity, and

(iv) any other relevant factor;

(*d*) if the person or entity has employees, agents or other persons authorized to act on their behalf, developing and maintaining a written ongoing compliance training program for those employees, agents or persons; and

(*e*) instituting and documenting a review of the policies and procedures, the risk assessment and the training program for the purpose of testing their effectiveness, which review is required to be carried out every two years by an internal or external auditor of the person or entity, or by the person or entity if they do not have such an auditor.

(2) For the purposes of the compliance program referred to in subsection 9.6(1) of the Act, every entity referred to in that subsection shall report the following in written form to a senior officer within 30 days after the assessment:

(*a*) the findings of the review referred to in paragraph (1)(*e*);

(*b*) any updates made to the policies and procedures within the reporting period; and

(*c*) the status of the implementation of the updates to those policies and procedures.

308. In addition, section 71.1 of the Regulations require Financial Institutions to take the following steps when faced with a higher risk client:

The prescribed special measures that are required to be taken by a person or entity referred to in subsection 9.6(1) of the Act for the purpose of subsection 9.6(3) of the Act are the development and application of written policies and procedures for

(*a*) taking reasonable measures to keep client identification information and the information referred to in section 11.1 up to date;

(*b*) taking reasonable measures to conduct ongoing monitoring for the purpose of detecting transactions that are required to be reported to [FINTRAC] under section 7 of the Act; and

(*c*) mitigating the risks identified in accordance with subsection 9.6(3) of the Act.

309. The 2008 amendments to the Regulations also incorporated subsection 11.1(1). That subsection requires Financial Institutions to, having confirmed the existence of a corporate client, take reasonable measures to obtain the name and occupation of all directors of the corporation and the name, address and occupation of all persons who own or control, directly or indirectly, 25 percent or more of the shares of the client corporation.

310. Since 2008, pursuant to section 9.3 of the PCMLTFA, Financial Institutions are required to determine whether they were dealing with a PEFP. In instances where a Financial Institution determines that it is dealing with a PEFP, senior management approval is required for the banking relationship to proceed. Moreover, since 2008, subsection 14(n) of the Regulations require Financial Institutions to undertake enhanced, ongoing monitoring of their relationships with any PEFP.

311. Pursuant to section 462.31(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, anyone commits a "money laundering offense" for the purposes of the PCMLTFA who

> uses, transfers possession of, sends, delivers, transports, transmits, alters, disposes or otherwise deals with, in any manner and by any means, any property or any proceeds or any property with intent to conceal or convert that property or those proceeds, knowing or believing that all or a part of that property or of those proceeds was obtained as a result of fraud.

312. Any transaction in respect of which there were reasonable grounds for a Financial Institution to suspect any of these activities automatically required that Financial Institution to report to FINTRAC.

C. TD Bank's Internal Policies

313. During the time that it provided correspondent banking services to SIB, TD Bank was required to have in place and execute internal polices ("Internal Policies") that reflected the

rules and requirements laid out in the Applicable Standards, the PCMLTFA, the Regulations and the *Criminal Code*. TD Bank's Internal Policies were required and sought to address such areas as identification, client relationship reviews, enhanced due diligence, open source intelligence monitoring, transaction monitoring and reporting, risk assessment and risk mitigation practices.

314. In April 2000, Frank Craddock, TD Bank's Chief Security Officer and the person responsible for TD Bank's deterrence programs, gave evidence before the Canadian Parliament's Standing Committee on Finance on Bill C-22. Commenting on money laundering, he stated:

> In order to protect against this criminal activity, we have established sound policies and programs that detect and prevent money laundering.
>
> Just a few of the preventative measures taken by Canadian banks include: the right to refuse financial transactions suspected of being proceeds of crime as defined by the Criminal Code; a requirement that a declaration of source of funds be signed by customers for financial transactions involving $10,000 or more; a requirement for bank employees to report any financial transactions that are judged to be suspicious, regardless of the amount; the placement of a senior bank officer in every branch, known as the designated officer, to whom suspicious transactions are reported; a strong emphasis on the know-your-customer rule, whereby employees must obtain appropriate identification and documentation from clients, as well as understand the client's usual pattern of financial transactions; an audit of branch compliance with AML policies; and various staff awareness and education programs, including the distribution of related videos produced by the CBA corporate security committees.
>
> We all work within the scope of the existing legislation, together with the guidelines issued by the Office of the Superintendent of Financial Institutions, known as OSFI, and we believe we have developed a very effective measure to identify money-laundering activities while avoiding high volumes of irrelevant reports.

315. Similarly, by at least April 2006, TD Bank publicly stated on its website that it had in place a Global AML Program. In particular, the TD Bank Financial Group of Companies' AML Statement provided:

Although a Canadian based financial institution, TDBFG is subject to the AML statutes and regulations in various countries around the globe. TDBGF's AML program (described below) contemplates and accommodates these statutes and establishes minimum standards and requirements across all our businesses throughout the world.

In order to comply with applicable Canadian and AML laws in the countries in which we operate, TDBGF has implemented a Global AML Program. The Global AML Progam includes appointing a Chief AML Officer who is responsible to senior management and the board of directors for establishing and maintaining the TD Bank Financial Group's AML Compliance Program; a risk-based Global AML Policy including Know Your Customer and Enhanced Due Diligence, record keeping & retention (the Global AML Policy establishes minimum standards across all our business units and often adopts standards higher than local requirements); currency transaction and suspicious transaction monitoring and reporting; a hierarchy of designated AML officer functions; periodic training of appropriate employees; and independent internal audits.

This program is routinely evaluated, updated and enhanced in order to reflect changes to TDBFG's business activities and applicable supervisory standards and legal requirements.

All employees are required to read and acknowledge the TDBGF Code of Conduct & Ethics annually. The guidelines require that and employee not knowingly initiate or be a party to a money laundering scheme. TDBGF is committed to complying with the *United Nations Suppression of Terrorist Regulations*. No employee shall deal, directly or indirectly, with any person or group known or reasonably known to be involved in or supporting terrorism activities. Employees are require to report illegal, suspicious or unusual activity.

Annually all employees are required to complete an enterprise wide AML training program which includes a test indicating they have mastered the concepts.

316. To the extent that TD Bank's Internal Policies did not comply with the requirements of the Applicable Standards, the PCMLTFA, the Regulations and the *Criminal Code*, TD Bank violated of the laws of Canada and breached the standard of care required by a reasonable bank.

317. Alternatively, TD Bank also violated the laws of Canada and breached the standard of care required by a reasonable bank if its Internal Polices adhered to the Applicable Standards, the PCMLTFA, the Regulations and the *Criminal Code* but failed to implement its Internal Policies.

VII. TD BANK'S FAILURE TO ACT

318. For the reasons described above, TD Bank should never have opened correspondent bank accounts for SIB (then Guardian) and, having done so, should have determined that those accounts needed to be closed. Instead, TD Bank at all relevant times continued unabated in its provision of banking services to SIB. It did so notwithstanding that it was uniquely situated to uncover the secret in respect of Tier III and the SIB Looting. As a result, TD Bank is liable to SIB and SIB's customers in negligence and knowing assistance.

A. TD Bank's Negligence

1. Duty of Care

(a) TD Bank Owed a Duty of Care to SIB

319. The plaintiffs plead that TD Bank owed SIB duties by virtue of its position as SIB's correspondent bank. Such duties were an implied term of the contract that governs the relationship between a banker and its customer (even if no written contract existed) and were otherwise the result of the relationship between TD Bank and SIB.

320. It was at all times reasonably foreseeable that SIB would suffer the damages described herein as a result of the failure of TD Bank to adhere to the applicable standard of care, namely by way of its acts and omissions described herein.

(b) TD Bank Owed a Duty of Care to SIB's Customers

321. In the alternative to the claims made on behalf of SIB, the plaintiffs plead that as Joint Liquidators with the powers and capacities of a trustee in bankruptcy and charged to recover funds for SIB's customers, the ultimate victims of Stanford's CD Scheme, they may appropriately advance the claims SIB's creditors may have against TD Bank. If required, the plaintiffs plead

that they are entitled to a representative order pursuant to Rule 10 of the *Rules of Civil Procedure*.

322. The plaintiffs plead that TD Bank owed SIB's customers a duty of care to prevent the use of its facilities for fraudulent purposes since, in all of the circumstances described herein, it:

(a) had actual knowledge of, or was reckless and/or willfully blind to, the SIB Looting; or,

(b) ought to have known of the SIB Looting (that is, had constructive knowledge).

323. The plaintiffs plead that, as a result of TD Bank's actual knowledge (willful blindness or recklessness) or constructive knowledge of the SIB Looting, it was reasonably foreseeable that TD Bank's acts or omissions described herein would cause harm to SIB's customers. Those acts and omissions are the proximate cause of the harm suffered by SIB's customers. In all the circumstances, there was sufficient proximity between TD Bank and SIB's customers to give rise to a duty of care owed by TD Bank to SIB's customers and there is no basis on which to negate that duty of care.

2. Standard of Care

324. At the very least, a reasonable banker was required to act at all times in accordance with the Applicable Standards, the PCMLTFA, the Regulations and the *Criminal Code*.

325. Had TD Bank acted as a reasonable banker, it would have, through the exercise of reasonable care and skill, never provided banking services to SIB, discovered the SIB Looting, terminated SIB's access to TD Bank's facilities, reported the conduct of Stanford and the Other Insiders to the appropriate authorities and/or frozen SIB's accounts. Due to the acts and

omissions described herein (including breach of contract), TD Bank failed to act as a reasonable banker in the circumstances. As a result, TD Bank breached the duties it owed to SIB and SIB's customers.

B. TD Bank's Knowing Assistance

1. TD Bank's Liability to SIB for Knowing Assistance

326. The plaintiffs plead that TD Bank is liable for knowing assistance in the breaches of fiduciary duty and breaches of trust by Stanford and the Other Insiders.

327. TD Bank knew that Stanford and the Other Insiders were directors and/or corporate officers of SIB and thus owed fiduciary duties to SIB and SIB's customers. TD Bank also knew that SIB's customers purchased the CDs from SIB expecting to receive a return on their purchase and that SIB held the monies used to purchase the CDs in trust for SIB's customers.

328. TD Bank had sufficient information such that it also knew of, or was reckless or willfully blind to, the SIB Looting and of Stanford's and the Other Insiders' breaches of their fiduciary duties and breaches of trust through their orchestration of the SIB Looting. Despite such knowledge, TD Bank continued to provide correspondent banking services to SIB, which enabled Stanford and the Other Insiders to maintain the SIB Looting and thereby continue their misappropriation. Accordingly, TD Bank participated in the breaches of fiduciary duty and breaches of trust of Stanford and the Other Insiders.

329. SIB ultimately became insolvent and was put into liquidation. Having knowingly assisted Stanford and the Other Insiders, TD Bank is liable for the damages caused by those breaches. Such damages include the full amounts improperly diverted from SIB and SIB's customers by Stanford and the Other Insiders through the SIB Looting after TD Bank had sufficient

information that it knew of, or was recklessly or willfully blind to, the SIB Looting. The Joint Liquidators estimate that the amounts for which TD Bank is liable are approximately US$5.5 billion and potentially higher.

C. Damages Caused by TD Bank and Other Relief

330. TD Bank's acts and omissions described herein are the proximate cause of the harm suffered by SIB and SIB's customers. As a result of TD Bank's breaches of duty, it repeatedly missed opportunities to reveal and stop the SIB Looting being orchestrated and undertaken by Stanford and the Other Insiders and/or turned a blind eye to the SIB Looting. Instead, TD Bank allowed the SIB Looting to continue and Stanford and the Other Insiders were allowed to continue misappropriating SIB's funds. In addition, customers continued to make investments in SIB CDs, most or all of which were subsequently misappropriated from SIB by Stanford and the Other Insiders. The plaintiffs plead that if TD Bank had performed even its basic duties to SIB and SIB's customers as required, the discovery of the SIB Looting at an earlier date would have avoided the increased liabilities of SIB and otherwise reduced or eliminated the losses and damages incurred by SIB and SIB's customers after that date.

331. It was reasonably foreseeable that SIB and its customers would suffer the damages described herein as a result of the acts and omissions of TD Bank described herein.

332. By failing to act as a reasonable banker, TD Bank facilitated and allowed the SIB Looting to continue when it ought to have been reported and prevented. But for TD Bank's conduct, the fraudulent transactions at issue would not have been completed and damages would not have been suffered by SIB and its customers, who now comprise more than 21,000 creditors of SIB's estate.

333. SIB and its customers suffered substantial damages and losses, in an amount that is presently not fully known, but that will be quantified prior to trial, and that is at least in the amount of US$5.5 billion.

334. Given its misconduct as pleaded herein, TD Bank is also liable to provide a full accounting of all revenues and profits from its dealings with SIB and to disgorge and make full restitution of all such revenues and profits.

VIII. LOCATION OF THE TRIAL

335. The plaintiffs propose that this action be tried in Toronto.

Date: May 12, 2014

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Lawyers for the plaintiffs

MARCUS A. WIDE, et al.
Plaintiffs

v.

TORONTO-DOMINION BANK
Defendant

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

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

AMENDED STATEMENT OF CLAIM

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Lawyers for the plaintiffs

TAB D

This is **Exhibit "D"** referred to in the
affidavit of Marcus A. Wide
sworn before me, this 22nd day of September, 2016.

A Commissioner for taking affidavits

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

STATEMENT OF DEFENCE

Response to the Fresh As Amended Statement of Defence

1. The Toronto-Dominion Bank ("TD Bank") admits the allegations contained in paragraphs 8, 26, 27, 28, 30, 36, 37, 42, 43, 58, 59 (first sentence only; the second and third sentences are denied), 66, 67, 69, 84, 86, 92, 93, 95, 96, 111, 115, 116, 118, 119, 120, 121, 122, 123, 209, 246, 247, 248, 295, 302, 305, 306, 307, 312, 314, 315 and 335 of the Fresh as Amended Statement of Claim.

2. TD Bank denies the allegations contained in paragraphs 1-7, 9-17, 20-25, 29, 31-35, 41 (second sentence only; TD Bank has no knowledge in respect of the first sentence), 44, 59 (second and third sentences only; the first sentence is admitted), 60, 70-83, 85, 87-91, 94, 112,

117, 124, 125, 126, 139, 140, 144-172, 210-213, 242-245, 249-294, 301, 303, 304, 308, 309, 310, 311, 313 and 316-334 of the Fresh as Amended Statement of Claim.

3. TD Bank has no knowledge in respect of the allegations contained in paragraphs 18, 19, 38, 39, 40, 41 (first sentence only; the second sentence is denied), 45-57, 61-65, 68, 97-110, 113, 114, 127-138, 141-143, 173-208, 214-241 and 296-300 of the Fresh as Amended Statement of Claim.

Limitations Defence

4. On February 16, 2009, a U.S. District Court in Dallas, Texas issued an order (the "Freeze Order") freezing the worldwide assets of Stanford International Bank Ltd. ("SIB") on the basis that SIB had engaged in a Ponzi scheme fraud.

5. From the time of the issuance of the Freeze Order onwards, it was publicly and generally known that SIB had engaged in a fraud.

6. Prior to the Freeze Order, TD Bank had provided correspondent banking services to SIB and related entities. This fact was also generally known as of February 2009.

7. In the months following the Freeze Order, a number of pieces of litigation were commenced worldwide in respect of the matter. In Canada, the litigation included proceedings brought by Bennett Jones LLP, currently counsel for Marcus Wide and High Dickson in their capacities as joint liquidators of SIB appointed by the Eastern Caribbean Supreme Court (the "Joint Liquidators"), and proceedings against TD Bank:

(a) on February 25, 2009, Bennett Jones LLP commenced a putative class action in the Alberta Court of Queen's Bench (under the style *Dynasty Furniture Limited (as a representative plaintiff) v. SIB*, Court File No. 0901-02821);

(b) on April 6, 2009, the Joint Liquidators' predecessors, also appointed by the Eastern Caribbean Supreme Court, brought an *ex parte* motion before a bankruptcy registrar of the Québec Superior Court seeking recognition under the *Bankruptcy and Insolvency Act* of the bankruptcy proceedings in the Eastern Caribbean Supreme Court (under the style *Stanford International Bank Ltd. and Stanford Trust Company Ltd. (Receivership of)*, Court File No. 500-11-036045-090);

(c) on April 17, 2009, Bennett Jones LLP, acting for a group of plaintiffs known as the "Dynasty Plaintiffs", commenced a fraud action against Allen Stanford, the owner of SIB, in the Alberta Court of Queen's Bench (under the style *Dynasty Furniture Manufacturing Ltd. v. Stanford*, Court File No. 0901-05677);

(d) on April 17, 2009, the Dynasty Plaintiffs also commenced a Norwich application against TD Bank in the Alberta Court of Queen's Bench (under the style *Dynasty Furniture Manufacturing Ltd. v. The Toronto-Dominion Bank*, Court File No. 0901-05717), with Bennett Jones LLP acting for the Dynasty Plaintiffs;

(e) on April 24, 2009, the Attorney General of Ontario commenced a proceeding in the Ontario Superior Court of Justice under the *Civil Remedies Act*, S.O. 2001, c. 28 in respect of approximately $20 million of SIB's funds that were on deposit with TD Bank at the time of the Freeze Order (under the style *Attorney General of*

Ontario v. The Contents of Various Financial Accounts Held With The TD Bank and TD Waterhouse (in rem), Court File No. CV-09-8154-00CL);

(f) on June 19, 2009, the United States Department of Justice issued a press release announcing that Robert Allen Stanford, the Chairman of SIB, and several other SIB executives had been indicted on fraud and obstruction charges related to SIB's Ponzi scheme fraud; and

(g) after the Dynasty Alberta Action and the Dynasty Alberta Norwich Application were stayed by the Alberta Court of Queen's Bench on the basis of *forum non conveniens*, on July 29, 2009, the Dynasty Plaintiffs, represented by Bennett Jones LLP, reinstituted the Dynasty Alberta Norwich Application by bringing an application in the Ontario Superior Court of Justice (under the style *Dynasty Furniture Manufacturing Ltd. v. The Toronto-Dominion Bank*, Court File No. 09-8300-00CL).

8. As a result, 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, 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. Accordingly, since this action was not commenced until August 22, 2011, it is statute barred and ought to be dismissed. TD Bank pleads and relies on the *Limitations Act, 2002,* S.O. 2002, c. 24, Sch. B.

Defence on the Merits

10. The various allegations made against TD Bank in the Fresh as Amended Statement of Claim are without merit. If this action is not dismissed on the basis of the limitations defence, TD Bank will amend its statement of defence to respond to the allegations on the merits.

Reservation of Rights

11. This statement of defence is filed without prejudice to TD Bank's right to challenge the adequacy of the Fresh as Amended Statement of Claim on any basis, including (without limitation):

(a) the authority of the Joint Liquidators to bring the action;

(b) the procedure chosen by the Joint Liquidators to pursue this proceeding; and

(c) whether reasonable causes of action are pleaded in the Fresh as Amended Statement of Claim.

Conclusion

12. TD Bank therefore requests that this action be dismissed with costs.

September 12, 2014

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MARCUS WIDE et al v. THE TORONTO-DOMINION BANK

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

STATEMENT OF DEFENCE

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DOCS 13459876v3

TAB E

This is **Exhibit "E"** referred to in the
affidavit of Marcus A. Wide
sworn before me, this 22nd day of September, 2016.

A Commissioner for taking affidavits

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

REPLY TO DEFENCE

1. The plaintiffs, Marcus A. Wide and Hugh Dickson of Grant Thornton LLP (the "Joint Liquidators"), repeat and rely upon the allegations set out in the statement of claim.

2. The Joint Liquidators deny the allegations contained in the statement of defence except as expressly admitted herein.

There Was No Person Capable of Commencing a Proceeding in Respect of the Claim Against TD Bank Until After the Limitations Date

3. Stanford International Bank Limited ("SIB") was incapable of commencing proceedings and there was no person capable of commencing a proceeding in respect of a claim against TD Bank on behalf of SIB until, at the earliest, September 11, 2009. Accordingly, the limitations

period did not begin to run until after August 22, 2009 (the "Limitations Date") and the Joint Liquidators' claim is not limitations barred.

4. On February 16, 2009, the U.S. Securities and Exchange Commission (the "SEC") obtained an injunction preventing SIB from carrying on business and an order appointing an equity receiver over SIB and its affiliated entities (the "U.S. Receiver"). At that time, the U.S. Receiver did not seek recognition of his appointment in Canada.

5. On February 19, 2009, the Joint Liquidators' predecessors, Nigel Hamilton-Smith and Peter Wastell (the "**Former Officeholders**"), were appointed on an emergency basis as joint receiver-managers of SIB and Stanford Trust Company Ltd. ("**STC**") in Antigua. Soon after, the High Court of Justice of Antigua issued an order defining the capacity of the Former Officeholders to act as receiver-managers of SIB and STC (the "**Antiguan Receivership Order**").

6. The Antiguan Receivership Order did not provide the Former Officeholders with the capacity required to investigate or pursue claims against third party individuals or entities with which SIB had done business. Accordingly, the Antiguan Receivership Order did not provide the Former Officeholders with the capacity required to investigate or pursue an action against TD Bank.

7. On April 6, 2009, the Former Officeholders received an order of the Registrar of the Quebec Superior Court recognizing their appointment as receiver-managers in Antigua (the "**First Quebec Recognition Order**"). However, consistent with the Antiguan Receivership Order, the First Quebec Recognition Order did not provide the Former Officeholders with the capacity required to pursue third party claims in Canada.

8. Accordingly, while acting as receiver-managers of SIB, the Former Officeholders did not have the capacity required to investigate or pursue third party claims, including against TD Bank.

9. On April 15, 2009, the Former Officeholders were appointed as joint liquidators of SIB by the Eastern Caribbean Supreme Court (the "Antiguan Liquidation Order"). As of that date, the Former Officeholders were no longer receiver-managers of SIB.

10. The Antiguan Liquidation Order provided the Former Officeholders with the capacity to investigate and pursue third party claims on behalf of SIB for the first time. In particular, it provided that the Former Officeholders "shall have the right to bring any proceeding or action in Antigua and Barbuda and/or in a foreign jurisdiction" and "shall have the authority to initiate, prosecute and continue the prosecution of any and all proceedings".

11. However, notwithstanding that the Antiguan Liquidation Order provided the Former Officeholders with the capacity to investigate and pursue third party claims, as a matter of Canadian law, the Former Officeholders required recognition of their appointment as liquidators by a Canadian court and an order of a Canadian court providing the Former Officeholders with the capacity to pursue third party claims in Canada. The Antiguan Liquidation Order also expressly acknowledged the need for such recognition and approval before the Former Officeholders could act in foreign jurisdictions such as Canada.

12. On April 22, 2009, the Former Officeholders delivered a motion to the Quebec Superior Court seeking the recognition of their Antiguan appointment as liquidators and approval to act in Canada, including an express request for authorization "to institute or continue any present legal proceedings initiated by [SIB] in Quebec, and generally in Canada". However, at the same time,

the U.S. Receiver sought, for the first time, recognition and approval to act in Canada through his Canadian representative, Ernst & Young Inc. ("E&Y").

13. On September 11, 2009, the Quebec Superior Court rendered two decisions and corresponding orders in respect of the competing motions by the Former Officeholders and the U.S. Receiver (the "Second Quebec Recognition Order").

14. Among other things, the Second Quebec Recognition Order appointed E&Y as interim receiver of the Canadian assets of SIB and authorized E&Y to initiate and pursue proceedings in respect of SIB in Canada. This was the first time that E&Y was recognized and empowered with the capacity to pursue proceedings in Canada.

15. The Second Quebec Recognition Order expressly excluded the Former Officeholders from acting in Canada. It provided: "in each case where [E&Y] takes any such actions or steps [including initiating or pursuing proceedings in Canada], it shall be exclusively authorized and empowered to do so, to the exclusion of the Respondents and the [Former Officeholders]."

16. The Former Officeholders unsuccessfully appealed the Second Quebec Recognition Order. Leave to appeal to the Supreme Court of Canada was then sought by the Former Officeholders and, later, the Joint Liquidators. However, leave to appeal was denied.

17. In light of the foregoing, at the earliest, it was only upon the rendering of the Second Quebec Recognition Order on September 11, 2009 that there became a person capable of commencing a proceeding in respect of a claim on behalf of SIB against TD Bank. At that time, the "person with a claim" was E&Y and not the Former Officeholders.

18. Following their appointment in May 2011, the Joint Liquidators determined that the only person capable of commencing a proceeding in respect of a claim against TD Bank in Canada was E&Y and that E&Y had not yet commenced such an action.

19. As a result, on August 19, 2011, the Joint Liquidators sought and received an order of the Quebec Superior Court authorizing and empowering the Joint Liquidators to institute and litigate, in place and stead of E&Y, proceedings against TD Bank in any appropriate Canadian jurisdiction (the "Authorization Order"). The Authorization Order specifically recognizes the Joint Liquidators as having "the equivalent or substantially similar powers and capacities than those of a trustee in bankruptcy or other insolvency holder within Canada" and authorized the Joint Liquidators to exercise those powers and capacities for the purposes of the institution and litigation of the within action against TD Bank.

20. On August 22, 2011, the Joint Liquidators commenced the within action against TD Bank.

21. On June 12, 2012, the Quebec Superior Court ordered that, if TD Bank intended to challenge the validity of the Authorization Order, it must bring a motion in respect of such a challenge by June 30, 2012, failing which TD Bank would be barred from bringing such a motion in the future. TD Bank did not move to challenge the Authorization Order, thereby accepting the validity of the Authorization Order and the capacity it provided to the Joint Liquidators.

The Fifth Circuit Ruled That the Fraud Was Not Discoverable Until August 27, 2009

22. Following the collapse of SIB in February 2009, Stanford, James Milton Davis ("Davis") and a small cabal of other insiders were criminally charged in connection with their involvement in the fraud committed on SIB.

23. On August 27, 2009, Davis entered a guilty plea in respect of his criminal charges stemming from SIB's collapse (the "Davis Plea"). The Davis Plea contained a detailed description of the fraud committed by Robert Allen Stanford ("Stanford"), Davis and the small cabal of other insiders of SIB. The information contained in the Davis Plea was not previously available.

24. Subsequently, the U.S. Receiver commenced a fraudulent transfer claim pursuant to the *Texas Uniform Fraudulent Transfers Act*, Tex. Bus. & Com. Code §24.001 et seq. ("TUFTA") against various U.S. national political committees in an action styled as *Janvey v. Democratic Senatorial Campaign Committee, Inc.* In response, the political committees moved to dismiss the claim on grounds that, among other things, it was barred pursuant to the applicable one-year TUFTA limitation period. However, the political committees' motion was finally dismissed by the U.S. Court of Appeal for the Fifth Circuit in a decision rendered on March 18, 2013. In dismissing the motion, the Fifth Circuit held:

> The evidence reflects that upon the Receiver's appointment on February 16, 2009, it was <u>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</u> 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...and requested that [FTI] 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 corporation that had been diverted and dissipated in the operation of the scheme.
>
> [...]
>
> 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 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. The Receiver filed this suit on February 19, 2010, less than one year after Davis's guilty plea. There is no evidence in the record to indicate that the Receiver or Van Tassel had developed or could reasonably have developed knowledge or probative evidence of the true nature and duration of the Ponzi scheme prior to Davis's guilty plea on August 27, 2009. [underlining added]

25. Thus, having considered comprehensive evidence before it concerning the daunting circumstances faced by the U.S. Receiver in administering SIB's estate, the Fifth Circuit held that the fraud committed on SIB was not discoverable until August 27, 2009, which is five days after the Limitations Date. Contrary to its allegations in the within action, TD Bank has previously adopted and relied on the Fifth Circuit's decision regarding the date of discovery on multiple occasions.

26. Separately, a class action, *Rotstain et al. v. The Toronto-Dominion Bank et al.*, was commenced in Texas on behalf of SIB creditors against, among others, TD Bank (the "Texas Class Action"). An organization composed of SIB creditors known as the "Official Stanford Investors Committee" ("OSIC") subsequently intervened in the Texas Class Action. However, TD Bank brought a motion seeking the dismissal of OSIC's claims, including on the basis that OSIC's TUFTA fraudulent transfer claims and two of its tort claims were limitations barred.

27. In particular, since the time the within action was commenced, TD Bank has taken the following positions in respect of OSIC's TUFTA claims:

(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";

(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."

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

29. 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 have a two year limitation period from when they were discoverable, TD Bank took the following position: "Statute expired on August 27, 2011 (2 years from James Davis Guilty plea)".

30. 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 upon the Davis Plea on August 27, 2009. Like the claims TD Bank has addressed in the Texas Class Action, the facts giving rise to the Joint Liquidators' claim include, as a starting point, the fact that a fraud was committed on SIB. As the Davis Plea occurred after the Limitations Date, TD Bank has taken a position requiring the conclusion that the Joint Liquidators' claim was not discoverable before the Limitations Date. At a minimum, the issues relevant to the discoverability of the Joint Liquidators' claim are not as simple as TD Bank pleads in the within action.

31. As a result, TD Bank cannot now rely on its limitations defence in response to the Joint Liquidators' claim. The Joint Liquidators plead and rely on the doctrine of approbation and reprobation.

A Reasonable Person with the Abilities and In the Circumstances of the Former Officeholders Would Not Have Discovered the Joint Liquidators' Claim Before the Limitations Date

32. In the alternative, a reasonable person with the abilities and in the circumstances of the Former Officeholders would not have discovered the facts giving rise to the Joint Liquidators' claim before the Limitations Date. Accordingly, pursuant to the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B (the "*Limitations Act*"), on which the Joint Liquidators plead and rely, the Joint Liquidators' claim against TD Bank is not limitations barred.

Knowledge of Certain Facts was Required for Discovery

33. Contrary to the allegations contained in paragraphs 4 to 8 of TD Bank's statement of defence, knowledge that there was a fraud in respect of SIB's affairs and that TD Bank was one

of SIB's correspondent banks does not amount to discovery of the Joint Liquidators' claim. Further, discovery of a fraud was a foundational fact and numerous other facts were subsequently required to amount to discovery. The Joint Liquidators admit that there were proceedings commenced and a press release issued as set out in sub-paragraphs 7(a) to 7(g) of TD Bank's statement of defence. However, the Joint Liquidators deny that those proceedings and press release demonstrate when a reasonable person with the abilities and in the circumstances of the Former Officeholders ought to have discovered the Joint Liquidators' claim against TD Bank.

34. For discovery to occur, a reasonable person with the abilities and in the circumstances of the Former Officeholders first ought to have known of the facts detailed below.

1. SIB suffered an injury, loss or damage

35. In this case, the injury, loss or damage was the financial loss suffered by SIB and its creditors. The determination that SIB had suffered a financial loss required an extensive forensic review of SIB's financial affairs including a determination of all of SIB's existing assets and outstanding liabilities as at the date of its collapse. This was a time and resource intensive project made more complicated by the fact that SIB was a multi-billion dollar entity that had been in operation for more than 20 years. It held assets with entities around the world and owed liabilities to tens of thousands of individuals and entities.

2. SIB's loss was the result of fraud

36. It was necessary to determine that SIB's financial loss was the result of fraud. Doing so was necessary to evaluate and identify the potential wrongdoers from which SIB could potentially recover its loss. Had it been determined that SIB's loss was caused by some non-

fraudulent occurrence (for instance, poor investment decisions), the potential wrongdoers would presumably have been distinct from those who in fact caused or contributed to the fraud. The determination that SIB's loss was the result of fraud was a necessarily complex task given that the fraud was deliberately undertaken in a clandestine manner to avoid detection and obscure the true nature of SIB's and the fraudster's affairs. As detailed above, TD Bank has taken the position that the fraud became discoverable on August 27, 2009.

3. SIB was the victim of the fraud, not the perpetrator

37. It was a necessary consideration whether SIB was the victim of the fraud or the perpetrator. This determination was critical to assessing whether there were third party claims, including against TD Bank.

4. TD Bank provided services that were relevant to the undertaking of the fraud

38. It was necessary to determine that TD Bank provided services to SIB and that those services were relevant to the undertaking of the fraud. In particular, it was necessary to determine that TD Bank provided correspondent banking services to SIB and that such services facilitated the undertaking of the fraud. On the other hand, if TD Bank had provided different services to SIB that did not facilitate the undertaking of the fraud, no viable claim would exist against TD Bank.

5. TD Bank's acts or omissions contributed to the loss

39. It was not enough to simply know that the services provided by TD Bank to SIB were relevant to the undertaking of the fraud. It was also necessary to determine that, TD Bank's improper acts or omissions contributed to the loss suffered by SIB. In particular, as detailed in the Joint Liquidators' statement of claim, it was necessary to determine that TD Bank should

have known there was no legitimate business purpose for TD Bank's services, that TD Bank had an exclusive window into SIB's affairs and/or that there was a multitude of open source information in respect of, among others, SIB and Stanford, all of which required TD Bank to terminate SIB's access to TD Bank's facilities, report the fraudulent or improper conduct to the appropriate authorities and freeze SIB's accounts. However, TD Bank at all times continued unabated in its provision of banking services to SIB, with the result that the fraud on SIB was allowed to continue and cause SIB's loss. Determining that TD Bank failed to act as was required in the circumstances necessitated a review and analysis of the information available to TD Bank and TD Bank's conduct, which was complicated by the lack of access to TD Bank's internal records.

6. A proceeding against TD Bank was an appropriate way to remedy SIB's loss

40. Having determined all of the foregoing facts, it remained to be determined whether a proceeding against TD Bank was an appropriate way to remedy SIB's loss. Given the mandate of the Former Officeholders (and the Joint Liquidators) to act in the best interests of SIB and its creditors, and the multitude of potential avenues available to recover funds given the size of SIB and the extent of its dealings, determining that a proceeding against TD Bank was an appropriate way to remedy SIB's loss required extensive analysis going beyond the facts strictly relevant to the Joint Liquidators' claim against TD Bank but also issues faced by SIB's estate on the whole.

The Abilities of the Former Officeholders and the Circumstances in Which They Found Themselves

41. Between the date of the Former Officeholders' appointment as receiver-managers and the Limitations Date, a reasonable person with the abilities and in the circumstances of the Former Officeholders would not have discovered the facts giving rise to the Joint Liquidators' claim

against TD Bank. The abilities of the Former Officeholders and the circumstances in which they found themselves are outlined below.

1. The Former Officeholders completely lacked the funding required to investigate or pursue third party claims

42. Prior to the Limitations Date, the Former Officeholders lacked access to the funds necessary to undertake the receivership and liquidation of SIB.

43. Notwithstanding their diligent efforts to locate and access funds upon their appointment, the only funds initially available to the Former Officeholders for the administration of SIB's receivership and liquidation totaled approximately USD $1.1 million, a miniscule amount in light of SIB's multi-billion dollar operations.

44. The funds available to the Former Officeholders were further limited by the expenses being incurred by SIB upon their appointment as receiver-managers. At the time of their appointment, SIB was spending approximately USD $400,000 a month on the ongoing expenses of employee salaries, securities, amenities, IT and maintenance alone.

45. As a result, notwithstanding that the Former Officeholders took all available steps to reduce the use of funds by SIB's estate (including not being paid for their services), the funds available to the Former Officeholders were severely limited and ultimately ran out in July 2009.

46. Only after diligent and contested efforts were the Former Officeholders able to successfully obtain an order from the U.K. Court of Appeal releasing the funds required to cover the operational costs of the liquidation over the next six months. That order was obtained on August 18, 2009, just four days before the Limitations Date, and the funds were not received for some time thereafter.

47. No reasonable person with the abilities and in the circumstances of the Former Officeholders would have used the scarce funds available to investigate third party claims, particularly without the capacity to subsequently commence such claims and, in any event, without the funds required to pursue such claims.

2. The Former Officeholders were faced with the complex circumstances resulting from the arrangement of SIB's affairs and its subsequent collapse

48. Even if the Former Officeholders had the funding required to investigate and pursue third party claims (which they did not), the circumstances resulting from SIB's collapse were extraordinarily complex and limited the Former Officeholders' ability to readily discover the facts giving rise to the Joint Liquidators' claim against TD Bank.

49. TD Bank's previous position in related litigation 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.

50. This position taken by TD Bank concerning the circumstances resulting from SIB's collapse clearly acknowledges the chaos resulting from that collapse and the lengthy and expensive work required to discover third party claims (such as the within action) that resulted. This position is contrary to TD Bank's position as pleaded in the within action.

51. Consistent with TD Bank's position in the related litigation, the circumstances resulting from SIB's collapse included, among other things, the following:

(a) Over the course of more than 20 years, SIB was the victim of a multi-billion dollar fraud committed by a small cabal of insiders using a complex web of approximately 130 corporations affiliated with SIB and other entities chartered and operated in more than 50 locations spanning fifteen U.S. states and thirteen countries, including Antigua;

(b) As a result of the magnitude of the operations of SIB and its affiliates, there were hundreds of millions records relevant to the Former Officeholders' mandate as receiver-managers and liquidators, if not more;

(c) The records relevant to the Former Officeholders' mandate as receiver-managers and liquidators were disorganized and not centrally kept. Most notably, many such records were not located in Antigua and at all times prior to the Limitations Date were neither under the control of nor accessible by the Former Officeholders. Further, SIB's true financial picture was deliberately kept separate

and apart from SIB's normal and readily available records and many relevant records were held by third party financial institutions (including TD Bank);

(d) The banking records available to the Former Officeholders consisted of records from all of the banks that held correspondent accounts for SIB and from banks that provided other services to SIB. Such banks (including TD Bank) provided daily banking records to SIB, which therefore totaled tens of thousands of pages and detailed tens of millions of transactions. Like SIB's other records, its banking records were disorganized and not centrally kept;

(e) In many instances, third party financial institutions that held SIB's assets upon its collapse refused to promptly cooperate and provide the information or records requested by the Former Officeholders, if they did so at all. In turn, the Former Officeholders could not readily ascertain the assets and liabilities of SIB in connection with those financial institutions. For instance, when the Former Officeholders requested that TD Bank provide account details and balances of SIB accounts, TD Bank's lawyers initially refused to provide such information;

(f) Certain records relevant to the Former Officeholders' mandate as receiver-managers and liquidators were unavailable to them prior to the Limitations Date because those records were held exclusively by the U.S. Department of Justice in connection with the criminal proceedings arising from SIB's collapse;

(g) Notwithstanding the Former Officeholders' efforts to negotiate and co-operate with the U.S. Receiver, due to legal complications, no agreement was reached between the Former Officeholders and the U.S. Receiver concerning the sharing

of information between the two estates prior to the Limitations Date. Accordingly, any information exclusively held by the U.S. Receiver relevant to the Joint Liquidators' claim against TD Bank was not directly accessible by the Former Officeholders;

(h) The Former Officeholders often could not rely on information about SIB's affairs held by third parties. For instance, unbeknownst to the Former Officeholders, the information held by both the Antiguan Financial Services Regulatory Commission and SIB's external auditor, C.A.S. Hewlett & Co., had been fraudulently manipulated and used to conceal the fraud committed on SIB;

(i) The assets and liabilities of SIB were diverse and complex. For instance, among many other things:

(i) At the time of its collapse in February 2009, SIB had approximately 25,000 clients located in approximately 113 different countries with SIB certificates of deposit valued at approximately USD $8 billion,

(ii) As detailed at paragraph 62 of the Joint Liquidators' statement of claim, SIB offered six different types of products to customers. There were distinct terms and conditions for each type of product, all of which impacted the extent of the liabilities owed by SIB to individual customers,

(iii) As detailed at paragraph 63 of the Joint Liquidators' statement of claim, SIB also offered investment banking services including public equity dealings, private placements, mergers and acquisitions, and debt financing,

all of which were undertaken for an array of clients around the world and which gave rise to distinct assets and liabilities of SIB,

(iv) SIB had investment assets with hundreds of financial institutions around the world totaling millions of dollars including equities, bonds, private equity investments and cash,

(v) SIB held extensive and diverse real property assets in Antigua that gave rise to unique financial and legal issues, and

(vi) SIB had extensive other assets ranging from smaller items such as office furniture and vehicles to debts owing to SIB worth millions of dollars;

(j) Upon arriving at SIB's offices in Antigua on February 20, 2009, the Former Officeholders found approximately 100 SIB customers in the lobby. Those customers had travelled to SIB's offices from around the world to demand repayment of their investments. Those customers were extremely agitated and demanding, so much so that SIB personnel were required to seek the assistance of the Antiguan police;

(k) Following the appointment of the Former Officeholders as receiver-managers, SIB's customers from around the world continued to travel to SIB's offices to demand their repayments and speak with the Former Officeholders or SIB personnel;

(l) Within the initial months following the appointment of the Former Officeholders as receiver-managers of SIB, the Former Officeholders received more than 15,000

emails from SIB customers demanding information on the status of SIB and their investments. Large numbers of such emails from SIB customers continued to be received by the Former Officeholders throughout the period they acted as receiver-managers and liquidators of SIB;

(m) Within the initial months following the appointment of the Former Officeholders as receiver-managers of SIB, the Former Officeholders also received thousands of telephone calls from SIB customers demanding information on the status of SIB and their investments. Large numbers of such telephone calls continued to be received by the Former Officeholders throughout the period they acted as receiver-managers and liquidators of SIB;

(n) Upon their appointment as receiver-managers, the Former Officeholders became responsible for the approximately 90 employees of SIB's offices in Antigua. Those employees were generally of limited assistance to the Former Officeholders due to their dismay over SIB's unexpected collapse and, more importantly, because information truly relevant to the Former Officeholders' efforts as receiver-managers and liquidators had been deliberately kept from them. This restricted the Former Officeholders' ability to investigate and uncover the true nature of SIB's affairs;

(o) To the extent that SIB's assets were held in foreign jurisdictions or the Former Officeholders were required to act in foreign jurisdictions in order to complete their mandate as receiver-managers or liquidators, the Former Officeholders were required to obtain recognition from the courts of such jurisdictions prior to

obtaining those assets or otherwise complete their mandate. Obtaining such recognition was a complex process that required the Former Officeholders to identify, retain and extensively coordinate with local counsel in foreign jurisdictions;

(p) Due to legal complications, virtually all steps taken in foreign jurisdictions by the Former Officeholders prior to the Limitations Date were vehemently opposed by the U.S. Receiver, the SEC and the Asset Forfeiture and Money Laundering Section of the U.S. Department of Justice;

(q) At all times that the Former Officeholders acted as receiver-managers or liquidators of SIB, they also acted as receiver-managers of STC. The receivership of STC gave rise to an extensive number of unique issues that required attention and actions distinct from those taken in respect of SIB.

3. The Former Officeholders' personal abilities and circumstances limited their ability to readily discover a claim against TD Bank

52. Even if the Former Officeholders had the funding required to investigate and pursue third party claims (which they did not), their personal abilities and circumstances limited their ability to readily discover the facts giving rise to the Joint Liquidators' claim against TD Bank. Among other things, at the time of their initial appointment, those abilities and circumstances included the following:

(a) The Former Officeholders were citizens of the United Kingdom and were not citizens of Antigua;

(b) The Former Officeholders were educated and trained in the United Kingdom in accordance with the practices and laws of the United Kingdom and not in accordance with the practices and laws of Antigua;

(c) The Former Officeholders were based in the United Kingdom and the vast majority of their professional experience was obtained in the United Kingdom;

(d) The Former Officeholders had very limited experience working in Antigua, having undertaken only one previous project in that jurisdiction;

(e) The Former Officeholders had limited knowledge of the relevant laws, personnel and customs of undertaking a receivership or liquidation in Antigua;

(f) Although the Former Officeholders had experience undertaking receiverships and liquidations, they had never undertaken a project the size and scale of the receivership and liquidation of SIB, which (unbeknownst to the Former Officeholders at that time) had operated for more than 20 years and was the victim of the second largest financial fraud in history;

(g) The Former Officeholders had no knowledge of SIB's business or affairs and no knowledge of the personnel, information or records that they been placed in charge of by virtue of their appointment as receiver-managers;

(h) The Former Officeholders had no knowledge that SIB had suffered an injury, loss or damage and, in particular, did not know that SIB had suffered a financial loss and was in fact insolvent. Instead, they knew only that SIB's accounts had been frozen by the U.S. Receivership Order;

(i) The Former Officeholders had no knowledge or way to immediately determine that a fraud had occurred in connection with SIB and, importantly, had no knowledge or way to immediately determine that SIB was the victim of a fraud;

(j) Like with respect to SIB, the Former Officeholders similarly had no knowledge whatsoever in respect of STC, an entity for which they also served as receiver-managers;

(k) The Former Officeholders had no or very limited knowledge of TD Bank and, in particular, did not know of the location of any TD Bank offices relevant to SIB or the types of services TD Bank provided;

(l) The Former Officeholders had no knowledge that TD Bank had provided correspondent banking services to SIB and similarly had no knowledge of any other banking services that had been provided to SIB;

(m) The Former Officeholders specifically had no knowledge or way to immediately determine that any services provided by TD Bank to SIB were relevant to the undertaking of a fraud; and

(n) The Former Officeholders had no knowledge of any acts or omissions of TD Bank in connection with its provision of correspondent banking services to SIB.

4. The Former Officeholders acted with reasonable diligence in the circumstances

53. The actions taken by the Former Officeholders prior to the Limitations Date were reasonable and consistent with their mandate and capacity first as receiver-managers and then as

liquidators. The Former Officeholders at all relevant times acted with reasonable diligence, particularly in light of the funding restraints detailed above. For instance, notwithstanding their circumstances, among extensive other actions, prior to the Limitations Date, the Former Officeholders:

(a) Located and reviewed many of the available records that were relevant to their mandate as receiver-managers and liquidators, including those records held both at SIB in Antigua and, to the extent possible, with third parties around the world;

(b) Interviewed and worked with SIB employees and others in order to understand SIB's operations and, in turn, undertake the receivership and liquidation;

(c) Investigated and confirmed the sums owed to SIB's customers and other creditors;

(d) To the extent possible, located and reviewed the investment assets held by SIB with financial institutions around the world, including by undertaking extensive correspondence with such financial institutions;

(e) To the extent possible, located and revised the diverse non-investment assets of SIB held by SIB around the world, including by undertaking any necessary correspondence and steps to engage personnel knowledgeable of or responsible for such assets;

(f) To the extent possible in light of the very limited funds available, retained and utilized professionals around the world to take steps on behalf of SIB and the Former Officeholders;

(g) Took steps to determine the funds available to the Former Officeholders to undertake the receivership and liquidation and, upon realizing that there was insufficient funds, took steps to locate further sources of funds and access those funds;

(h) Ensured the preservation of SIB's operating infrastructure and computer systems, including by securing and imaging SIB's extensive computer systems and records;

(i) Ensured regular and responsive communications with SIB creditors, including by responding to extensive creditor inquiries, issuing regular press releases in both English and Spanish, and maintaining a website including information relevant to the receivership and liquidation;

(j) Extensively corresponded and negotiated with the U.S. Receiver with a view to co-operating and co-ordinating the administration of the two estates of SIB;

(k) Implemented and maintained a SIB-specific online claims management system;

(l) Sought recognition of their appointment as receiver-managers and liquidators in jurisdictions around the world where it was determined that SIB had assets, including in Canada, the United States, the United Kingdom and Switzerland; and

(m) Took steps further to their mandate as receiver-managers of STC, most of which were distinct from the steps required in respect of SIB.

54. In taking such steps, the Former Officeholders acted properly and consistent with their mandate as receiver-managers and liquidators. They rationally prioritized their many competing priorities and responsibilities and did so in light of the restraints caused by lack of funding and lack of information. The Former Officeholders acted consistent with their role as court-appointed officers acting on behalf of SIB's creditors and acted in the most cost-effective manner possible.

55. In the circumstances, even if the Former Officeholders had spent all of their time and efforts on investigating and pursuing third party claims in dereliction of their other higher priorities, they still would not have discovered the facts giving rise to the Joint Liquidators' claim against TD Bank prior to the Limitations Date. For similar reasons, even with the benefit of funding and certain records not available to the Former Officeholders, the U.S. Receiver also did not discover and could not have discovered with reasonable diligence those facts until after the Limitations Date. At all relevant times, the Former Officeholders and the U.S. Receiver acted as would a reasonable person in the circumstances.

Conclusion

56. In light of the foregoing, TD Bank's limitations defence must fail.

Date: September 22, 2014

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Lawyers for the plaintiffs

MARCUS A. WIDE, et al.
Plaintiffs

v.

THE TORONTO-DOMINION BANK
Defendant
Court File No. CV-12-9780-00CL

188

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

REPLY TO STATEMENT OF DEFENCE

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Lawyers for the plaintiffs

TAB F

This is **Exhibit "F"** referred to in the
affidavit of Marcus A. Wide
sworn before me, this 22nd day of September, 2016.

A Commissioner for taking affidavits

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

NOTICE OF MOTION
(motion for summary judgment)

THE TORONTO-DOMINION BANK ("TD Bank") will make a motion to a judge presiding over the Commercial List on a date to be fixed, at 330 University Avenue, Toronto.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. summary judgment dismissing this action;

2. costs of this motion and of the action; and

3. such further and other relief as this Court considers just.

THE GROUNDS FOR THE MOTION ARE:

1. The plaintiffs purport to sue TD Bank for losses allegedly suffered by investors in certificates of deposit issued by Stanford International Bank Ltd. ("SIB"), which was based in Antigua.

2. On February 16, 2009, a U.S. District Court in Dallas, Texas issued an order (the "Freeze Order") freezing the worldwide assets of SIB on the basis that SIB had engaged in a Ponzi scheme fraud.

3. From the time of the issuance of the Freeze Order onwards, it was publicly and generally known that SIB had engaged in a fraud.

4. Prior to the Freeze Order, TD Bank had provided correspondent banking services to SIB and related entities. This fact was also generally known as of February 2009.

5. In the months following the Freeze Order, a number of pieces of litigation were commenced worldwide in respect of the matter. In Canada, the litigation included proceedings brought by Bennett Jones LLP, currently counsel for Marcus Wide and High Dickson in their capacities as joint liquidators of SIB appointed by the Eastern Caribbean Supreme Court (the "Joint Liquidators"), and proceedings against TD Bank:

(a) on February 25, 2009, Bennett Jones LLP commenced a putative class action in the Alberta Court of Queen's Bench (under the style *Dynasty Furniture Limited (as a representative plaintiff) v. SIB*, Court File No. 0901-02821);

(b) on April 6, 2009, the Joint Liquidators' predecessors, also appointed by the Eastern Caribbean Supreme Court, brought an *ex parte* motion before a bankruptcy registrar of the Québec Superior Court seeking recognition under the *Bankruptcy and Insolvency Act* of the bankruptcy proceedings in the Eastern Caribbean Supreme Court (under the style *Stanford International Bank Ltd. and Stanford Trust Company Ltd. (Receivership of)*, Court File No. 500-11-036045-090);

(c) on April 17, 2009, Bennett Jones LLP, acting for a group of plaintiffs known as the "Dynasty Plaintiffs", commenced a fraud action against Allen Stanford, the owner of SIB, in the Alberta Court of Queen's Bench (under the style *Dynasty Furniture Manufacturing Ltd. v. Stanford*, Court File No. 0901-05677);

(d) on April 17, 2009, the Dynasty Plaintiffs also commenced a Norwich application against TD Bank in the Alberta Court of Queen's Bench (under the style *Dynasty Furniture Manufacturing Ltd. v. The Toronto-Dominion Bank*, Court File No. 0901-05717), with Bennett Jones LLP acting for the Dynasty Plaintiffs;

(e) on April 24, 2009, the Attorney General of Ontario commenced a proceeding in the Ontario Superior Court of Justice under the *Civil Remedies Act*, S.O. 2001, c. 28 in respect of approximately $20 million of SIB's funds that were on deposit with TD Bank at the time of the Freeze Order (under the style *Attorney General of*

Ontario v. The Contents of Various Financial Accounts Held With The TD Bank and TD Waterhouse (in rem), Court File No. CV-09-8154-00CL);

(f) on June 19, 2009, the United States Department of Justice issued a press release announcing that Robert Allen Stanford, the Chairman of SIB, and several other SIB executives had been indicted on fraud and obstruction charges related to SIB's Ponzi scheme fraud; and

(g) after the Dynasty Alberta Action and the Dynasty Alberta Norwich Application were stayed by the Alberta Court of Queen's Bench on the basis of *forum non conveniens*, on July 29, 2009, the Dynasty Plaintiffs, represented by Bennett Jones LLP, reinstituted the Dynasty Alberta Norwich Application by bringing an application in the Ontario Superior Court of Justice (under the style *Dynasty Furniture Manufacturing Ltd. v. The Toronto-Dominion Bank*, Court File No. 09-8300-00CL).

6. As a result, 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, 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.

7. Accordingly, since this action was not commenced until August 22, 2011, it is statute barred and ought to be dismissed. TD Bank pleads and relies on the *Limitations Act, 2002,* S.O. 2002, c. 24, Sch. B.

8. TD will also rely on such further and other grounds as counsel may advise and this Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. the Affidavit of Wolfgang Mersch, sworn October 10, 2014; and

2. such further and other materials as counsel may advise and this Court may permit.

October 10, 2014

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Lawyers for the Plaintiffs

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

NOTICE OF MOTION

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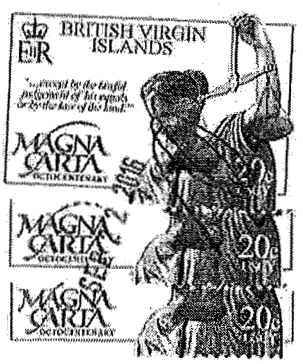
Lawyers for the Defendant

DOCS 13848054

TAB G

This is **Exhibit "G"** referred to in the
affidavit of Marcus A. Wide
sworn before me, this 22nd day of September, 2016.

A Commissioner for taking affidavits



CITATION: Wide v. TD Bank, 2015 ONSC 6900
COURT FILE NO.: CV-12-9780-00CL
DATE: 20151109

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: 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

BEFORE: Conway J.

COUNSEL: *Geoff R. Hall* and *Junior Sirivar*, for The Toronto-Dominion Bank, moving party

Lincoln Caylor, *Maureen M. Ward* and *Nathan J. Shaheen*, for Marcus Wide and Hugh Dickson (in their capacities as Joint Liquidators of Stanford International Bank Limited), responding parties

HEARD: September 16 and 17, 2015 and written submissions

ENDORSEMENT

[1] Stanford International Bank Limited ("SIB") was an offshore bank headquartered in Antigua. It sold approximately $8 billion in purported high-yield certificates of deposits ("CDs") in what turned out to be one of the largest Ponzi schemes in history. That scheme was orchestrated primarily by SIB's Chairman Allen Stanford ("Stanford") and Chief Financial Officer James Davis ("Davis").

[2] On February 16, 2009, the U.S. Securities and Exchange Commission (the "SEC") filed civil charges in the U.S. District Court for the North District of Texas (Dallas Division) against, among others, SIB, its related entities, and Stanford and Davis on the basis of an alleged massive ongoing fraud. That day, the court granted an order (the "Freeze Order") preventing SIB and its related entities from carrying on business.

[3] The Toronto Dominion Bank ("TD") was SIB's main correspondent bank from the early 1990s to its collapse in 2009. TD maintained accounts for SIB through which the funds flowed between SIB and its investors for the purchase and redemption of CDs.

[4] On August 22, 2011, the plaintiffs, as joint liquidators of SIB (the "Joint Liquidators"), commenced an action against TD on behalf of SIB and its customers. The claim seeks damages of USD$5.5 billion for negligence and knowing assistance.

[5] TD brings a summary judgment motion to dismiss the claim as statute barred, on the basis that the Joint Liquidators' claim against TD was discoverable before August 22, 2009, more than two years before the action was commenced.

[6] For the reasons that follow, the motion is dismissed.

Background

[7] On February 16, 2009, the Freeze Order was granted. The court found that there was good cause to believe that SIB, Stanford and Davis and others[1] (the "Stanford defendants") used improper means to obtain investor funds and assets, and issued a temporary restraining order against the Stanford defendants. The court appointed Ralph Janvey (the "U.S. Receiver") as receiver over the assets of the various Stanford defendants.

[8] On February 19, 2009, the SEC issued a press release stating that it had charged the Stanford defendants with conducting a fraudulent, multi-billion dollar investment scheme. The matter quickly attracted widespread international publicity.

[9] On February 19, 2009, the Antiguan Financial Services Regulatory Commission appointed Nigel Hamilton-Smith and Peter Wastell (the "Former Officeholders") as receiver-managers of SIB. The Former Officeholders, based in the United Kingdom, arrived in Antigua on February 20, 2009, accompanied by their U.K. legal counsel. They were met with chaos and deluged with thousands of calls and emails from SIB customers.

[10] The Former Officeholders proceeded to investigate the financial affairs of SIB, try to restore order, and identify and protect SIB assets in financial institutions around the world. The Former Officeholders had virtually no funding to operate SIB's estate. Therefore, they concentrated on stabilizing the estate and accessing funds belonging to SIB in accounts in foreign jurisdictions.

[11] The Former Officeholders learned about SIB's banking relationship with TD almost immediately. SIB accounting staff told the Former Officeholders that TD was the main correspondent bank for SIB and gave them various details about the SIB accounts at TD.

[12] Investor litigation over the collapse of SIB started in short order. On February 25, 2009, a putative class action was brought by Dynasty Furniture Manufacturing Ltd. against the Stanford defendants in Canada (the "Dynasty Action"). Dynasty's counsel sent the Former Officeholders a copy of the statement of claim on March 6, 2009.

---

[1] The Stanford defendants were SIB, Stanford Group Company, Stanford Capital Management, LLC, Messrs. Stanford and Davis, and Laura Pendergest-Holt.

[13] The Former Officeholders quickly determined that SIB was insolvent and on April 15, 2009, they were appointed as joint liquidators of SIB. That order authorized them to bring proceedings against third parties in Antigua and Barbuda and/or in foreign jurisdictions. However, because of their limited funding, the Former Officeholders' priority continued to be to "follow the cash" and secure assets of SIB in accounts around the world, rather than to investigate or pursue claims against any third parties.

[14] According to the plaintiffs' expert, Mr. Tacon, a U.K.-trained insolvency expert, the priorities and work streams developed by the Former Officeholders were consistent with what could have been expected from a reasonable liquidator. He states that the discovery and pursuit of third party claims could not reasonably have been expected under the circumstances at that time.

[15] On April 17, 2009, Dynasty and others commenced an action against TD in Alberta for a *Norwich* order to examine SIB banking records held by TD (the "*Norwich* **Action**"). Their counsel provided a copy of the *Norwich* claim to the Former Officeholders on April 17, 2009. It refers to the Dynasty Action and states that "TD Bank acted as correspondent banks [sic] for [the Stanford defendants] and thereby became involved in the tortious acts of those companies so as to facilitate the wrongdoings alleged in the [Dynasty Action]."

[16] On June 19, 2009, the United States Department of Justice issued a press release announcing that Stanford and several other SIB executives had been indicted on fraud and obstruction charges related to the Ponzi scheme.

[17] On August 26, 2009, Dynasty and others commenced an action against TD seeking damages in connection with TD's provision of correspondent banking services to SIB (the "**Dynasty TD Action**"). That action was later assigned to the Joint Liquidators in 2011.

[18] On August 27, 2009, Davis pleaded guilty to the fraud and further details about the nature, extent and duration of the fraud became available publicly (the "**Davis Guilty Plea**").

[19] The Former Officeholders had sought recognition to act in Canada shortly after their appointment as liquidators, as did the U.S. Receiver. On September 11, 2009, the Quebec Superior Court of Justice appointed the U.S. Receiver's representative, Ernst & Young Inc., as interim receiver of SIB's Canadian assets.

[20] The Former Officeholders were removed as liquidators by court order in Antigua on June 8, 2010. On May 12, 2011, the Joint Liquidators became the successors to the Former Officeholders. They sought authorization to bring a claim against TD in Canada in the place of Ernst & Young. On August 19, 2011, the Joint Liquidators were authorized by the Quebec Superior Court to bring a claim against TD in Canada on behalf of SIB and its customers.

[21] On August 22, 2011, the Joint Liquidators commenced this action against TD.

The Claim Against TD

[22] As noted above, the Joint Liquidators claim against TD in negligence and knowing assistance. The Joint Liquidators assert two claims – one on behalf of SIB as TD's customer and one on behalf of SIB's customers (non-customers of TD).

[23] Essentially, the claim alleges that as SIB's correspondent bank from the 1990s to 2009, TD failed to act in accordance with the standard of care applicable to a reasonable banker. The plaintiffs allege that TD failed to conduct proper due diligence before it started providing banking services to an Antiguan off-shore bank, and compounded its negligence by continuing to provide banking services to SIB for 20 years. They allege that TD ignored public information and red flags that should have led it to terminate SIB's access to TD's facilities, report the conduct of Stanford and others to the appropriate authorities, and/or freeze SIB's accounts. The claim further alleges that TD is liable for providing knowing assistance in the breaches of duties and breaches of trust by Stanford and others.

[24] The plaintiffs' claim is premised on the central allegation that Stanford and Davis and a small cabal of other insiders orchestrated a scheme to loot SIB of several billion dollars of its assets (the "SIB Looting"). The plaintiffs claim that as a result of its negligence, TD missed numerous opportunities to reveal and stop the scheme by which the SIB Looting took place and, as a result, SIB and its customers suffered at least $5.5 billion in damages.

The Limitations Issue and Applicable Legal Principles

[25] Section 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Schedule B (the "Act") sets out the basic limitation period, namely that a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

[26] Pursuant to s. 5(1) of the Act, a claim is discovered on the earlier of,

> (a) the day on which the person with the claim first knew,
>
> > (i) that the injury, loss or damage had occurred,
> >
> > (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
> >
> > (iii) that the act or omission was that of the person against whom the claim is made, and
> >
> > (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

[27] Under s. 5(2) of the Act, a person with a claim is presumed to have known of the matters referred to in clause (1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[28] The parties agree that in this case, the earliest date that the limitation period could have run is February 16, 2009, when the Freeze Order was issued. There is no suggestion that the plaintiffs' predecessors knew or ought to have known of a potential claim against TD before that date.

[29] The critical date for limitations purposes is August 22, 2009, two years before the date the claim was issued. If the claim ought to have been discovered before that date,[2] the plaintiffs' claim is out of time. If it was after August 22, 2009, the claim survives.

[30] The parties acknowledge that the Joint Liquidators were not in office from February 16, 2009 to August 22, 2009 – it was their predecessors, the Former Officeholders (first as receiver-managers and then as liquidators) who were in office, and it is the Former Officeholders' knowledge that is relevant in this case.[3] [4]

[31] The issue on this motion, therefore, is whether a potential claim against TD was discoverable by the Former Officeholders on or before August 22, 2009.

[32] Section 5(1)(b) of the Act codifies the long-standing discoverability doctrine that a limitation period will begin running not from the date a cause of action was actually discovered, but rather from the date that it should reasonably have been discovered. As stated by the Ontario Court of Appeal in *Lawless v. Anderson*:

> The principle of discoverability provides that "a cause of action arises for the purposes of a limitation period when the material facts on which it is based have been discovered, or ought to have been discovered, by the plaintiff by the exercise of reasonable diligence.
>
> Determining whether a person has discovered a claim is a fact-based analysis. The question to be posed is whether the prospective plaintiff knows enough facts on which to base an allegation of negligence against the defendant. If the plaintiff does, then the claim has been "discovered", and the limitation begins to run....[5]

[33] Discoverability does not require perfect knowledge of a potential claim. Rather, discovery of "sufficient facts" or *prima facie* grounds giving rise to a claim will commence the

---

[2] TD concedes that there is no evidence that the Former Officeholders had actual knowledge of a potential claim against TD before August 22, 2009.

[3] See also s. 12 of the Act. If a person claims through a predecessor, the limitation period starts to run from the date the predecessor first knew or ought to have known of the matters in s. 5(1)(a).

[4] While the claim is two-fold (brought by the plaintiffs on behalf of both SIB and its customers), TD acknowledges that functionally it is the knowledge of the Former Officeholders that is relevant for discoverability purposes in this case.

[5] 2011 ONCA 102, at paras. 22-23, quoting *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (C.A.) at p. 170.

limitation period: see *Kowal v. Shyiak*, 2012 ONCA 512, at para. 18; *Coutanch v. Napoleon Delicatessen*, [2004] 72 O.R. (3d) 122 (C.A.), at para. 26. When a defendant raises a limitations issue, the onus is on the plaintiff to prove that the claim was commenced in a timely manner: *McSween v. Louis*, [2000] O.J. No. 2076 (C.A.), at para. 37.

Analysis

[34] TD submits that the Former Officeholders ought to have known that SIB had a claim against TD before August 22, 2009. TD relies on the following evidence: (a) news of the alleged fraud was widespread as early as February 16, 2009; (b) the Former Officeholders knew early on that TD was the main correspondent bank for SIB; (c) the Dynasty plaintiffs had sued TD in the *Norwich* Action; (d) the Former Officeholders were appointed as liquidators of SIB in April 2009 and had a mandate to pursue claims by SIB against third parties; and (e) Mr. Hamilton-Smith, one of the Former Officeholders, stated that by April 20, 2009, they had gained a deep understanding of SIB's business and that by May 15, 2009 his own findings were consistent with the SEC's allegations that SIB was involved in a massive Ponzi scheme.

[35] The plaintiffs have tendered a great deal of evidence on this motion with respect to the situation faced by the Former Officeholders between February 16 and August 22, 2009.[6] The plaintiffs argue that there was no obvious evidence of wrongdoing by TD when the Former Officeholders arrived in February 2009. Further investigation of a potential claim against TD would have been required. The plaintiffs argue that given the mayhem and lack of funding that existed at the time, it was reasonable for them not to have investigated potential third party claims under the circumstances. They rely on Mr. Tacon's expert opinion to support their position.

[36] I am not deciding this motion on the basis of that argument. Rather, I am dismissing this summary judgment motion because the issue of discoverability is a genuine issue for trial. I cannot fairly and justly adjudicate, based on the record before me, whether the claim against TD was discoverable by the Former Officeholders before August 22, 2009. Further, it would not be in the interest of justice for me to use the fact finding powers under Rules 20.04(2.1) and (2.2) to resolve this issue: *Hyrniak v. Mauldin* 2014 SCC 7, [2014] 1 S.C.R. 87, at paras. 66-68.

[37] The analysis of whether the claim against TD was discoverable before August 22, 2009 is not as simple as TD suggests. For example, the fact that the Former Officeholders knew that a Ponzi scheme was alleged and that TD was the correspondent bank is not determinative of whether they ought to have known of any potential wrongdoing on the part of TD. Likewise, the fact that a *Norwich* order was sought against TD is not determinative – those types of orders are commonly sought from a bank to obtain evidence for use in a claim against another third party wrongdoer.

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[6] Their evidence includes affidavits from (a) Mr. Wiltshire (U.K. counsel who accompanied the Former Officeholders to SIB's Antigua office in February 2009); (b) Omari Osborne and Beverly Jacobs, Manager of SIB's accounting department and Vice President of Client Support, respectively, during that period; and (c) Mr. Wide, one of the Joint Liquidators. As noted above, they rely on the expert evidence of Mr. Tacon.

[38] In this case, the plaintiffs' claim is premised on the allegation that the SIB Looting occurred and that TD should have taken steps to prevent it. Whether the Former Officeholders ought to have known prior to August 22, 2009 that there was a potential claim against TD will entail numerous factual inquiries. These may include, for example, what the Former Officeholders ought to have known during that period about: the role TD played in SIB's operations; how involved TD was with SIB's principals; what the mechanics of the Ponzi scheme were; who at SIB was involved in conducting the Ponzi scheme;[7] and what part TD played in facilitating the conduct of this Ponzi scheme.

[39] This analysis, in turn, will engage numerous other factual inquiries. For example, what was the effect of the Former Officeholders not having access to the financial and banking documents held by the U.S. Receiver? According to the plaintiffs, these were the only records that could have revealed the details of how the fraud was undertaken. The plaintiffs argue that without access to those records, the Former Officeholders could only have learned these details on the date of the Davis Guilty Plea.[8]

[40] The Davis Guilty Plea occurred on August 27, 2009, within the two year limitation period. At that point, the details of the fraud were made publicly available, including the extent, nature and duration of the fraud.[9] A factual inquiry is required as to how relevant or necessary the information in the Davis Guilty Plea was in order for the Former Officeholders to have discovered that SIB (TD's customer) had a potential claim against TD.[10] I note that TD has previously taken the position in other SIB-related litigation that the limitation period started on the date of the Davis Guilty Plea. While this is not an admission for purposes of this proceeding, it reinforces the fact that the information contained in the Davis Guilty Plea may be highly relevant to the limitations analysis in this case.

[41] These factual inquiries and determinations cannot possibly be made on this record. I accept the plaintiffs' submission that the evidence is varied, complex, includes expert evidence and goes to central issues of who knew what, when they knew it and what ought to have occurred in Antigua in 2009. A determination of these issues will require multiple findings of

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[7] In the Davis Guilty Plea, it was admitted that the fraud was perpetrated primarily by Stanford and Davis, who were responsible for managing SIB's assets in the United States and who deliberately concealed the fraud from SIB employees.

[8] The U.S. Receiver's own evidence on this motion was that even with the access he had to those records they were so complex and disorganized that it was difficult to piece together a complete picture of the Stanford operations and identify and pursue third party claims. .

[9] I note that the U.S. Court of Appeal for the Fifth Circuit concluded that there was no evidence before it to indicate that the U.S. Receiver could reasonably have known about the true nature and duration of the Ponzi scheme before the date of the Davis Guilty Plea.

[10] TD argues that the fact that the Dynasty plaintiffs brought an action against TD on August 26, 2009 – the day before the Davis Guilty Plea – demonstrates that the information in the Davis Guilty Plea is irrelevant to discoverability. I reject that submission. The issue of discoverability looks at when the plaintiffs' claim in this action was discoverable, not when the Dynasty plaintiffs' claim was discoverable (and on which there is no evidence before me). The Davis Guilty Plea may well be relevant to discoverability of the plaintiffs' claim, regardless of the timing of the Dynasty TD Action.

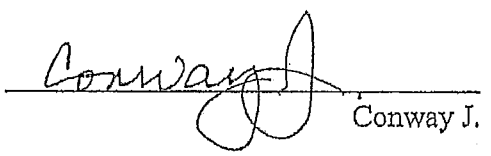
fact. In my view, the issue of when the Former Officeholders ought to have known that SIB had a potential claim against TD cannot be fairly adjudicated on this motion and is a genuine issue for trial. Given the overlap in the evidence on discoverability and the merits of the action,[11] I decline to order a mini-trial, as suggested by TD.

Decision

[42] TD's motion for summary judgment is dismissed.

[43] I will remain seized of this matter as the case management judge. The parties are to arrange a 9:30 appointment before me to determine next steps and set a timetable for this action.

[44] If the parties are unable to agree on costs of this motion, written submissions not exceeding 3 pages (double spaced) may be made by the plaintiffs within 15 days and by TD within 10 days thereafter.



Conway J.

Date: November 9, 2015

[11] In particular, there will be overlap in the evidence about the fraud, how and by whom it was conducted, and the banking relationship between SIB and TD.

TAB H

This is **Exhibit "H"** referred to in the
affidavit of Marcus A. Wide
sworn before me, this 22nd day of September, 2016.

A Commissioner for taking affidavits

CONWAY J.

Commercial List File Number:	CV-12-9780-00CL
Civil File Number:	

Date: November 17, 2015

SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST
9:30 A.M. HEARING REQUEST FORM

A	PLEASE NOTE: The 9:30 hearing procedure is only for "ex parte, urgent, scheduling and consent matters which take no longer than 10 minutes" (Practice Direction, (2002), 57 O.R. (3rd) 97; paragraph 25). This restriction will be enforced. This matter is (tick one or more): ☐ ex parte ☐ urgent ☒ scheduling ☐ consent other (explain)
B	Short Title of Proceeding: Marcus Wide et al. v. The Toronto-Dominion Bank
C	Date(s) Requested: December 1, 2015
D	The following is a brief description of the matter to be considered at the 9:30 appointment: Scheduling next steps further to the endorsement of Conway J. dated November 9, 2015.
E	The following materials will be necessary for the matter to be considered. (It is the responsibility of counsel to confirm that the proper materials are available for the Court.)
F	Is any Judge seized of these matters or any judicial conflicts? ☒ yes ☐ no Justice Conway

Dec. 1/15 9:30

COUNSEL FOR APPLICANT/MOVING PARTY		COUNSEL FOR OTHER PARTY	
Party	Marcus Wide et al.	Party	The Toronto-Dominion Bank
Counsel	per Lincoln Caylor, Maureen Ward	Counsel	per Geoff Hall, Junior Sirivar
Address	Bennett Jones LLP, 3400 One First Canadian Place, P.O. Box 130, Toronto, Ontario, M5X 1A4	Address	McCarthy Tetrault LLP, Suite 5300, TD Bank Tower, Toronto, Ontario, M5K 1E6
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(IF MORE THAN 2 PARTIES INVOLVED, ADD ADDITIONAL SIGNATURES AND PARTICULARS ON REVERSE OR SEPARATE PAGE)

To be submitted to: Commercial List Office, 330 University Avenue, 7th Floor, Toronto Ontario Fax to: (416) 327-6228
You may also convert to PDF and email to Toronto.Commercialist@jus.gov.on.ca

Endorsement/Disposition ☐ See attached Yellow Endorsement Form.

Dec 1/15 Schedule set for next steps - completion of pleadings + discovery plan. Counsel to reattend at a 9:30 before me once discovery plan agreed or before if other issues need to [illegible]

Commercial Form A

Confirm George in [illegible] Jus 1/15

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

TIMETABLE FOR JOINT LIQUIDATORS AND DYNASTY ACTIONS

Step	Deadline
Joint Liquidators to deliver letter outlining their proposed approach to documentary productions and providing comments on the appropriate approach to documentary productions to be adopted by TD Bank so that preliminary steps are ongoing regarding productions[1]	December 14, 2015
The parties will meet to discuss the proposed production of documents based on the Joint Liquidators' letter	January 15, 2016
Delivery of Amended Statement of Defence in the Joint Liquidators' Action	~~March 31~~, 2016 Feb 29
Delivery of Amended Reply in the Joint Liquidators' action	~~April 22~~, 2016 March 18
Parties to agree on a discovery plan	May ~~31~~ 6, 2016
Production of documents	In accordance with the discovery plan

December 1, 2015

[1] All steps relating to production of documents will cover both the Joint Liquidators' action and the Dynasty action.

UNOFFICIAL TRANSCRIPTION OF THE HANDWRITTEN ENDORSEMENT OF JUSTICE CONWAY DATED DECEMBER 1, 2015

Schedule set for next steps – completion of pleadings and discovery plan. Counsel to reattend at a 9:30 [i.e., a 9:30 chambers appointment] before me once discovery plan agreed or before if other issues need to be addressed.

B. Conway J.

TAB I

This is **Exhibit "I"** referred to in the
affidavit of Marcus A. Wide
sworn before me, this 22nd day of September, 2016.

A Commissioner for taking affidavits

Bennett Jones

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Our File No.: 68029.1

December 14, 2015

BY EMAIL

Mr. Geoff Hall
McCarthy Tetrault LLP
Suite 5300
Toronto-Dominion Bank Tower
Toronto, ON M5K 1E6

Dear Counsel:

Re: Marcus Wide et al. v. The Toronto-Dominion Bank
Court File No. CV-12-9780-00CL

Further to the direction of Justice Conway at the chambers appointment of November 27, 2015, this letter outlines the proposed approach to documentary productions of our clients, Marcus Wide and Hugh Dickson (the "**Joint Liquidators**"). It also provides comments on the appropriate approach to documentary productions to be adopted by The Toronto-Dominion Bank ("**TD Bank**").

I. JOINT LIQUIDATORS' DOCUMENTARY PRODUCTIONS

A. Joint Liquidators' Records

The Joint Liquidators have possession, control or power over records of the following general nature:

1. Records of the estate of SIB

The Joint Liquidators have a database that provides a platform for records to be hosted, searched, reviewed and categorized (the "**Recommind Database**"). The Recommind Database is comprised of the electronic and physical records from the Antiguan estate of Stanford International Bank Limited

("SIB") that are potentially relevant to the Joint Liquidators' tracing and litigation efforts, including all internal and external correspondence of SIB personnel, and statements or other records relevant to SIB's relationships with third parties.

In order to be placed in the Recommind Database, the 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 subjected to an optical character recognition process. This process entails the digital detection of the text of records, with the results being that the content of the newly scanned records was rendered fully searchable. The records that were originally in electronic form have been placed in the Recommind Database and are also fully searchable.

As a result of the foregoing, the Recommind Database currently contains over three terabytes of data that comprises approximately 4.9 million records. There was no date restriction placed on the records placed in the Recommind Database, although the records available to the Joint Liquidators tend not to span the early years of the relationship between SIB and TD Bank.[1]

2. Records of the U.S.-based Stanford entities

The records of the U.S.-based Stanford entities are controlled by their U.S. receiver, Ralph Janvey (the "U.S. Receiver"). In March 2013, the Joint Liquidators and the U.S. Receiver entered into an agreement whereby the Joint Liquidators became entitled to access records held by the U.S. Receiver.

The U.S. Receiver controls a database that provides a platform for documents to be hosted, searched, reviewed and categorized (the "Ringtail Database"). The records in the Ringtail Database consist of emails sent and received by personnel of Stanford entities plus attachments. We understand that there are approximately 7 million records in the Ringtail database, the majority of which were created between 1995 and 2009. The U.S. Receiver also has some electronic records that are not in the Ringtail Database but are relevant to the Joint Liquidators' action against TD Bank. For instance, the U.S. Receiver previously provided a USB to the Joint Liquidators containing TD Bank account information.

The U.S. Receiver also controls all of the physical records of the U.S.-based Stanford entities. The physical records have been collected and are stored in a warehouse in Houston, Texas. Within the warehouse, the physical records are contained in boxes or cabinets, each of which is labeled. The labels note at least the location from which the files in the box or cabinet were taken and, in some instances, further information on the contents. The U.S. Receiver prepared a spreadsheet listing the boxes and cabinets. There are over 18,000 entries on the spreadsheet, each of which corresponds to an individual box or cabinet.

[1] The whereabouts of the majority of the earlier records is unknown and those records may no longer exist.

3. Other records

The Joint Liquidators also have possession, control or power over certain non-privileged records resulting from their roles as liquidators of SIB (such as creditor claims documents), and from their investigation into the affairs of SIB and their claim against TD Bank.

B. Joint Liquidators' Identification of Relevant Records

The Joint Liquidators proposed approach to undertaking their documentary productions is outlined below.

1. Identifying electronic records for production (Recommind/Ringtail)

The Joint Liquidators will identify the electronic records to be produced in accordance with the following considerations and resulting steps:

a) The Joint Liquidators cannot identify all of the individuals from SIB and its affiliates who may have been involved with TD Bank during the relevant period and who would therefore be appropriate custodians in respect of a review of electronic records. Accordingly, the Joint Liquidators will not limit their efforts to identify relevant electronic records by custodian.

b) The Joint Liquidators will run search terms into the electronic records of all custodians available to them. There are a total of 678 custodians in the Recommind Database and a list of those custodians is provided at Schedule "A". There are a total of 163 custodians in the Ringtail Database and a list of those custodians is provided at Schedule "B".

c) The Joint Liquidators have developed a list of search terms to be run into both the Recommind Database and the Ringtail Database. The list of search terms includes names of personnel from TD Bank (or its affiliates) known to have been involved in the provision of banking services to SIB (or its principals/affiliates). Obviously TD Bank may be aware of other such personnel. It also includes other terms that are relevant to the Joint Liquidators' claim in accordance with the amended statement of claim. The Joint Liquidators' list of search terms and "hits" in the Recommind Database and Ringtail Database are provided at Schedule "C". Please provide the names of any relevant personnel from TD Bank (or its affiliates) or any other potentially relevant search terms that we may have missed in your return letter.

d) The searches run in the Recommind Database and Ringtail Database result in a total of 353,189 "hits". The Joint Liquidators have begun to review the records. The review is aimed at identifying all records relevant to the Joint Liquidators' claim. It will also be aimed at ensuring no privileged records are produced (although this is not expected to be an issue in the circumstances of this case) and eliminating, to the extent possible, duplicate records.

2. Identifying physical records for production (Houston warehouse)

The Joint Liquidators will identify the physical records to be produced in accordance with the following consideration and resulting steps, some of which have been previously undertaken:

a) The Joint Liquidators cannot review all of the physical records held by the U.S. Receiver in the Houston warehouse and given that the spreadsheet indexing the records in the warehouse contains more than 18,000 entries, it was not practical or proportionate to review each of those entries.

b) The Joint Liquidators developed a list of search terms to be run into the spreadsheet. A list of the spreadsheet search terms is provided at Schedule "D". The search terms were run as a key-word search into the spreadsheet. Based on the results of this search, the Joint Liquidators identified sections of the spreadsheet that appeared most likely to be relevant. A line-by-line review of those more limited portions of the spreadsheet was then undertaken.

c) The line-by-line review of the spreadsheet resulted in the Joint Liquidators identifying 211 boxes or cabinets that appeared most likely to correspond with relevant physical records.

d) The list of entries determined most likely to be relevant was used to identify and pull the corresponding 211 boxes or cabinets from the Houston warehouse. The Joint Liquidators' team attended at the Houston warehouse to undertake a high level review of those records. Arrangements were made to copy all potentially relevant records identified in the course of the review and the Joint Liquidators were provided with those copies.

e) The Joint Liquidators will review the copies of the potentially relevant records to identify the records that are actually relevant and to ensure no privileged records are produced (although this is not expected to be an issue in the circumstances of this case).

3. Identifying other relevant records

It is reasonable to anticipate the Joint Liquidators may identify other records that are relevant to their claim against TD Bank. For instance, such records could result from the Joint Liquidators' ongoing investigation. The Joint Liquidators will take steps to identify any such records so that they can be produced. In addition, the Joint Liquidators will request that the U.S. Receiver provide them with any electronic records that are not in the Ringtail Database but are potentially relevant based on the description of relevant records above. The Joint Liquidators will review these records to identify any relevant records to be produced and also produce the relevant creditor claims documents.

C. Joint Liquidators' Production of Relevant Records

Once the Joint Liquidators have identified their relevant records, they will place them all in a centralized database. Physical records will be scanned and uploaded to the database and appropriate metadata will be included for all records. A spreadsheet identifying the Joint Liquidators'

productions will be provided to you and we will coordinate with you to export to you any records you request or provide you with access to the database.

II. TD BANK'S DOCUMENTARY PRODUCTIONS

The Joint Liquidators' position is that TD Bank is required to take the following steps in respect of its documentary productions:

a) confirm the date on which TD Bank and any of its affiliates, subsidiaries or related companies including, for instance, TD Asset Management, TD Waterhouse, TD Securities, TD Private Investment Counsel and TD Bank, N.A. (all referred throughout the remainder of this letter simply as "TD Bank") first took any steps in any way connected with or relevant to the provision of banking services to SIB or any of its principals, predecessors, affiliates, subsidiaries or related companies including, for instance, Bank of Antigua, Caribbean Star Airlines, Caribbean Sun Airlines, Guardian International Bank Ltd., Robert Allen Stanford, Stanford Financial Group or Stanford Group Company (all referred throughout the remainder of this letter simply as "SIB"). We understand this date is likely in the early 1990s but may be earlier;

b) confirm the locations from which TD Bank provided any services to SIB or conducted any work in any way connected with or relevant to the provision of banking services to SIB, including, for example, any compliance or risk assessment work that may not have related directly to SIB but was nonetheless relevant to the provision of banking services by TD Bank to SIB;

c) identify all personnel from TD Bank who played any role in the provision of banking services by TD Bank to SIB at any relevant time and from any relevant location. We are aware of the identification of certain such personnel as a result of the Joint Liquidators' investigation and have included a list of such personnel at Schedule "E". However, TD Bank has exclusive knowledge of the full list of relevant personnel and should identify all such personnel;

d) confirm that all personnel from TD Bank identified in accordance with item c) constitute custodians whose electronic and physical files will be reviewed by TD Bank for the purpose of identifying relevant documents to be produced as detailed below;

e) narrow the electronic records to be reviewed by running search terms through the electronic records of each relevant custodian. The search terms to be run include those listed at Schedule "F" and may include others to be suggested by TD Bank. We note that the search terms we have provided are largely similar to those to be run by the Joint Liquidators except that the names of personnel from TD Bank have been removed and the names of personnel from SIB have been added. It may be that TD Bank is aware of additional personnel from SIB to be added to the list;

f) review all electronic records resulting from undertaking item e) to identify all relevant records and any records over which privilege will be claimed (although we expect that privilege concerns will not to arise in the circumstances of this case);

g) review the potentially relevant physical records to identify all relevant records and any records over which privilege will be claimed (although we expect that privilege concerns will not arise in the circumstances of this case). We appreciate that all physical records from all custodians cannot be reviewed. Some strategy will therefore be required to ensure that TD Bank is reviewing the appropriate physical records. This strategy will presumably include a limiting of physical records to be reviewed based on the relevant time period, the nature of the physical records, etc. We expect TD Bank (or its affiliates) may also have relevant physical records that are not associated with a particular custodian but nonetheless must be reviewed and produced (e.g. files specific to SIB); and

h) in addition to the discovery agreement between the Joint Liquidators and TD Bank, ensure that a detailed record is being kept of all steps taken in respect of TD Bank's documentary production, including steps previously taken and those to be taken going forward.

Given that only TD Bank fully understands its own record keeping and systems, it is best positioned to provide details in respect of how its review and production can be undertaken to implement the process described above. We look forward to receiving these details from you.

III. DYNASTY ACTION PRODUCTIONS

The records to be produced by the plaintiffs in the Dynasty Action include all of the records produced by the Joint Liquidators. We therefore propose to provide one set of productions to you that will constitute the productions of both the Joint Liquidators and the Dynasty Action plaintiffs. In addition, the Dynasty Action plaintiffs may have a small number of additional documents to produce. We propose to produce these in a supplementary affidavit of documents to you.

The position of the Joint Liquidators and the plaintiffs in the Dynasty Action is that TD Bank's productions should be the same in the Joint Liquidators' action and the Dynasty Action. Please confirm that TD Bank agrees with this position.

IV. RELEVANT RECORDS

On November 14, 2012, the Joint Liquidators' Quebec counsel wrote to your firm and described in a general sense the nature of the records that are relevant to the Joint Liquidators' claim against TD Bank. The November 2012 letter is attached as Schedule "G".

The Joint Liquidators' position on the timeframe and scope of the relevant records is consistent with the November 2012 letter. The relevant time frame commences in at least the early 1990s and continues until sometime after the collapse of SIB in February 2009. All steps taken by TD Bank throughout 2009 (and potentially later) as a result of, or in connection with, SIB's collapse are

relevant. This timeframe must be taken into account when the parties are working to identify relevant records for the purpose of productions.

The Joint Liquidators' position on the nature of the relevant records is detailed below. The scope of the relevant records is defined by the pleadings. We have referenced the below descriptions to the statement of claim where appropriate. Some of the descriptions clearly apply generally and therefore no specific reference to the statement of claim has been provided. The below descriptions also must be taken into account when the parties are working to identify relevant records for the purpose of productions. The relevant documents include, at a minimum, those meeting the following criteria:

a) records wherever stored that are connected in any way to the relationship between TD Bank and SIB, whether in the possession of the Joint Liquidators or TD Bank;

b) records of any past or present personnel of TD Bank who had any involvement with SIB and that pertain in any way to that involvement;

c) records that relate in any way to the standards or practices applicable to Canadian or American financial institutions during the period that TD Bank provided correspondent banking services to SIB (the "Applicable Standards") including, without limiting the foregoing, the standards or practices promulgated by:

   the Office of the Superintendent of Financial Institutions,
   the Financial Transaction and Reports Analysis Centre of Canada,
   the Office of the Comptroller of the Currency,
   the Office of Foreign Assets Control,
   the Financial Crimes Enforcement Network,
   the Basel Committee on Banking Supervision,
   the Financial Action Task Force, and
   the Wolfsberg Group[2];

d) records that relate in any way to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations* or any laws of the U.S. that govern the provision of banking services and were applicable to TD Bank during the period that it provided banking services to SIB including, but not limited to, the *Bank Secrecy Act*, the *Money Laundering Act*, the *Foreign Assets Control Regulations* and the *Patriot Act* (together, the "Applicable Laws")[3];

e) records that relate in any way to TD Bank's compliance (or lack thereof) with the Applicable Standards or Applicable Laws including, among other things, those documents relating to:

   a. the development of internal practices and procedures designed to ensure compliance with the Applicable Standards and Applicable Laws by TD Bank,

[2] Amended statement of claim, ¶244-293.
[3] Amended statement of claim, ¶301-317.

b. records, correspondence or reports pertaining to compliance (or lack thereof) with the Applicable Standards or Applicable Laws by TD Bank, and

c. any disclosure made by TD Bank to third parties as a result of adherence to the Applicable Standards or Applicable Laws by TD Bank[4];

f) records that were generated or received by TD Bank in the course of dealing with any regulatory body or regulatory requirements in Canada, the U.S. or elsewhere in connection with the provision of banking services to SIB[5];

g) fraud and compliance alerts generated by TD Bank related to SIB, including all suspicious transaction reports or suspicious activity reports, whether automatically or manually generated, and all documents related to the investigation and adjudication of such alerts, including correspondence generated in connection therewith[6];

h) records and any related notes or commentary in respect of Know Your Client, credit information, call reports, account opening information or applications, internal audit reports, external audit reports, inspection reports, operational review reports, annual reports, annual and periodic risk reviews, minutes of risk committee meetings and related correspondence, and due diligence or enhanced due diligence reports generated or received by TD Bank in connection with its provision of correspondent banking services generally and, without limiting the generality of the foregoing, banking services to SIB[7];

i) without limiting the foregoing, documents connected in any way to TD Bank's anti-money laundering processes, procedures, compliance, standards, compliance training records or test results, including but not limited to such documents related to SIB, whether those documents were originally generated by TD Bank or were received by TD Bank from third parties, including SIB[8];

j) briefing and background notes in respect of TD Bank's annual reports or other public disclosure from the relevant period that relate in any way to the provision of correspondent banking services;

k) payment data and account records in any way connected to SIB[9];

l) records, reports, correspondence or other documents in respect of SIB generated by relevant departments or divisions of TD Bank, or correspondence within or between those departments or divisions, including, at a minimum, departments or divisions having the following functions or identities:

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[4] Amended statement of claim, ¶244-317.
[5] Amended statement of claim, ¶244-317.
[6] Amended statement of claim, ¶211, 302, 312.
[7] Amended statement of claim, ¶69-83, 150-172, 211, 313-317.
[8] Amended statement of claim, ¶244-317.
[9] Amended statement of claim, ¶1(b), 68, 84-96, 334.

Fraud and electronic monitoring,
Anti-money laundering compliance,
Emerging markets,
Correspondent banking,
Global operations technology,
Trade financing,
Sanctions screening/watch list monitoring,
Inspection,
Internal audit,
External audit,
Operational review
TD Waterhouse Private Investment Counsel;
Global Transactions/Trade within TD Securities, and
Financial Institutions Group within TD Securities[10];

m) documents that relate in any way to TD Bank's knowledge of or communications with other financial institutions that had dealings with SIB, whether or not those other financial institutions at any time provided products or services to SIB[11];

n) documents in respect of TD Bank's acquisition of the Bank of New York's correspondent banking relationships including, without limiting the foregoing, the correspondent banking relationships with Bank of Antigua and SIB[12];

o) TD Bank records, reports, internal memoranda, correspondence or other documents detailing fees generated and profits earned by TD Bank as a result of providing correspondent banking or foreign exchange services during the relevant period[13];

p) documents connected in any way to TD Bank's provision of banking services to Robert Allen Stanford, Antiguan Sun, Bank of Antigua, Caribbean Star Airlines, Caribbean Sun Airlines, Guardian International Bank Limited, Stanford Financial Group, Stanford Group Company or any other Robert Allen Stanford-owned or related entities[14];

q) documents connected in any way to TD Bank's management of discretionary investment portfolios for SIB or its principals/affiliates including, without limiting the generality of the foregoing, the Bank of Antigua[15];

r) documents connected in any way to TD Bank's provision of trade financing and treasury services to SIB[16];

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[10] Amended statement of claim, ¶8, 43, 69-83, 92-96, 102, 112, 140, 146-147, 150-172, 211, 313-317.
[11] Amended statement of claim, ¶212-243, 263(c).
[12] Amended statement of claim, ¶69-77.
[13] Amended statement of claim, ¶1(b), 68, 84-96, 334.
[14] Amended statement of claim, ¶8, 45-64, 69-77, 84, 92-96, 150-151, 158.
[15] Amended statement of claim, ¶8, 92-96, 102, 112, 140, 146-147, 150-151, 158, 169(e),

s) contracts or agreements between TD Bank and SIB and any correspondence or other documents related thereto;

t) document, whether generated by TD Bank, an affiliate or a third party, that pertains in any way to Montserrat or Antigua and/or the regulatory environment that existed in Montserrat or Antigua during the period that TD Bank provided banking services to SIB[17];

u) documents connected in any way to the U.S. Senate's Minority Staff of the Permanent Subcommittee on Investigations' report entitled "Report on Correspondent Banking: A Gateway for Money Laundering" dated February 5, 2001 including, without limiting the foregoing, any records, reports, correspondence or other documents relating to TD Bank's involvement with the creation of that report or TD Bank's review of that report[18];

v) reports created or procured by TD Bank in connection with its provision of banking services to SIB following SIB's collapse including, without limiting the foregoing, any reports created by McGuire Woods LLP or any other third party firm;

w) documents connected in any way to open source information (as that term is used in the our clients' amended statement of claim) relevant to SIB, including the open source information referred to in the amended statement of claim or any other relevant open source information[19];

x) without limiting the foregoing, documents that relate in any way to TD Bank's provision of banking services to the Bank of Antigua[20]; and

y) any other documents relevant in any way to the allegations made in the Joint Liquidators' amended statement of claim, TD Bank's statement of defence or the Joint Liquidators' reply pleading.

We note that there are no geographical limitations on the relevant records. The operations of SIB and the other Stanford-entities with which TD Bank interacted were international in scope and should include documents in other jurisdictions besides Canada such as, at a minimum, the U.S. and Antigua.

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[16] Amended statement of claim, ¶43, 94, 150(d), 154.
[17] Amended statement of claim, ¶45-58, 124-149.
[18] Amended statement of claim, ¶138-140, 160, 169(c), 296-300.
[19] Amended statement of claim, ¶172-211, 279, 290, 292, 305, 313.
[20] Amended statement of claim, ¶43, 54-55, 69-77, 93, 112, 140, 145, 150-151, 161, 169(b), 214-219, 238.

V. TIMETABLE FOR DOCUMENTARY PRODUCTIONS

The Joint Liquidators propose the following timetable for documentary productions:

Date	Event
May 6, 2016	Deadline for parties to agree to a detailed discovery plan
September 1, 2016	Deadlines for parties to complete documentary productions

Yours truly,

Bennett Jones LLP

BENNETT JONES LLP

LC/MW/NJS

TAB J

This is **Exhibit "J"** referred to in the
affidavit of Marcus A. Wide
sworn before me, this 22nd day of September, 2016.

A Commissioner for taking affidavits

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December 22, 2015

SENT VIA E-MAIL TO THE COMMERCIAL LIST OFFICE

The Honourable Madam Justice Barbara Conway
Ontario Superior Court of Justice - Commercial List
330 University Avenue
7th Floor
Toronto ON M5G 1R7

Dear Madam Justice Conway:

Re: **Marcus Wide et al. v. The Toronto-Dominion Bank**
Court File No. CV-12-9780-00CL

Introduction

I write to update you on this proceeding and to advise that I will be seeking a chambers appointment in early January 2016 to discuss a development that has occurred since the chambers appointment before you on December 1, 2015.

The issue of how the Joint Liquidators' action is constituted

You will recall that there is an outstanding issue with respect to the manner in which the Joint Liquidators' action is constituted. In paragraph 319 of their Fresh As Amended Statement of Claim the Joint Liquidators purport to sue on behalf of Stanford International Bank ("SIB"), while in paragraph 321 of their Fresh As Amended Statement of Claim the Joint Liquidators purport to sue on behalf of SIB's creditors:

> "319. The plaintiffs plead that TD Bank owed SIB duties by virtue of its position as SIB's correspondent bank. Such duties were an implied term of the contract that governs the relationship between a banker and its customer (even if no written contract existed) and were otherwise the result of the relationship between TD Bank and SIB."
>
> "321. In the alternative to the claims made on behalf of SIB, the plaintiffs plead that as Joint Liquidators with the powers and capacities of a trustee in bankruptcy and charged to recover funds for SIB's customers, the ultimate victims of Stanford's CD Scheme, they may appropriately advance the claims SIB's creditors may have against TD Bank. If required, the plaintiffs plead that they are entitled to a representative order pursuant to Rule 10 of the *Rules of Civil Procedure*."

TD Bank does not accept that the Joint Liquidators' action is properly constituted pursuant to paragraphs 319 and 321. TD Bank's position is that: (i) the damages sought by the Joint Liquidators, namely the losses of SIB's creditors, are not recoverable in an action brought on behalf of SIB; and (ii) the appropriate procedural vehicle to assert the claims of SIB's customers is an action under the *Class Proceedings Act, 1992*, in which a representative plaintiff is identified and the action is certified under section 5 of the Act.

TD Bank will raise this issue in its Statement of Defence which will be filed by February 29, 2016, and has already flagged this issue in footnote 12 of its reply factum on the motion for summary judgment (dated July 29, 2015):

> "If this motion for summary judgment is dismissed, the court will have to deal with the issue of whether the Joint Liquidators have properly advanced a claim on behalf of SIB's creditors, in particular whether the action should be a class action subject to the certification requirements of the *Class Proceedings Act*. But that is for another day. What is important to present purposes is that the Joint Liquidators are purporting to bring this action on behalf of others."

The need for coordination with U.S. proceedings

You will also recall that when the parties appeared before you in chambers on December 1, 2015 to set a timetable (a copy of which is enclosed), I advised that TD Bank is the subject of litigation in the United States which also purports to be brought on behalf of all of SIB's creditors. I further advised that TD Bank was considering bringing a motion to coordinate the proceedings with the U.S. court.

Recent developments

After the December 1, 2015 chambers appointment, as TD Bank began to work on a motion to coordinate the Canadian and U.S. proceedings, it became clear that a necessary precondition to any such motion is a determination of whether the Joint Liquidators' claim is validly constituted. Specifically, until it is clear whether the Joint Liquidators can in fact sue on behalf of approximately 21,000 creditors of SIB or assert claims for their investment losses, it will not be possible to assess whether and to what extent there is overlap between the Joint Liquidators' action and the U.S. proceedings, much less craft a coordinated approach to the proceedings.

The need to sort out the constitution of these claims is further evidenced by the Joint Liquidators' approach to documentary discovery, which was revealed to TD Bank on December 14, 2015. As you will recall, as part of the timetable you approved on December 1, 2015, the Joint Liquidators were required to provide on or before December 14, 2015 a written description of their proposed approach to documentary production. In accordance with that direction the Joint Liquidators have delivered a 68-page package (an 11 page letter plus 57 pages of attachments) which makes it clear that they contemplate an extremely broad documentary discovery process. Just as TD Bank cannot at present determine the extent to which the Joint Liquidators' action overlaps with the U.S. proceedings, it is difficult to envisage how the parties can have an informed discussion about the scope of discovery, much less agree on a discovery plan, until the scope of the Joint Liquidators' action is clear.

Accordingly, in order to permit TD Bank to determine the extent to which it is subject to overlapping claims in two countries, TD Bank must first bring a motion for an order that: (i) the

damages sought by the Joint Liquidators, namely the losses of SIB's creditors, are not recoverable in an action brought on behalf of SIB; and (ii) the appropriate procedural vehicle to assert the claims of SIB's customers is an action under the *Class Proceedings Act, 1992*, in which a representative plaintiff is identified and the action is certified under section 5 of the Act.

We are currently in the process of drafting the motion, and suggest that the parties should have a chambers appointment as soon as practicable in order to set a timetable for it. Given the time of the year, it will not be possible to have such a chambers appointment before January. However, I did not want to wait to advise you, and the Joint Liquidators, of the manner in which TD Bank intends to proceed at this time.

Once the parties have clarity on the proper scope of the Canadian proceedings, TD Bank will revisit with the Court whether there is overlap with the U.S. proceedings and whether it would be prudent for the respective courts to coordinate in order to avoid wasting the resources of the judiciary, the SIB estate, and the parties.

I will of course book the chambers appointment in the normal course by working with the Joint Liquidators' counsel and the Commercial List office to find a mutually convenient date.

Thank you for your continued assistance in this matter.

Yours truly,

Geoff R. Hall

GRH/hsd
Encl.

cc. Lincoln Caylor, counsel for the Joint Liquidators

TAB K

This is **Exhibit "K"** referred to in the
affidavit of Marcus A. Wide
sworn before me, this 22nd day of September, 2016.

A Commissioner for taking affidavits

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

NOTICE OF MOTION

(motion for an order staying the action and directing the Plaintiffs to reconstitute as a class proceeding in accordance with the *Class Proceedings Act, 1992*)

THE TORONTO-DOMINION BANK ("TD Bank") will make a motion to the Honourable Madam Justice Conway on a date and at a time to be fixed by the Commercial List office, at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. an order:

(a) staying the action pursuant to Rule 21.01(3)(b) of the *Rules of Civil Procedure*;

(b) directing the Plaintiffs to reconstitute the action as a class proceeding pursuant to section 2(3)(b) of the *Class Proceedings Act, 1992* (the "*CPA*"), and

(c) requiring the Plaintiffs to comply with the requirements of the *CPA*, including the certification requirement in section 5;

2. costs of this motion; and

3. such further and other relief as this Court considers appropriate.

THE GROUNDS FOR THE MOTION ARE:

1. The damages sought by the Plaintiffs, namely the losses of the creditors of Stanford International Bank Limited ("**SIB**"), are not recoverable in an action brought on behalf of SIB.

2. The appropriate procedural vehicle to assert the claims of SIB's customers is a class action under the *CPA*.

A. The Plaintiffs do not have standing to bring a claim for damages sustained by non-parties

3. The Plaintiffs were appointed by a court in Antigua as trustees in bankruptcy for SIB. In this action, they seek recovery of damages of over $5.5 billion USD for alleged losses which they acknowledge were largely sustained by SIB's customers, who they say number over 21,000. SIB's customers are not parties to this action. In other words, the damages asserted in this action were not brought on behalf of SIB – which the Plaintiffs were appointed to represent as trustees in bankruptcy – but on behalf of non-party customers of SIB.

4. The Plaintiffs do not have standing to bring such claims, and there is no legal basis on which they can institute this action on behalf of a class of individuals. Paragraph 35 of their Fresh as Amended Statement of Claim purports to do just this, and constitutes an impermissible end run around the CPA.

B. The CPA *is designed to manage complex actions brought on behalf of numerous persons and it is in the public interest that it be employed in this case*

5. The *CPA*'s class action regime was specifically enacted to facilitate actions brought on behalf of, or for the benefit of, numerous persons having a common interest in order to achieve redress for a widespread alleged harm or injury. It is therefore the sole appropriate procedural vehicle with which to allow the Plaintiffs' proposed representative action to proceed.

6. The *CPA* regime is particularly appropriate in complex cases, and this claim is certainly complex: it alleges various forms of wrongdoing said to have been perpetrated over the course of decades, claims a very large sum of damages, implicates numerous individuals in an array of jurisdictions, and is underpinned by a massive documentary record. The Plaintiffs' pleading alone is nearly 100 pages long.

(a) *The affected parties should be bound by the proceedings and by any agreement to settle*

7. Because the Plaintiffs lack standing to bring this action as it is currently constituted, proceeding with it creates a great deal of uncertainty and is contrary to public policy.

8. Firstly, it is unclear how, if at all, the action brought by the Plaintiffs is binding on the non-parties they purport to represent, and specifically how these non-parties would be bound by any final adjudication of the claim.

9. Conversely, certification under the *CPA*, if granted, would identify the interested parties and allow the litigants to properly assess the potential consequences of the proceedings, including the scope of the claim and the possibility that a final determination may be made on their rights.

10. Similarly, any attempt to settle an action purportedly brought on behalf of non-parties is impracticable and mired in uncertainty in the absence of a certified class, since there is no procedural mechanism for making such a settlement binding on tens of thousands of non-parties. Where there is a certified class, this mechanism is provided for under section 29(3) of the *CPA*. In the event that settlement is contemplated, it would be in the public interest to facilitate it in order to avoid the time and expense of adjudicating this complex dispute before the courts.

(b) *Rule 10 is not the appropriate procedural vehicle for this claim*

11. While the Plaintiffs refer in their Fresh As Amended Statement of Claim to seeking a representative order under Rule 10, such an order would be inapplicable to the present circumstances. The purpose of Rule 10 is to manage litigation that affects the rights of parties that cannot be ascertained or readily brought before the court, such as the unborn. SIB's customers are an ascertainable class which can be defined using objective criteria.

12. Rule 10 is not intended to offer an alternative to the *CPA*. The two serve distinct purposes, as described above. Further, when the *CPA* was enacted, the *Rules of Civil Procedure*

were specifically reformed so as to remove any route to circumvent the procedural safeguards and legislative intent of the *CPA*.

13. In any event, even if Rule 10 were to offer a simplified alternative to the *CPA*, this would not be an appropriate case in which to employ it. As already noted, the size and complexity of this action, if it is permitted to proceed as a representative action, call for the robust procedural framework established in the *CPA*.

14. TD Bank will rely on the *CPA* and Rules 21.01(3)(b) and 26 of the *Rules of Civil Procedure*.

15. TD Bank will also rely on such further and other grounds as counsel may advise and this Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. the Fresh As Amended Statement of Claim; and

2. such further and other materials as counsel may advise and this Court may permit.

January 8, 2016

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Lawyers for the Plaintiffs

MARCUS WIDE et al v. THE TORONTO-DOMINION BANK

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

NOTICE OF MOTION

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Lawyers for The Toronto-Dominion Bank

TAB L

This is **Exhibit "L"** referred to in the
affidavit of Marcus A. Wide
sworn before me, this 22nd day of September, 2016.

A Commissioner for taking affidavits

Court File Number: CV-12-9780-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Wide
Plaintiff(s)

AND

TD
Defendant(s)

Case Management ☐ Yes ☐ No by Judge: _____

Counsel	Telephone No:	Facsimile No:

☐ Order ☐ Direction for Registrar (No formal order need be taken out)
☐ Above action transferred to the Commercial List at Toronto (No formal order need be taken out)

☐ Adjourned to: _____
☐ Time Table approved (as follows):

Motion by TD Re constitution of Pl's action: Timetable as agreed + attached. Date for motion (1 DAY) to be scheduled by CL Office before me as case mgmt judge.

Jan 11/16
Date

Conway J
Judge's Signature

☐ Additional Pages _____

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

TIMETABLE FOR MOTION RE MANNER IN WHICH THE JOINT LIQUIDATORS' ACTION IS CONSTITUTED

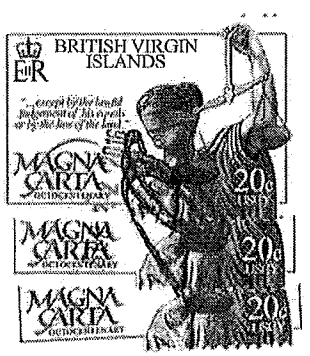
Step	Deadline
Service of notice of motion	January 8, 2015 (already completed)
Service of TD Bank's factum	January 25, 2016
Service of the Joint Liquidators' factum	February 8, 2016
Service of TD Bank's reply factum (if any)	February 15, 2016
Argument of motion	After February 15, 2016 on a date that is convenient to the court and counsel

January 11, 2016

TAB M

This is **Exhibit "M"** referred to in the
affidavit of Marcus A. Wide
sworn before me, this 22nd day of September, 2016.

A Commissioner for taking affidavits



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mccarthy tétrault

January 13, 2016

Via Email [caylorl@bennettjones.com]

Mr. Lincoln Caylor
Partner, Litigation
Bennett Jones LLP
3400 One First Canadian Place
P.O. Box 130
Toronto ON M5X 1A4

Dear Mr. Caylor:

Re: The Toronto-Dominion Bank ats Marcus Wide
Court File No. CV-12-9780-00CL

We write with regard to your correspondence of December 14, 2015, in which you outline the Joint Liquidators' proposed approach to documentary productions. This letter responds to your proposed approach and outlines the position of The Toronto-Dominion Bank ("**TD Bank**") as to the appropriate approach to documentary productions.

This letter is without prejudice to TD Bank's right to revise its position as appropriate when the scope of this action is clarified pursuant to its motion to challenge the manner in which it is constituted, notice of which was served on January 8, 2016.

TD Bank's Documentary Productions

Document preservation efforts

The CLX Database

Documents were collected primarily from the two groups which had direct dealings with Stanford-related entities on behalf of TD Bank:

1. the Financial Institutions group within TD Securities, which is responsible for correspondent banking and therefore had the bulk of relevant Stanford-related documents in TD Bank's possession; and

2. the Private Investment Counsel group ("**PIC**").

Documents were also collected from certain other units within TD Bank and third parties which had relevant records.

These documents, which will be described further below, have all been uploaded to a CaseLogistix electronic database maintained by McCarthy Tétrault (the "CLX Database"). This database contains approximately 16,800 records. TD Bank proposes to provide production of the entirety of the CLX Database, as we expect that all of the records contained therein will be relevant and responsive to some category of documents of which production is requested in your letter of December 14, 2015 at pages 7-10.

Documents held by the Financial Institutions Group

Within the Financial Institutions group, all documents pertaining to Stanford-related entities were collected as follows:

a) all Stanford-related e-mails on the computers of personnel who had involvement with Stanford-related entities were printed off and copied;

b) all paper files in the possession of such personnel were copied;

c) all central paper files located on the floor on which the Financial Institutions group is located were copied; and

d) all paper documents which had been sent for off-site storage were copied.

Overall, these records include KYC information, credit information, call reports, account opening information, annual reports, and correspondence with Stanford-related entities.

The custodians from whom these documents were collected were Wolfgang Mersch, Geoff Rothwell, Bill Sebenski, Tarik Muzaffar, Andrew Nicholl, Vince Chang, Wendy Watson, Fui Fui Chang, Patty Holk, Reene Nichols, Ritva Wallenius, and Virginia DiFonzo. Some of the documents were central records and were not associated with a particular custodian.

Documents held by PIC

Within PIC, copies were made of internal notes, correspondence, e-mails which had been printed out and saved in correspondence, client statements for Stanford International Bank ("SIB") from 1999 to 2009, client statements from the Bank of Antigua from 2002 to 2009, and all account opening documentation and investment management agreements signed with SIB, Bank of Antigua and the Bank of Panama.

The custodians from whom these documents were collected were Perry Mercer, Douglas Ball, Gabriel Cabrone, Brian Clark, and Ben Eggers. Some of the documents were central records and were not associated with a particular custodian.

Documents held by other units or parties

All documents pertaining to Stanford-related entities were also collected from TD Bank's Global Operations Technology group, which provides support to the Financial Institutions group. These

records include documents related to account opening, account statements, and drafts. As with the Financial Institutions group, any records sent for off-site storage were copied.

Payment data related to Stanford was also collected from the Technology department. These documents consisted of spreadsheets showing payment information for Stanford-related entities.

Documents were also collected from Symcor, a financial processing services provider for TD Bank. These documents consisted of cash letters (cheques) related to Stanford-related entities.

Finally, documents were gathered from TD Bank's Trade Finance department in Montreal, which had in its possession letters of credit pertaining to Stanford-related entities, and from the Money Market desk, which had documents related to short-term deposits made by Stanford-related entities.

Preservation of Additional Emails

The entire email accounts of six key custodians have been captured electronically outside of the CLX Database: Wolfgang Mersch, Geoff Rothwell, Tarik Muzaffar, Bill Sebenski, Martin Doyle, and Perry Mercer.

As one would expect, these email accounts were found to contain a large quantity of irrelevant records. We have determined that about 25,000 of the 500,000 records contained in these accounts are potentially relevant to Stanford.

We would propose to run the search terms listed at Schedule F to your letter on these 25,000 records and produce all of the hits generated by those search terms.

The hard drive of Wolfgang Mersch

The computer hard drive of Wolfgang Mersch has been preserved for the purposes of this litigation. It has not been indexed, searched, or uploaded to any database.

We would propose to identify any relevant records on the hard drive in a similar manner as we have done for the email accounts. First, TD Bank will index the hard drive and run broad search terms to identify and narrow the records most likely to be relevant to Stanford-related entities. Then, we would propose to run the search terms provided at Schedule F of your letter on that subset of the hard drive and produce any relevant hits generated.

The scope of documentary discovery to be provided by TD Bank

TD Bank is generally in agreement with the scope of relevant records identified at pages 7-10 of your letter, with the following exceptions:

a) Items c), d), h), i), j), and u) are overbroad and should be qualified to specify that such records will only be produced insofar as they relate to TD Bank's relationship with and provision of correspondent banking services to Stanford-related entities;

b) Item e) is overbroad and disproportionate. It has not been established that all of the standards and laws identified in items c) and d) were indeed applicable to the matters at

issue, and it is therefore unclear how TD Bank's overall compliance and disclosure efforts related to those standards and laws are relevant to this litigation;

c) Item n) is overbroad and irrelevant to the matters at issue. TD Bank has agreed to produce the relevant KYC information for the Stanford-related entities;

d) Item o) is irrelevant. No proper basis for the disgorgement of profits has been articulated aside from a bald pleading of "misconduct" at paragraph 331 of the Amended Statement of Claim;

e) Item t) is overbroad as drafted; and

f) Item v) pertains to documents which are privileged.

With respect to the list of TD Bank custodians at Schedule E to your letter, we are prepared to provide production of records from the relevant custodians, as listed above. However, it would be disproportionate to expect TD Bank to preserve or retrieve all records of custodians with tangential or no involvement in the matters at issue in this action, or whose relevant records are contained within the files of the most relevant custodians.

Joint Liquidators' Documentary Productions

TD Bank is generally agreeable to the approach proposed by the Joint Liquidators as relates to the identification and production of relevant records in their possession, power or control, with the following comments and qualifications.

Search terms

Your letter mentions at page 5 that the search terms you have proposed to be run by TD Bank and the Joint Liquidators are largely similar with the exception of the custodians. We note that certain search terms you have proposed for TD Bank have been omitted from the list of terms to be run by the Joint Liquidators. We would propose that, aside from the custodians, the list of search terms be identical for both parties.

Documents relevant to discoverability of the claims

The discoverability of the Joint Liquidators' claims against TD Bank will be an issue at trial. As such, TD Bank is entitled to production of all records pertaining to the Joint Liquidators' knowledge of and investigation into the relationship between TD Bank and the Stanford-related entities.

Without limiting the generality of the foregoing, TD Bank is entitled to any notes and records produced pursuant to meetings with any witnesses or affected parties in connection with the matters at issue in this claim.

In the event that the Joint Liquidators have a valid claim of privilege over the contents of any such records, TD Bank is entitled to Schedule B disclosure of the nature and date of any such notes and records.

Documents substantiating damages and the identity and knowledge of the affected parties

Given the scope of the claim being advanced by the Joint Liquidators, they must provide production of records pertinent to the assessment of damages and the knowledge, information and belief of all affected parties. The relevant records would include, at a minimum:

a) Documents which substantiate the damages claimed by the Joint Liquidators in this action, including, but not limited to:

   a. Bank statements and any other documents demonstrating the nominal value of any securities or other holdings held by SIB on behalf of its customers globally as of February 16, 2009; and

   b. Bank statements and any other documents demonstrating the combined net value per customer of all currency or instruments remitted to or withdrawn from SIB by or on behalf of its customers globally for the period during which TD Bank provided correspondent banking services to SIB;

b) Records demonstrating the identities and KYC information of all SIB customers globally for the period during which TD Bank provided correspondent banking services to SIB;

c) All disclosures and other information provided to SIB's customers in relation to the certificates of deposit and any other securities or investment products issued by SIB;

d) All disclosures and other information provided to SIB's customers in relation to SIB's operations generally; and

e) Records pertaining to investment advice provided to SIB's customers in relation to the certificates of deposit, any other securities or investment products issued by SIB, and in relation to investing with SIB generally, whether such advice was provided by SIB or not.

Other issues mentioned in the letter

We understand that the Joint Liquidators are unaware of the whereabouts of the majority of records pertaining to the early years of the relationship between SIB and TD Bank, and that they believe that those records may no longer exist. Please provide us with the details of efforts undertaken by the Joint Liquidators in order to comply with the SIB Estate's discovery obligations in this regard.

It is TD Bank's position that the contents of the USB key provided to the Joint Liquidators by the U.S. Receiver and mentioned at page 2 of your letter are relevant and producible.

Further, we understand that the Joint Liquidators propose not to do a line-by-line review of the spreadsheet indexing the records contained in the Houston warehouse. We are generally agreeable to the ad hoc method proposed by the Joint Liquidators for identifying the records most likely to be relevant from that index. However, it is our position that TD Bank is entitled to production of the spreadsheet index and reserves its right to request production of relevant records therefrom other than those identified by the Joint Liquidators as being relevant in their ad hoc review.

mccarthy tétrault

The Dynasty Action

TD Bank agrees with the Joint Liquidators' and Dynasty plaintiffs' position that its productions in both of their actions should be the same. We are also agreeable to receiving the additional productions of the Dynasty plaintiffs in a supplementary affidavit of documents.

Timetable for Documentary Productions

We anticipate that TD Bank's upcoming motion regarding the manner in which this action is constituted will have some bearing on the timing of documentary discovery, particularly if the motion succeeds and the Joint Liquidators are directed to proceed with a certification motion. We would therefore propose to revisit the issue of setting a timetable for documentary productions pending the outcome of TD Bank's motion.

Yours truly,

McCarthy Tétrault LLP

Per:

Vladimira Ivanov

VI/mj

e.c. Geoff Hall
Junior Sirivar

#15190230

TAB N

This is **Exhibit "N"** referred to in the
affidavit of Marcus A. Wide
sworn before me, this 22nd day of September, 2016.

A Commissioner for taking affidavits

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

FACTUM OF THE TORONTO-DOMINION BANK
(motion for an order staying the action and directing the Plaintiffs to reconstitute as a class proceeding in accordance with the *Class Proceedings Act, 1992*, returnable March 11, 2016)

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Lawyers for the Plaintiffs

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

FACTUM OF THE TORONTO-DOMINION BANK

I. OVERVIEW

1. This action is an attempt to recover losses arising from the second-largest Ponzi scheme in history. More than 21,000 customers of Stanford International Bank ("SIB") who are in 113 different countries lost an estimated $5.5 billion USD when SIB collapsed and certificates of deposit ("CDs") that they purchased from SIB were not repaid. The Toronto-Dominion Bank ("TD Bank") provided banking services, primarily correspondent banking, to SIB. This action is an attempt to get TD Bank to provide compensation for the losses of SIB's customers, relying on theories of negligence and knowing assistance.

2. The plaintiffs in this action (the "Joint Liquidators") are appointed as liquidators of SIB by an Antiguan court. They seek to assert their claim without going through the

certification process in the *Class Proceedings Act, 1992*.[1] They do so by arguing that they can bring an action on behalf of SIB's customers, either within an ordinary civil action brought in the name of SIB, or pursuant to a representation order under Rule 10 of the *Rules of Civil Procedure*. They further argue that the claim on behalf of SIB's customers can be asserted by SIB itself (into whose shoes they have stepped), relying on the Ontario Court of Appeal's recent decision in *Livent Inc. v. Deloitte & Touche*.[2]

3. None of these arguments is correct.

4. Rule 10 is not a simplified rules version of the *Class Proceedings Act, 1992*, as some cases and commentators have mistakenly stated. An examination of the legislative history demonstrates that Rule 10 and the *Class Proceedings Act, 1992* are designed to do completely different things, and it is only the latter that is the appropriate procedure for a claim on behalf of a class of individuals like the class the Joint Liquidators purport to represent in this case. Even if Rule 10 is available as a simplified rules version of the *Class Proceedings Act, 1992*, this case is about as far from a "simplified" case as is imaginable. It involves a $5.5 billion USD claim on behalf of a class of 21,000 people in 113 countries, and involves extraordinarily detailed and complex allegations covering a quarter century of history. If Rule 10 is available in this case, it is hard to imagine any case in which it would not be available, or any case in which anyone would ever proceed under the *Class Proceedings Act, 1992* instead of Rule 10.

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[1] S.O. 1992, c. 6.
[2] *Livent Inc. v. Deloitte & Touche*, 2016 ONCA 11 at para. 60 ("*Livent*"), Book of Authorities of The Toronto-Dominion Bank ("TD BOA"), Tab 8.

5. *Livent* is distinguishable from the facts of this case and does not provide a basis for avoiding a class action on behalf of SIB's customers. *Livent* turns on the duties that an *auditor* owes to its client. Those duties are not the same as, and cannot be analogized to, the duties owed by a *bank* to its customer. Moreover, the measure of damages is not the same.

6. This action is not properly constituted. The Joint Liquidators lack standing to bring this action on behalf of SIB's customers. Consequently, as non-parties, SIB's customers cannot be bound by any aspect of these proceedings, and continuing with this action as is would run contrary to law and policy. The appropriate remedy is to stay the action as presently constituted and direct that it be reconstituted as a class proceeding under the *Class Proceedings Act, 1992*, subject to all of the procedural requirements of that statute including the certification requirement.

II. THE FACTS[3]

The allegations against TD Bank

7. SIB was a bank based in Antigua. It operated a Ponzi scheme that collapsed in 2009. Prior to its collapse, SIB sold CDs to investors around the world. Those investors have lost most of their investments. Unable to collect from SIB, they are attempting through the vehicle of this lawsuit to recover their losses from TD Bank.[4]

---

[3] The following recitation of the facts is taken from the Fresh As Amended Statement of Claim. Needless to say, the allegations have only been pleaded and not yet proven.

[4] Fresh As Amended Statement of Claim, Motion Record of The Toronto-Dominion Bank ("TD Motion Record"), Tab 2.

8. TD Bank provided three main types of banking services to SIB. The majority of the allegations in the Fresh As Amended Statement of Claim relate to TD Bank's provision of correspondent banking services[5] to SIB. When a customer of SIB wished to make a U.S. or Canadian dollar deposit with SIB by electronic funds transfer, the funds were remitted through SIB's correspondent banking accounts at TD Bank.[6] TD Bank also managed discretionary investment portfolios for SIB, and provided trade finance and treasury services to SIB.[7]

9. The Joint Liquidators are appointed as liquidators of SIB by an Antiguan court. They have been authorized by the Quebec Superior Court to pursue claims in Canada against TD Bank, and claim to do so in the same capacity as a Canadian trustee in bankruptcy.[8]

The scope and magnitude of the action

10. By any account, this action is massive.

11. The Fresh As Amended Statement of Claim is 335 paragraphs and 100 pages long.

12. The damages claimed are "at least in the amount of US$5.5 billion".[9]

13. The claim is asserted on behalf of SIB and a purported class of "more than 21,000 customers in approximately 113 countries".[10]

---

[5] The Fresh As Amended Statement of Claim describes correspondent banking as including "any account or formal relationship established by a financial institution to receive deposits from, make payments to or other disbursements on behalf of a foreign financial institution, or to handle other financial transactions related to the foreign financial institution": see the Fresh As Amended Statement of Claim, para. 59, TD Motion Record, Tab 2.
[6] Fresh As Amended Statement of Claim, para. 60, TD Motion Record, Tab 2.
[7] Fresh As Amended Statement of Claim, paras. 92 and 93, TD Motion Record, Tab 2.
[8] Fresh As Amended Statement of Claim, paras. 28-34, TD Motion Record, Tab 2.
[9] Fresh As Amended Statement of Claim, paras. 1(a) and 333, TD Motion Record, Tab 2.
[10] Fresh As Amended Statement of Claim, paras. 4, 35 and 332, TD Motion Record, Tab 2.

14. The relationship between TD Bank and SIB lasted from the early 1990s until 2009. It involved some 11 separate bank accounts and at least 15 trips by TD personnel to SIB in Antigua and Houston, Texas.[11]

15. The allegations cover a time period of a quarter of a century, starting in 1984 and ending with the collapse of SIB in 2009.

16. Looking only at the allegations made in respect of events in the 1980s and 1990s (in other words, the first 16 years of the relevant period), a trial of the action would involve a very detailed examination of evidence relating to a vast swath of history:

(a) A trial would start with events in 1984, when Allen Stanford allegedly declared personal bankruptcy.[12]

(b) The trial would move on to events in 1985, when Allen Stanford is alleged to have incorporated Guardian International Bank Limited ("Guardian") in Montserrat, and would go on to consider the operations of Guardian in Montserrat from 1985 to 1990, and the departure of Guardian from Montserrat under threat that Guardian's banking licence was about to be revoked.[13]

(c) A trial would consider events in 1988 and 1989, when it is alleged that banking regulators in Texas warned Mr. Stanford about operating an unauthorized foreign bank representative office in Texas and the U.S. Office of the

[11] Fresh As Amended Statement of Claim, paras. 84 and 156, TD Motion Record, Tab 2.
[12] Fresh As Amended Statement of Claim, paras. 78 and 173, TD Motion Record, Tab 2.
[13] Fresh As Amended Statement of Claim, paras. 45, 47, 52, 53, 174 and 179, TD Motion Record, Tab 2.

Comptroller of the Currency issued advisories about similar violations of banking laws in Florida and California.[14]

(d) A trial would cover the alleged investigation in 1989 and later of the Montserrat banking system by U.S. and British authorities.[15]

(e) A trial would consider the reincorporation of Guardian in Antigua in 1990 and Mr. Stanford's acquisition in 1990 of Bank of Antigua.[16]

(f) A trial would cover the alleged growth of SIB's CD business from $14 million USD in 1990 to $8 billion USD in 2009.[17]

(g) A trial would cover standards for anti-money laundering ("AML") compliance developed by the Office of the Superintendent of Financial Institutions ("OSFI") since 1990, including OSFI guidelines issued in 1990, 1996, and subsequently, and standards issued by the Financial Action Task Force ("FATF") in 1990, 1996, and subsequently.[18]

(h) A trial would address an allegation that as far back as the early 1990s, U.S. Customs officials noted the lack of regulation of SIB's activities and possible smuggling activities by SIB personnel.[19]

(i) A trial would consider TD Bank's alleged acquisition in 1992 of some of Bank of New York's interests in Canada, including correspondent banking relationships in the Caribbean.[20]

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[14] Fresh As Amended Statement of Claim, paras. 49 and 175, TD Motion Record, Tab 2.
[15] Fresh As Amended Statement of Claim, para. 176, TD Motion Record, Tab 2.
[16] Fresh As Amended Statement of Claim, para. 54, TD Motion Record, Tab 2.
[17] Fresh As Amended Statement of Claim, para. 68, TD Motion Record, Tab 2.
[18] Fresh As Amended Statement of Claim, paras. 246, 251 and 256-261, TD Motion Record, Tab 2.
[19] Fresh As Amended Statement of Claim, para. 241, TD Motion Record, Tab 2.

(j) A trial would cover SIB's reported rates of return from at least 1995 onwards, including an allegation that SIB reported identical rates of return of exactly 15.71% in both 1995 and 1996 and that from 1997 onwards SIB reported rates of return that were at least 140 percent greater than the average rate of return generated by U.S. banks' CDs.[21]

(k) A trial would consider evidence that, at least as early as 1996, the U.S. State Department's International Narcotics Control Strategy Report highlighted weaknesses in Antigua's banking system relating to money laundering – a fact that is alleged to have been a "red flag" for TD Bank.[22]

(l) A trial would hear evidence about TD Bank's dealings with American International Bank Limited ("AIB") in 1996 and 1997, which was allegedly considered by a report made in 2001 by the U.S. Senate's Minority Staff of the Permanent Subcommittee on Investigations, and the closing of AIB's correspondent banking account in 1996 or 1997.[23]

(m) A trial would cover the work of the Antiguan Offshore Financial Sector Planning Committee starting in 1997 to consider improvements to Antigua's banking laws.[24]

(n) A trial would cover alleged proceedings in 1997 against Mr. Stanford in the United States Tax Court.[25]

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[20] Fresh As Amended Statement of Claim, para. 69, TD Motion Record, Tab 2.
[21] Fresh As Amended Statement of Claim, para. 184 and 185, TD Motion Record, Tab 2.
[22] Fresh As Amended Statement of Claim, para. 125, TD Motion Record, Tab 2.
[23] Fresh As Amended Statement of Claim, paras. 90, 138 and 139, TD Motion Record, Tab 2.
[24] Fresh As Amended Statement of Claim, para. 128, TD Motion Record, Tab 2.
[25] Fresh As Amended Statement of Claim, para. 187, TD Motion Record, Tab 2.

(o) A trial would cover an allegation that the U.S. Securities Exchange Commission (the "SEC") investigated SIB in 1997, 1998 and later.[26]

(p) A trial would cover an allegation that, in 1998, U.S. authorities obtained a warrant to freeze funds controlled by suspected money launderers, the bulk of which was found to be in an SIB account.[27]

(q) A trial would cover an allegation that, in 1998, SIB filed a Regulation D exemption with the SEC that permitted the sale of SIB CDs to accredited investors in the U.S. without registering them as securities.[28]

(r) A trial would cover government lobbying by an SIB affiliate from 1999 onwards, in which $4.8 million USD was allegedly spent on lobbying in the U.S. and $2.4 million USD was allegedly donated to political parties in the U.S.

(s) A trial would cover the advisory allegedly issued in 1999 by the U.S. Treasury Department's Financial Crimes Enforcement Network (the "FinCEN Advisory") about Antigua's banking regulations, as well as a similar advisory also allegedly issued in 1999 by the government of the United Kingdom and Mr. Stanford's response to the FinCEN Advisory.[29]

(t) A trial would cover an allegation that, in September 1999, SIB wrote to TD Bank about media reports arising from the FinCEN Advisory.[30]

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[26] Fresh As Amended Statement of Claim, paras. 220 and 221, TD Motion Record, Tab 2.
[27] Fresh As Amended Statement of Claim, para. 188, TD Motion Record, Tab 2.
[28] Fresh As Amended Statement of Claim, para. 189, TD Motion Record, Tab 2.
[29] Fresh As Amended Statement of Claim, paras. 131-134, TD Motion Record, Tab 2.
[30] Fresh As Amended Statement of Claim, para. 146, TD Motion Record, Tab 2.

(u) A trial would cover an allegation that, in 1999 (or 2000), a meeting took place among TD Bank personnel at which concerns were raised that TD Bank did not understand SIB's business properly, as well as a follow up due diligence trip to SIB in Houston.[31]

(v) A trial would cover alleged successful criminal prosecutions in the U.S. in the late 1990s as a result of the activities of AIB and its owner William Cooper.[32]

(w) A trial would cover an allegation that in September 1999 SIB wrote to TD Bank about media reports arising from the FinCEN Advisory.

17. It is worth noting that this impressive list covers only allegations in respect of events in the 1980s and 1990s. There are numerous allegations involving events occurring between 2000 and 2009.

18. In addition to the activities of TD Bank, the Fresh As Amended Statement of Claim makes allegations that a number of institutions similarly situated to TD Bank had relevant knowledge about SIB, including SocGen (a French bank), the SEC, Pershing LLC (an international clearing house), Ferrier Lullin & Cie (a Swiss bank), Synder Kearney LLC (a U.S. law firm), First Advantage Investigative Services (a U.S. investigation firm), Fidelity Investments, Chase Manhattan Bank, First Interstate Bank (a U.S. bank), Citizens & Southern Bank (a U.S. bank), Bank of America, the National Association of Securities Dealers, and U.S. Customs.[33] A trial of this action as presently constituted would involve an examination

[31] Fresh As Amended Statement of Claim, paras. 154-155, TD Motion Record, Tab 2.
[32] Fresh As Amended Statement of Claim, para. 72, TD Motion Record, Tab 2.
[33] Fresh As Amended Statement of Claim, paras. 214-243, TD Motion Record, Tab 2.

of the actions of a large number of financial institutions operating in multiple jurisdictions across the globe.

19. The allegations in the Fresh As Amended Statement of Claim refer to an array of applicable banking standards and laws, including:

(a) five sets of AML guidelines issued by OSFI (in 1990, 1996, 2003, 2004, and 2008);[34]

(b) three sets of standards issued by the Basel Committee on Banking Supervision (in 2001, 2003 and 2004);[35]

(c) four sets of standards issued by FATF (in 1990, 1996, 2003 and 2007);[36] and

(d) standards developed by the Wolfsberg Group in 2002.[37]

The claims the Joint Liquidators seek to pursue

20. While the Joint Liquidators attempt throughout the Fresh As Amended Statement of Claim to portray their action as primarily brought on behalf of SIB and only in the alternative on behalf of SIB's customers, no none should be fooled by form over substance. In substance this is an improper and procedurally defective claim on behalf of SIB's 21,000 customers to recover the $5.5 billion that they lost when SIB collapsed and could not repay their CDs. In a rare but candid acknowledgement of the reality of the action, the Joint Liquidators note that

[34] Fresh As Amended Statement of Claim, para. 246, TD Motion Record, Tab 2.
[35] Fresh As Amended Statement of Claim, para. 249, TD Motion Record, Tab 2.
[36] Fresh As Amended Statement of Claim, para. 251, TD Motion Record, Tab 2.
[37] Fresh As Amended Statement of Claim, para. 252, TD Motion Record, Tab 2.

"[a]ny damages awarded to SIB will form part of SIB's estate and be disbursed to SIB's creditors."[38]

21. The causes of action that the Joint Liquidators assert are negligence and knowing assistance.[39]

22. The Joint Liquidators purport to pursue these causes of action via two separate claims:

(a) The paragraph 321 claim. One is a negligence claim asserted on behalf of *SIB's creditors* in paragraph 321 of the Fresh As Amended Statement of Claim:

> "321. In the alternative to the claims made on behalf of SIB, the plaintiffs plead that as Joint Liquidators with the powers and capacities of a trustee in bankruptcy and charged to recover funds for SIB's customers, the ultimate victims of Stanford's CD Scheme, they may appropriately advance the claims SIB's creditors may have against TD Bank. If required, the plaintiffs plead that they are entitled to a representative order pursuant to Rule 10 of the *Rules of Civil Procedure*."[40]

(b) The paragraph 319 claim. The other is a claim asserted on behalf of *SIB* in paragraph 319 of the Fresh As Amended Statement of Claim and relying primarily on purported implied terms of the contract governing the relationship between TD Bank and SIB as banker and customer:

> "319. The plaintiffs plead that TD Bank owed SIB duties by virtue of its position as SIB's correspondent bank. *Such duties were an implied term of the contract that governs the relationship between a banker and its customer* (even if no written contract existed) and were otherwise the result of the

[38] Fresh As Amended Statement of Claim, para. 35, TD Motion Record, Tab 2.
[39] Fresh As Amended Statement of Claim, para. 318, TD Motion Record, Tab 2.
[40] Fresh As Amended Statement of Claim, para. 321, TD Motion Record, Tab 2.

relationship between TD Bank and SIB."[41] [Emphasis added.]

III. THE ISSUES

23. What is the appropriate procedure for a claim to be asserted on behalf of SIB's customers? The only appropriate procedure is a class action under the *Class Proceedings Act, 1992* that is properly certified.

24. Does a claim on behalf of SIB solve the problem with the way the action is constituted? No, framing the claim as one asserted by SIB does not solve the problem.

IV. THE LAW AND ARGUMENT

The only appropriate procedure to assert the claims of SIB's customers is a class action under the *Class Proceeding Act, 1992*

25. It is trite law that a corporation cannot advance a claim on behalf of its stakeholders, such as shareholders and creditors. This point was very recently reaffirmed by the Ontario Court of Appeal in *Livent*.[42] The Joint Liquidators stand in the shoes of SIB, so they have no greater right than SIB would have to assert a claim on behalf of SIB's customers. Thus to the extent that the claim asserted in the Joint Liquidators' action is brought on behalf of SIB's customers, it must be through some other mechanism than SIB itself.

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[41] Fresh As Amended Statement of Claim, para. 319, TD Motion Record, Tab 2.
[42] *Livent* at para. 60, TD BOA, Tab 8.

26. There are two potential procedural mechanisms by which the claim on behalf of SIB's customers could be asserted. A class action under the *Class Proceedings Act, 1992* is obviously one of them. Is a representative order under Rule 10 an alternative, as the Joint Liquidators suggest in paragraph 319 of the Fresh As Amended Statement of Claim?

27. The answer to this question is clearly no, although the reasons for that conclusion are somewhat complicated by the convoluted history of Rule 10 proceedings subsequent to the passage of the *Class Proceedings Act, 1992*.

Properly interpreted, Rule 10 is not an alternative to a class action

28. A consideration of the legislative history reveals that Rule 10 representative orders and class actions under the *Class Proceedings Act, 1992* were intended to serve entirely different functions, such that a Rule 10 proceeding is not an alternative to a class action:

(a) Rule 10 was never intended to act as a simplified "alternative" procedure to the one envisioned by the *Class Proceedings Act, 1992*. It was intended only to provide tools to manage litigation that would affect the rights of parties that cannot be ascertained or readily brought before the court. Its predecessor rule *co-existed* with a rule that is the predecessor to Ontario's modern class actions regime, and the two plainly served different functions.

(b) When the *Class Proceedings Act, 1992* was enacted, Ontario's *Rules of Civil Procedure* were specifically amended so as to not provide for any mechanism

to bring a class action outside of the scope of the *Class Proceedings Act*, but to only contain supplementary rules applicable to class proceedings.[43]

29. Rule 75 of the pre-1985 *Rules of Practice* provided: "Where there are numerous persons having the same interest, one or more may sue or be sued or may be authorized by the court to defend on behalf, or for the benefit of, all."[44] Rule 75 was the predecessor to Ontario's modern class proceedings regime.

30. Rules 76-79 and 91 of the same *Rules of Practice* provided for representation orders in situations where the rights of an unborn or unascertainable party were implicated, there was a variation of a trust, a settlement was approved which would bind absent parties, and a deceased person had no personal representative. They were the predecessors to the modern Rule 10.

31. Upon enactment of the current *Rules of Civil Procedure* in 1985, Rule 12 reproduced the former Rule 75 with almost no change in substance, thereby becoming the new class proceedings provision. Meanwhile, serious plans to reform Ontario's class proceedings regime were already underway, with the Law Reform Commission having noted in a comprehensive 1982 report that Rule 75 lacked procedural safeguards and had the unfortunate effect of permitting a plaintiff to "commence a class action without any requirement of judicial review".[45] The Supreme Court of Canada echoed these concerns the following year.[46]

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[43] With the narrow exception of Rule 12.08, which provides for a mechanism pursuant to which unincorporated associations and trade unions can bring a representative action outside of the *Class Proceedings Act, 1992* with authorization by the court. This provision addresses the specific problems arising from these bodies' lack of capacity to sue and be sued and only applies where proceeding under the *Class Proceedings Act, 1992* would be unduly expensive or inconvenient.
[44] *Rules of Practice and Procedure*, R.R.O. 1980, Reg. 540, Rule 75.
[45] Ontario Law Reform Commission, *Report on Class Actions* (1982), Vol. I at 290-291, TD BOA, Tab 13.
[46] *Naken v. General Motors of Canada Ltd.*, [1983] 1 S.C.R. 72, TD BOA, Tab 9.

32. The *Rules of Civil Procedure* consolidated Rule 76-79 and 91 of the former *Rules of Practice* into the modern Rule 10, which has not been amended subsequently. Rule 10 was intended to address the same underlying problem that all of the representation provisions addressed: managing litigation that will affect the rights of parties that cannot be ascertained or readily brought before the court. Building on its predecessors, Rule 10 was intended to generalize and broaden the circumstances in which a court could make a representation order to deal with this same underlying problem.

33. The Law Reform Commission's 1982 report did not bring about any legislative initiatives. In 1990, the Attorney General of Ontario took up the cause and put forth draft legislation that ultimately led to the enactment of the *Class Proceedings Act, 1992.*

34. Upon the enactment of the *Class Proceedings Act, 1992*, Rule 12 of the *Rules of Civil Procedure*, as enacted at the time, was revoked, given that its subject matter was now covered more expansively in the *Class Proceedings Act, 1992.* It was replaced with the modern Rule 12 (which has not been modified subsequently save for one small amendment in 2008), which sets out supplementary procedural provisions applicable to class proceedings and rationalizes the operation of the *Rules of Civil Procedure* generally to the conduct of class proceedings.[47]

35. Despite this clear legislative history, some cases and commentators have concluded that Rule 10 is a simplified procedure version of a class action.[48] With respect, this conclusion is simply wrong in light of the legislative history, and it overlooks the fact that

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[47] See the note above with respect to Rule 12.08.
[48] See, for example, *Dugal v. Research in Motion Ltd.* (2007), 87 O.R. (3d) 721 at para. 20 (S.C.J.), TD BOA, Tab 5, and Todd Archibald, Gordon Killeen and James C. Morton, *Ontario Superior Court Practice, 2016* (Markham: LexisNexis Canada Inc., 2015) at 833, TD BOA, Tab 11.

Rule 10 and a class action are two very different mechanisms designed to do two very different things.

36. Accordingly, contrary to the assertion in paragraph 321 of the Fresh As Amended Statement of Claim, on a proper interpretation Rule 10 is not available in this case.

Even if available, Rule 10 is inappropriate for a case of this complexity and magnitude

37. Even if Rule 10 is a simplified procedure version of a class action, this case is hardly amenable for a simplified procedure. It involves a claim of $5.5 billion involving a purported class of more than 21,000 people in 113 countries around the world, covering events that took place over a period of a quarter century and allegations that require a 100 page, 335 paragraph statement of claim to set out. If this case is amenable to a simplified class action procedure, it is hard to imagine any class action that would not be, and hard to imagine why anyone would ever bring a proceeding under the *Class Proceedings Act, 1992* instead of proceeding under Rule 10. It would set a terrible precedent to allow a case of this magnitude and complexity to go ahead under a "simplified procedure".

38. The *Class Proceedings Act, 1992* provides a well-established procedural framework for judicial management of complex claims brought on behalf of a class. This case requires that framework; the alternative would be chaos.

39. It would also be manifestly unfair to TD Bank to allow the Joint Liquidators to evade the certification requirement by proceeding instead under Rule 10. The certification requirement is an important procedural protection to ensure that a proceeding brought on behalf of a class:

(a) discloses a reasonable cause of action (section 5(1)(a) of the *Class Proceedings Act, 1992*);

(b) involves an identifiable class (section 5(1)(b) of the *Class Proceedings Act, 1992*);

(c) involves common issues (section 5(1)(c) of the *Class Proceedings Act, 1992*);

(d) is brought via the preferable procedure (section 5(1)(d) of the *Class Proceedings Act, 1992*);

(e) is asserted by an appropriate representative who can adequately represent the interests of the class and has a viable plan for advancing the litigation (section 5(1)(e) of the *Class Proceedings Act, 1992*);

(f) includes mechanisms to bind the entire class to the outcome if the case is litigated to trial; and

(g) includes mechanisms that would permit settlement that would bind the entire class.

A certification motion in this case might not be successful. At the very least, a certification motion is likely to narrow and sharpen the focus of the action. None of that should be bypassed via the mechanism of a Rule 10 proceeding.

A claim by SIB itself does not solve the problem.

Livent does not provide a basis for what the Joint Liquidators are attempting to do because it is premised on an entirely different duty

40. The Joint Liquidators seek to get around the problem of how the claim on behalf of SIB's customers is constituted by asserting a claim on behalf of SIB itself. To date the Joint Liquidators have relied on a single case, *Livent*, for the proposition that they can effectively assert a claim on behalf of SIB's customers by suing in the name of SIB. The difficulty with this argument is that *Livent* is distinguishable from this case on a number of grounds.

41. *Livent* held that the trustee in bankruptcy of an insolvent corporation may sue the corporation's *auditor* for negligence in failing to detect a fraud by the corporation's principals, and may recover the corporation's losses even if the corporation is insolvent such that the effect of the damages award is to benefit the corporation's creditors.[49]

42. *Livent*'s factual setting is crucial. Its entire analysis is premised upon an *auditor's* duty to its client. The analysis is not transferable to the relationship between a bank and its customer because the duties owed by a bank to its customer are completely different from the duties owed by an auditor to its client.

43. It is self-evident that an auditor owes a duty to its client to detect a fraud that renders the client's financial statements inaccurate or misleading. That is the whole point of an audit, and the very thing that an auditor is paid to do. The analysis in *Livent* was driven by this

[49] *Livent* at para. 60, TD BOA, Tab 8.

simple observation. *Livent* precludes an auditor from escaping liability for the very thing it was paid to do.

44. *Livent*'s analysis was entirely focused on the auditor-client relationship, and set up a regime of liability that makes sense in that context – but only in that context:

(a) In rejecting an argument that the auditor could rely on the defence of *ex turpi causa*, *Livent* pointed out that allowing the defence would "lame the very concept of an audit" because the "'very thing' an auditor undertakes is to exercise reasonable care in relation to the possibility of financial impropriety."[50]

(b) *Livent* noted that "the contractual relationship between Deloitte and Livent was shaped by the statutory, regulatory and professional standards governing Deloitte as an auditor of a public company",[51] and commented on the auditor's contractual commitment:

> "In addition, I note that under the engagement letters, which formed part of the contract between Deloitte and Livent, Deloitte undertook to evaluate the fairness of the presentation of the financial statements in conformity with generally accepted accounting principles ('GAAP') and to conduct its audits in accordance with GAAS. It is true that, under those same letters, Livent acknowledged that it was responsible for designing effective internal controls, properly recording transactions in the accounting records, making appropriate accounting estimates, safeguarding assets and ensuring the overall accuracy of the financial statements. Nonetheless, in accordance with GAAS, Deloitte was under an obligation to have proper auditing procedures in place to reduce the risk of not detecting material misstatements to an appropriately low level. To borrow the

[50] *Livent* at para. 153, TD BOA, Tab 8.
[51] *Livent* at para. 159, TD BOA, Tab 8.

> words of Lord Mance, one of the 'very things' Deloitte was retained to do was to exercise reasonable care in relation to detecting fraud. This is underscored by the fact that Deloitte knew at all material times that the financial statements it prepared were being used to solicit investment in Livent."[52]

(c) *Livent* examined the purposes of an audit of a publicly-traded company,[53] the standard of care for auditors,[54] the statutory and regulatory framework for audits,[55] the requirements of the Canadian Institute of Chartered Accountants Handbook and the Institute of Chartered Accountants of Ontario Handbook,[56] the particular auditor's own manuals,[57] and the obligation of an auditor to resign if it suspects fraud or error and management does not assist in dispelling the suspicion.[58]

45. Obviously none of the foregoing says anything about the obligations of a bank to its customer. Nor is any of that analysis applicable by analogy. The relationship between a bank and its customer is entirely different than the relationship between an auditor and its client.

46. In particular, unlike an auditor, a bank does not owe its customer a duty to detect the customer's own fraud.

47. It is trite law that the relationship between a bank and its customer is contractual (not fiduciary), and that certain terms are implied into the contract between the bank and its customer. Indeed, this is the mechanism the Joint Liquidators seek to rely on in paragraph

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[52] *Livent* at para. 160, TD BOA, Tab 8.
[53] *Livent* at paras. 184-188, TD BOA, Tab 8.
[54] *Livent* at paras. 189-191, TD BOA, Tab 8.
[55] *Livent* at paras. 192-197, TD BOA, Tab 8.
[56] *Livent* at paras. 198-215, TD BOA, Tab 8.
[57] *Livent* at paras. 216-219, TD BOA, Tab 8.
[58] *Livent* at paras. 220-225, TD BOA, Tab 8.

316 of the Fresh As Amended Statement of claim: they say that the contract between a bank and its customer includes an implied term that the bank will detect and warn the bank's customer of fraud committed by the customer's principal. The difficulty is that there is no such implied duty. No court has ever recognized it, and such a duty would be inconsistent with the implied duties that have been recognized by the courts for decades.

48. The leading case on the implied terms of a contract between a bank and its customer is the English Court of Appeal's decision in *Joachimson v. Swiss Bank Corp.*,[59] the authority of which "has been often confirmed by courts of high authority in Canada".[60] *Joachimson v. Swiss Bank Corp.* described the contract between a bank and its customer in the following terms:

> "I think that there is only one contract made between the bank and its customer. The terms of that contract involve obligations on both sides, and require careful statement. They appear upon consideration to include the following provisions. The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer, addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to take reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery. I think it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch where the current account is kept."[61]

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[59] [1921] 3 K.B. 110 (C.A.) ("*Joachimson*"), TD BOA, Tab 6.

[60] Bradley Crawford, *The Law of Banking and Payment in Canada* (Toronto: Canada Law Book, 2008 ff. (looseleaf) at §9:20.30(1), TD BOA, Tab 12, citing *Canadian Pacific Hotels Ltd. v. Bank of Montreal* (1987), 40 D.L.R. (4th) 385 (S.C.C.) at 431, TD BOA, Tab 3, *Yuckovich v. Royal Bank of Canada* (1998), 158 D.L.R. (4th) 37 (Ont. C.A.) at 44, TD BOA, Tab 10, and *Alberta (Workers' Compensation Board) v. Enoch Indian Band* (1993), 106 D.L.R. (4th) 279 (Alta. C.A.) at 282, TD BOA, Tab 1.

[61] *Joachimson* at 127, TD BOA, Tab 6.

Joachimson v. Swiss Bank Corp. does not support the implied duty on which the Joint Liquidators seek to rely.

49. Aside from the basic implied terms set out in *Joachimson v. Swiss Bank Corp.*, "[t]here have been remarkably few additional terms implied by the courts in subsequent cases."[62] Moreover, efforts by customers to establish new duties in their favour have generally failed. Two of those cases are of particular note for the issues that arise on this motion.

50. *Baldwin v. Daubney*[63] held that a bank does not owe its customer a duty to caution against imprudent investments. If a bank does not have an implied duty to caution a customer against imprudent investments, it cannot have an implied duty to caution a customer against fraud by the customer itself.

51. Even more directly on point is *Levy-Russell Ltd. v. Tecmotiv Inc.*,[64] which held that a bank had no implied duty to advise a client of the wrongdoing of certain of its executives, *even when the bank was explicitly made aware of the wrongdoing*, because such an obligation does not fall within the ambit of banking services:

> "The plaintiffs say that the bank, knowing that the directors and Foreht in particular, had consistently demonstrated an 'inability to balance his competing and conflicting interests...', failed to bring its concerns to the attention of Levy and Hayeems; and failed to brief Peat of those concerns.
>
> The plaintiffs argue that the bank knew Foreht was not acting as a director should – he was urging the bank to put in a receiver; to, in effect, gang up on

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[62] Bradley Crawford, *The Law of Banking and Payment in Canada* (Toronto: Canada Law Book, 2008 ff. (looseleaf) at §9:20.30(1), TD BOA, Tab 12.
[63] (2005), 78 O.R. (3d) 693 (S.C.J.) at para. 96, aff'd, (2006), 275 D.L.R. (4th) 762 (Ont. C.A.), leave to appeal refused (2007), 277 D.L.R. (4th) vii (S.C.C.), TD BOA, Tab 2.
[64] 1994 CarswellOnt 231 (Gen. Div.) at paras. 624-625, TD BOA, Tab 7.

> Levy; to remove him; to pressure Levy to accept Shieldings' offer. Counsel points to Soucie's June 9th note – 'Are we being drawn into a conspiracy?' and challenges Soucie's evidence that that particular concern never came up again. I have already reviewed Foreht's activities extensively and will not do so again. There is ample evidence that he displayed to the bank his devout interest in getting a Shieldings deal accepted one way or another. The bank was aware of and concerned about Foreht's 'two hats' throughout its 1986 and 1987 dealings with Levy-Russell. *The bank denies the existence of any duty upon it to advise a customer of any thoughts it may have as to the customer's officers potentially being in a conflict of interest. No case was cited to me directly supporting such a duty. The relationship of banker and customer is contractual and normally is best described as that of debtor and creditor. It does not of itself give rise to fiduciary duties and indeed the plaintiffs' claim against the bank is not founded on such duties, but on negligence. In Joachimson v. Swiss Bank Corp., [1921] 3 K.B. 110 (C.A.), Atkin L.J. (at p. 127) set out a careful analysis of the terms to be implied in a banker-customer contract. There is no reference to any duty such as the one alleged.* This description of the bank's duties was supplemented by Atkin L.J. in the later case of *Hilton v. Westminster Bank Ltd.* (1926), 135 L.T. 358 (C.A.) where he observed at p. 326 that another contractual duty was to exercise reasonable care and skill in performing its banking services. *Advising a customer of the possible conflict of interest of an officer or director is not a banking service; nor was it asserted that the bank led Levy or Hayeems to believe that it would give such advice. I am of the view that the bank did not have the duty contended for.*" [Emphasis added.]

52. The focus in *Levy-Russell Ltd. v. Tecmotiv Inc.* on banking services highlights the difference between *Livent* and the bank-customer relationship. In an auditor's liability case like *Livent*, the services that the defendant has undertaken to provide are *audit services*, which include an obligation to detect fraud in the preparation of a corporation's financial statements. In a bank case like this one, what the defendant has undertaken to provide is *banking services* – in this case, correspondent banking and some asset management and trade finance services. Banking services are not audit services.

53. There appears to be no case in which any court has ever found the implied term that the Joint Liquidators seek to rely upon in this case. This is not surprising: an implied duty on the bank to detect and warn of fraud by the customer's principals would be completely

inconsistent with the nature of the contract between a bank and its customer as established by *Joachimson v. Swiss Bank Corp.* and the cases which have followed and applied it – in particular *Levy-Russell Ltd. v. Tecmotiv Inc.* In that case, the wrongdoing was a conflict of interest pursuant to which the executives acted in their own self-interest and to the detriment of the corporation; the bank was found to have no duty to advise its customer of such a potential conflict of interest. This cannot be distinguished from the present case, which involves allegations that SIB's principals acted in self-interest and to the detriment of SIB.

54. The Joint Liquidators cannot fall back on the law of tort to create a duty that would be inconsistent with the implied terms of the banker-customer contract. As held by the Supreme Court of Canada in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*:[65]

> "In order, however, that there should not remain uncertainty, in view of the manner in which this case was argued, as to whether the customer of a bank could owe a duty in tort, in the absence of a verification agreement, to examine bank statements with reasonable care and to report any discrepancies within a reasonable time, I am of the opinion, assuming it to be arguable that such a duty could arise in tort, that *the principle of concurrent or alternate liability in contract and in tort affirmed in [Central Trust Co. v. Rafuse,* [1986] 2 S.C.R. 147] *cannot extend to the recognition of a duty of care in tort when that same duty of care has been rejected or excluded by the courts as an implied term of a particular class of contract.*" [Emphasis added.]

The measure of damages under Livent

55. *Livent* creates a further complication. Its measure of the corporation's damages is represented by the following formula:

L = ALD - ELD

where

[65] (1987), 40 D.L.R. (4th) 385 (S.C.C.) at 432, TD BOA, Tab 3.

L = loss

ALD = actual liquidation deficit

BLD = estimated liquidation deficit if there had been no breach of duty by the auditor.[66]

56. This formula does not measure the damages of SIB's customers. Those losses are the sum of each of the customer's individual losses in terms of CDs which were not repaid to them.

Conclusion on Livent

57. The real claim in this case is the claim of SIB's customers. Attempting to force those claims into the *Livent* analysis is an exercise in trying to get a square peg into a round hole. It just does not fit. The duty upon which *Livent* is premised is not present. The damages calculation is different. *Livent* does not provide a basis for solving the problem with the way the action is constituted.

The appropriate remedy

58. In light of all of the foregoing, the appropriate remedy is to stay the action but allow the claim to be reconstituted properly, as a putative class action on behalf of SIB's customers which will then proceed through the usual certification process. A similar solution was adopted in *Darcy v. Wheeler*,[67] in which a claim brought against an individual representative of a trade union was ordered to be reconstituted as a claim against the trade union as a defendant class.

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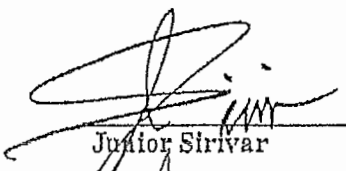
[66] *Livent* at paras. 61-63, TD BOA, Tab 8.
[67] (1995), 25 O.R. (3d) 412 (Gen. Div.) at para. 17, TD BOA, Tab 4.

V. ORDER REQUESTED

59. TD Bank requests an order staying the action, directing the Joint Liquidators to reconstitute the action as a class proceeding pursuant the *Class Proceedings Act, 1992*, and requiring them to comply with the requirements of the *Class Proceedings Act, 1992*, including the certification requirement in section 5. TD Bank also seeks its costs of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of February, 2016.

Geoff R. Hall



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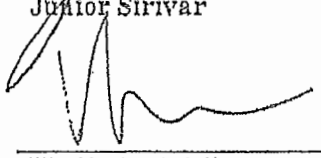

Vladimira M. Ivanov

McCarthy Tétrault LLP

Counsel for The Toronto-Dominion Bank

SCHEDULE A
LIST OF AUTHORITIES

1. *Alberta (Workers' Compensation Board) v. Enoch Indian Band* (1993), 106 D.L.R. (4th) 279 (Alta. C.A.)

2. *Baldwin v. Daubney*, (2005), 78 O.R. (3d) 693 (S.C.J.), aff'd, (2006), 275 D.L.R. (4th) 762 (Ont. C.A.), leave to appeal refused (2007), 277 D.L.R. (4th) vii (S.C.C.).

3. *Canadian Pacific Hotels Ltd. v. Bank of Montreal* (1987), 40 D.L.R. (4th) 385 (S.C.C.)

4. *Darcy v. Wheeler* (1995), 25 O.R. (3d) 412 (Gen. Div.)

5. *Dugal v. Research in Motion Ltd.* (2007), 87 O.R. (3d) 721

6. *Joachimson v. Swiss Bank Corp.*, [1921] 3 K.B. 110 (C.A.)

7. *Levy-Russell Ltd. v. Tecmotiv Inc.*, 1994 CarswellOnt 231 (Gen. Div.)

8. *Livent Inc. v. Deloitte & Touche*, 2016 ONCA 11

9. *Naken v. General Motors of Canada Ltd.*, [1983] 1 S.C.R. 72

10. *Vuckovich v. Royal Bank of Canada* (1998), 158 D.L.R. (4th) 37 (Ont. C.A.)

11. Bradley Crawford, *The Law of Banking and Payment in Canada* (Toronto: Canada Law Book, 2008 ff. (looseleaf) at §9:20.30(1).

12. Ontario Law Reform Commission, *Report on Class Actions* (1982), Vol. I at 290-291.

13. Todd Archibald, Gordon Killeen and James C. Morton, *Ontario Superior Court Practice, 2016* (Markham: LexisNexis Canada Inc., 2015) at 833.

SCHEDULE B
RELEVANT STATUTES

1. *Class Proceedings Act*, 1992, S.O. 1992, c. 6

Definitions

1. In this Act,

"common issues" means,

(a) common but not necessarily identical issues of fact, or

(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts; ("questions communes")

"court" means the Superior Court of Justice but does not include the Small Claims Court; ("tribunal")

"defendant" includes a respondent; ("défendeur")

"plaintiff" includes an applicant. ("demandeur") 1992, c. 6, s. 1; 2006, c. 19, Sched. C, s. 1 (1).

Plaintiff's class proceeding

2. (1) One or more members of a class of persons may commence a proceeding in the court on behalf of the members of the class. 1992, c. 6, s. 2 (1).

Motion for certification

(2) A person who commences a proceeding under subsection (1) shall make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing the person representative plaintiff. 1992, c. 6, s. 2 (2).

Idem

(3) A motion under subsection (2) shall be made,

(a) within ninety days after the later of,

(i) the date on which the last statement of defence, notice of intent to defend or notice of appearance is delivered, and

(ii) the date on which the time prescribed by the rules of court for delivery of the last statement of defence, notice of intent to defend or a notice of appearance expires without its being delivered; or

(b) subsequently, with leave of the court. 1992, c. 6, s. 2 (3).

Defendant's class proceeding

3. A defendant to two or more proceedings may, at any stage of one of the proceedings, make a motion to a judge of the court for an order certifying the proceedings as a class proceeding and appointing a representative plaintiff. 1992, c. 6, s. 3.

Classing defendants

4. Any party to a proceeding against two or more defendants may, at any stage of the proceeding, make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing a representative defendant. 1992, c. 6, s. 4.

Certification

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1).

Idem, subclass protection

(2) Despite subsection (1), where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,

(a) would fairly and adequately represent the interests of the subclass;

(b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and

(c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members. 1992, c. 6, s. 5 (2).

Evidence as to size of class

(3) Each party to a motion for certification shall, in an affidavit filed for use on the motion, provide the party's best information on the number of members in the class. 1992, c. 6, s. 5 (3).

Adjournments

(4) The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence. 1992, c. 6, s. 5 (4).

Certification not a ruling on merits

(5) An order certifying a class proceeding is not a determination of the merits of the proceeding. 1992, c. 6, s. 5 (5).

Certain matters not bar to certification

6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:

1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.

2. The relief claimed relates to separate contracts involving different class members.

3. Different remedies are sought for different class members.

4. The number of class members or the identity of each class member is not known.

5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members. 1992, c. 6, s. 6.

Refusal to certify: proceeding may continue in altered form

7. Where the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for the purpose, the court may,

(a) order the addition, deletion or substitution of parties;

(b) order the amendment of the pleadings or notice of application; and

(c) make any further order that it considers appropriate. 1992, c. 6, s. 7.

Contents of certification order

8. (1) An order certifying a proceeding as a class proceeding shall,

(a) describe the class;

(b) state the names of the representative parties;

(c) state the nature of the claims or defences asserted on behalf of the class;

(d) state the relief sought by or from the class;

(e) set out the common issues for the class; and

(f) specify the manner in which class members may opt out of the class proceeding and a date after which class members may not opt out. 1992, c. 6, s. 8 (1).

Subclass protection

(2) Where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, subsection (1) applies with necessary modifications in respect of the subclass. 1992, c. 6, s. 8 (2).

Amendment of certification order

(3) The court, on the motion of a party or class member, may amend an order certifying a proceeding as a class proceeding. 1992, c. 6, s. 8 (3).

Opting out

9. Any member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order. 1992, c. 6, s. 9.

Where it appears conditions for certification not satisfied

10. (1) On the motion of a party or class member, where it appears to the court that the conditions mentioned in subsections 5 (1) and (2) are not satisfied with respect to a class proceeding, the court may amend the certification order, may decertify the proceeding or may make any other order it considers appropriate. 1992, c. 6, s. 10 (1).

Proceeding may continue in altered form

(2) Where the court makes a decertification order under subsection (1), the court may permit the proceeding to continue as one or more proceedings between different parties. 1992, c. 6, s. 10 (2).

Powers of court

(3) For the purposes of subsections (1) and (2), the court has the powers set out in clauses 7 (a) to (c). 1992, c. 6, s. 10 (3).

Stages of class proceedings

11. (1) Subject to section 12, in a class proceeding,

(a) common issues for a class shall be determined together;

(b) common issues for a subclass shall be determined together; and

(c) individual issues that require the participation of individual class members shall be determined individually in accordance with sections 24 and 25. 1992, c. 6, s. 11 (1).

Separate judgments

(2) The court may give judgment in respect of the common issues and separate judgments in respect of any other issue. 1992, c. 6, s. 11 (2).

Court may determine conduct of proceeding

12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate. 1992, c. 6, s. 12.

Court may stay any other proceeding

13. The court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate. 1992, c. 6, s. 13.

Participation of class members

14. (1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding. 1992, c. 6, s. 14 (1).

Idem

(2) Participation under subsection (1) shall be in whatever manner and on whatever terms, including terms as to costs, the court considers appropriate. 1992, c. 6, s. 14 (2).

Discovery

Discovery of parties

15. (1) Parties to a class proceeding have the same rights of discovery under the rules of court against one another as they would have in any other proceeding. 1992, c. 6, s. 15 (1).

Discovery of class members with leave

(2) After discovery of the representative party, a party may move for discovery under the rules of court against other class members. 1992, c. 6, s. 15 (2).

Idem

(3) In deciding whether to grant leave to discover other class members, the court shall consider,

(a) the stage of the class proceeding and the issues to be determined at that stage;

(b) the presence of subclasses;

(c) whether the discovery is necessary in view of the claims or defences of the party seeking leave;

(d) the approximate monetary value of individual claims, if any;

(e) whether discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be discovered; and

(f) any other matter the court considers relevant. 1992, c. 6, s. 15 (3).

Idem

(4) A class member is subject to the same sanctions under the rules of court as a party for failure to submit to discovery. 1992, c. 6, s. 15 (4).

Examination of class members before a motion or application

16. (1) A party shall not require a class member other than a representative party to be examined as a witness before the hearing of a motion or application, except with leave of the court. 1992, c. 6, s. 16 (1).

Idem

(2) Subsection 15 (3) applies with necessary modifications to a decision whether to grant leave under subsection (1). 1992, c. 6, s. 16 (2).

Notice of certification

17. (1) Notice of certification of a class proceeding shall be given by the representative party to the class members in accordance with this section. 1992, c. 6, s. 17 (1).

Court may dispense with notice

(2) The court may dispense with notice if, having regard to the factors set out in subsection (3), the court considers it appropriate to do so. 1992, c. 6, s. 17 (2).

Order respecting notice

(3) The court shall make an order setting out when and by what means notice shall be given under this section and in so doing shall have regard to,

(a) the cost of giving notice;

(b) the nature of the relief sought;

(c) the size of the individual claims of the class members;

(d) the number of class members;

(e) the places of residence of class members; and

(f) any other relevant matter. 1992, c. 6, s. 17 (3).

Idem

(4) The court may order that notice be given,

(a) personally or by mail;

(b) by posting, advertising, publishing or leafleting;

(c) by individual notice to a sample group within the class; or

(d) by any means or combination of means that the court considers appropriate. 1992, c. 6, s. 17 (4).

Idem

(5) The court may order that notice be given to different class members by different means. 1992, c. 6, s. 17 (5).

Contents of notice

(6) Notice under this section shall, unless the court orders otherwise,

(a) describe the proceeding, including the names and addresses of the representative parties and the relief sought;

(b) state the manner by which and time within which class members may opt out of the proceeding;

(c) describe the possible financial consequences of the proceeding to class members;

(d) summarize any agreements between representative parties and their solicitors respecting fees and disbursements;

(e) describe any counterclaim being asserted by or against the class, including the relief sought in the counterclaim;

(f) state that the judgment, whether favourable or not, will bind all class members who do not opt out of the proceeding;

(g) describe the right of any class member to participate in the proceeding;

(h) give an address to which class members may direct inquiries about the proceeding; and

(i) give any other information the court considers appropriate. 1992, c. 6, s. 17 (6).

Solicitations of contributions

(7) With leave of the court, notice under this section may include a solicitation of contributions from class members to assist in paying solicitor's fees and disbursements. 1992, c. 6, s. 17 (7).

Notice where individual participation is required

18. (1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, the representative party shall give notice to those members in accordance with this section. 1992, c. 6, s. 18 (1).

Idem

(2) Subsections 17 (3) to (5) apply with necessary modifications to notice given under this section. 1992, c. 6, s. 18 (2).

Contents of notice

(3) Notice under this section shall,

(a) state that common issues have been determined in favour of the class;

(b) state that class members may be entitled to individual relief;

(c) describe the steps to be taken to establish an individual claim;

(d) state that failure on the part of a class member to take those steps will result in the member not being entitled to assert an individual claim except with leave of the court;

(e) give an address to which class members may direct inquiries about the proceeding; and

(f) give any other information that the court considers appropriate. 1992, c. 6, s. 18 (3).

Notice to protect interests of affected persons

19. (1) At any time in a class proceeding, the court may order any party to give such notice as it considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding. 1992, c. 6, s. 19 (1).

Idem

(2) Subsections 17 (3) to (5) apply with necessary modifications to notice given under this section. 1992, c. 6, s. 19 (2).

Approval of notice by the court

20. A notice under section 17, 18 or 19 shall be approved by the court before it is given. 1992, c. 6, s. 20.

Delivery of notice

21. The court may order a party to deliver, by whatever means are available to the party, the notice required to be given by another party under section 17, 18 or 19, where that is more practical. 1992, c. 6, s. 21.

Costs of notice

22. (1) The court may make any order it considers appropriate as to the costs of any notice under section 17, 18 or 19, including an order apportioning costs among parties. 1992, c. 6, s. 22 (1).

Idem

(2) In making an order under subsection (1), the court may have regard to the different interests of a subclass. 1992, c. 6, s. 22 (2).

Statistical evidence

23. (1) For the purposes of determining issues relating to the amount or distribution of a monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics. 1992, c. 6, s. 23 (1).

Idem

(2) A record of statistical information purporting to be prepared or published under the authority of the Parliament of Canada or the legislature of any province or territory of Canada may be admitted as evidence without proof of its authenticity. 1992, c. 6, s. 23 (2).

Notice

(3) Statistical information shall not be admitted as evidence under this section unless the party seeking to introduce the information has,

(a) given reasonable notice of it to the party against whom it is to be used, together with a copy of the information;

(b) complied with subsections (4) and (5); and

(c) complied with any requirement to produce documents under subsection (7). 1992, c. 6, s. 23 (3).

Contents of notice

(4) Notice under this section shall specify the source of any statistical information sought to be introduced that,

(a) was prepared or published under the authority of the Parliament of Canada or the legislature of any province or territory of Canada;

(b) was derived from market quotations, tabulations, lists, directories or other compilations generally used and relied on by members of the public; or

(c) was derived from reference material generally used and relied on by members of an occupational group. 1992, c. 6, s. 23 (4).

Idem

(5) Except with respect to information referred to in subsection (4), notice under this section shall,

(a) specify the name and qualifications of each person who supervised the preparation of statistical information sought to be introduced; and

(b) describe any documents prepared or used in the course of preparing the statistical information sought to be introduced. 1992, c. 6, s. 23 (5).

Cross-examination

(6) A party against whom statistical information is sought to be introduced under this section may require, for the purposes of cross-examination, the attendance of any person who supervised the preparation of the information. 1992, c. 6, s. 23 (6).

Production of documents

(7) Except with respect to information referred to in subsection (4), a party against whom statistical information is sought to be introduced under this section may require the party seeking to introduce it to produce for inspection any document that was prepared or used in the course of preparing the information, unless the document discloses the identity of persons responding to a survey who have not consented in writing to the disclosure. 1992, c. 6, s. 23 (7).

Aggregate assessment of monetary relief

24. (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

(a) monetary relief is claimed on behalf of some or all class members;

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and

(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members. 1992, c. 6, s. 24 (1).

Average or proportional application

(2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis. 1992, c. 6, s. 24 (2).

Idem

(3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members. 1992, c. 6, s. 24 (3).

Court to determine whether individual claims need to be made

(4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order. 1992, c. 6, s. 24 (4).

Procedures for determining claims

(5) Where the court determines under subsection (4) that individual claims need to be made, the court shall specify procedures for determining the claims. 1992, c. 6, s. 24 (5).

Idem

(6) In specifying procedures under subsection (5), the court shall minimize the burden on class members and, for the purpose, the court may authorize,

(a) the use of standardized proof of claim forms;

(b) the receipt of affidavit or other documentary evidence; and

(c) the auditing of claims on a sampling or other basis. 1992, c. 6, s. 24 (6).

Time limits for making claims

(7) When specifying procedures under subsection (5), the court shall set a reasonable time within which individual class members may make claims under this section. 1992, c. 6, s. 24 (7).

Idem

(8) A class member who fails to make a claim within the time set under subsection (7) may not later make a claim under this section except with leave of the court. 1992, c. 6, s. 24 (8).

Extension of time

(9) The court may give leave under subsection (8) if it is satisfied that,

(a) there are apparent grounds for relief;

(b) the delay was not caused by any fault of the person seeking the relief; and

(c) the defendant would not suffer substantial prejudice if leave were given. 1992, c. 6, s. 24 (9).

Court may amend subs. (1) judgment

(10) The court may amend a judgment given under subsection (1) to give effect to a claim made with leave under subsection (8) if the court considers it appropriate to do so. 1992, c. 6, s. 24 (10).

Individual issues

25. (1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,

(a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;

(b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and

(c) with the consent of the parties, direct that the issues be determined in any other manner. 1992, c. 6, s. 25 (1).

Directions as to procedure

(2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity. 1992, c. 6, s. 25 (2).

Idem

(3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,

(a) dispense with any procedural step that it considers unnecessary; and

(b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate. 1992, c. 6, s. 25 (3).

Time limits for making claims

(4) The court shall set a reasonable time within which individual class members may make claims under this section. 1992, c. 6, s. 25 (4).

Idem

(5) A class member who fails to make a claim within the time set under subsection (4) may not later make a claim under this section except with leave of the court. 1992, c. 6, s. 25 (5).

Extension of time

(6) Subsection 24 (9) applies with necessary modifications to a decision whether to give leave under subsection (5). 1992, c. 6, s. 25 (6).

Determination under cl. (1) (c) deemed court order

(7) A determination under clause (1) (c) is deemed to be an order of the court. 1992, c. 6, s. 25 (7).

Judgment distribution

26. (1) The court may direct any means of distribution of amounts awarded under section 24 or 25 that it considers appropriate. 1992, c. 6, s. 26 (1).

Idem

(2) In giving directions under subsection (1), the court may order that,

(a) the defendant distribute directly to class members the amount of monetary relief to which each class member is entitled by any means authorized by the court, including abatement and credit;

(b) the defendant pay into court or some other appropriate depository the total amount of the defendant's liability to the class until further order of the court; and

(c) any person other than the defendant distribute directly to class members the amount of monetary relief to which each member is entitled by any means authorized by the court. 1992, c. 6, s. 26 (2).

Idem

(3) In deciding whether to make an order under clause (2) (a), the court shall consider whether distribution by the defendant is the most practical way of distributing the award for any reason, including the fact that the amount of monetary relief to which each class member is entitled can be determined from the records of the defendant. 1992, c. 6, s. 26 (3).

Idem

(4) The court may order that all or a part of an award under section 24 that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members, if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order. 1992, c. 6, s. 26 (4).

Idem

(5) The court may make an order under subsection (4) whether or not all class members can be identified or all of their shares can be exactly determined. 1992, c. 6, s. 26 (5).

Idem

(6) The court may make an order under subsection (4) even if the order would benefit,

(a) persons who are not class members; or

(b) persons who may otherwise receive monetary relief as a result of the class proceeding. 1992, c. 6, s. 26 (6).

Supervisory role of the court

(7) The court shall supervise the execution of judgments and the distribution of awards under section 24 or 25 and may stay the whole or any part of an execution or distribution for a reasonable period on such terms as it considers appropriate. 1992, c. 6, s. 26 (7).

Payment of awards

(8) The court may order that an award made under section 24 or 25 be paid,

(a) in a lump sum, forthwith or within a time set by the court; or

(b) in instalments, on such terms as the court considers appropriate. 1992, c. 6, s. 26 (8).

Costs of distribution

(9) The court may order that the costs of distribution of an award under section 24 or 25, including the costs of notice associated with the distribution and the fees payable to a person administering the distribution, be paid out of the proceeds of the judgment or may make such other order as it considers appropriate. 1992, c. 6, s. 26 (9).

Return of unclaimed amounts

(10) Any part of an award for division among individual class members that remains unclaimed or otherwise undistributed after a time set by the court shall be returned to the party against whom the award was made, without further order of the court. 1992, c. 6, s. 26 (10).

Judgment on common issues

27. (1) A judgment on common issues of a class or subclass shall,

(a) set out the common issues;

(b) name or describe the class or subclass members;

(c) state the nature of the claims or defences asserted on behalf of the class or subclass; and

(d) specify the relief granted. 1992, c. 6, s. 27 (1).

Effect of judgment on common issues

(2) A judgment on common issues of a class or subclass does not bind,

(a) a person who has opted out of the class proceeding; or

(b) a party to the class proceeding in any subsequent proceeding between the party and a person mentioned in clause (a). 1992, c. 6, s. 27 (2).

Idem

(3) A judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding, but only to the extent that the judgment determines common issues that,

(a) are set out in the certification order;

(b) relate to claims or defences described in the certification order; and

(c) relate to relief sought by or from the class or subclass as stated in the certification order. 1992, c. 6, s. 27 (3).

Limitations

28. (1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when,

(a) the member opts out of the class proceeding;

(b) an amendment that has the effect of excluding the member from the class is made to the certification order;

(c) a decertification order is made under section 10;

(d) the class proceeding is dismissed without an adjudication on the merits;

(e) the class proceeding is abandoned or discontinued with the approval of the court; or

(f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise. 1992, c. 6, s. 28 (1).

Idem

(2) Where there is a right of appeal in respect of an event described in clauses (1) (a) to (f), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of. 1992, c. 6, s. 28 (2).

Discontinuance, abandonment and settlement

29. (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate. 1992, c. 6, s. 29 (1).

Settlement without court approval not binding

(2) A settlement of a class proceeding is not binding unless approved by the court. 1992, c. 6, s. 29 (2).

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court binds all class members. 1992, c. 6, s. 29 (3).

Notice: dismissal, discontinuance, abandonment or settlement

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

(a) an account of the conduct of the proceeding;

(b) a statement of the result of the proceeding; and

(c) a description of any plan for distributing settlement funds. 1992, c. 6, s. 29 (4).

Appeals

Appeals: refusals to certify and decertification orders

30. (1) A party may appeal to the Divisional Court from an order refusing to certify a proceeding as a class proceeding and from an order decertifying a proceeding. 1992, c. 6, s. 30 (1).

Appeals: certification orders

(2) A party may appeal to the Divisional Court from an order certifying a proceeding as a class proceeding, with leave of the Superior Court of Justice as provided in the rules of court. 1992, c. 6, s. 30 (2); 2006, c. 19, Sched. C, s. 1 (1).

Appeals: judgments on common issues and aggregate awards

(3) A party may appeal to the Court of Appeal from a judgment on common issues and from an order under section 24, other than an order that determines individual claims made by class members. 1992, c. 6, s. 30 (3).

Appeals by class members on behalf of the class

(4) If a representative party does not appeal or seek leave to appeal as permitted by subsection (1) or (2), or if a representative party abandons an appeal under subsection (1) or (2), any class member may make a motion to the court for leave to act as the representative party for the purposes of the relevant subsection. 1992, c. 6, s. 30 (4).

Idem

(5) If a representative party does not appeal as permitted by subsection (3), or if a representative party abandons an appeal under subsection (3), any class member may make a motion to the Court of Appeal for leave to act as the representative party for the purposes of subsection (3). 1992, c. 6, s. 30 (5).

Appeals: individual awards

(6) A class member may appeal to the Divisional Court from an order under section 24 or 25 determining an individual claim made by the member and awarding more than $3,000 to the member. 1992, c. 6, s. 30 (6).

Idem

(7) A representative plaintiff may appeal to the Divisional Court from an order under section 24 determining an individual claim made by a class member and awarding more than $3,000 to the member. 1992, c. 6, s. 30 (7).

Idem

(8) A defendant may appeal to the Divisional Court from an order under section 25 determining an individual claim made by a class member and awarding more than $3,000 to the member. 1992, c. 6, s. 30 (8).

Idem

(9) With leave of the Superior Court of Justice as provided in the rules of court, a class member may appeal to the Divisional Court from an order under section 24 or 25,

(a) determining an individual claim made by the member and awarding $3,000 or less to the member; or

(b) dismissing an individual claim made by the member for monetary relief. 1992, c. 6, s. 30 (9); 2006, c. 19, Sched. C, s. 1 (1).

Idem

(10) With leave of the Superior Court of Justice as provided in the rules of court, a representative plaintiff may appeal to the Divisional Court from an order under section 24,

(a) determining an individual claim made by a class member and awarding $3,000 or less to the member; or

(b) dismissing an individual claim made by a class member for monetary relief. 1992, c. 6, s. 30 (10); 2006, c. 19, Sched. C, s. 1 (1).

Idem

(11) With leave of the Superior Court of Justice as provided in the rules of court, a defendant may appeal to the Divisional Court from an order under section 25,

(a) determining an individual claim made by a class member and awarding $3,000 or less to the member; or

(b) dismissing an individual claim made by a class member for monetary relief. 1992, c. 6, s. 30 (11); 2006, c. 19, Sched. C, s. 1 (1).

Costs

31. (1) In exercising its discretion with respect to costs under subsection 131 (1) of the *Courts of Justice Act*, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest. 1992, c. 6, s. 31 (1).

Liability of class members for costs

(2) Class members, other than the representative party, are not liable for costs except with respect to the determination of their own individual claims. 1992, c. 6, s. 31 (2).

Small claims

(3) Where an individual claim under section 24 or 25 is within the monetary jurisdiction of the Small Claims Court where the class proceeding was commenced, costs related to the claim shall be assessed as if the claim had been determined by the Small Claims Court. 1992, c. 6, s. 31 (3).

Fees and disbursements

32. (1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,

(a) state the terms under which fees and disbursements shall be paid;

(b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and

(c) state the method by which payment is to be made, whether by lump sum, salary or otherwise. 1992, c. 6, s. 32 (1).

Court to approve agreements

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor. 1992, c. 6, s. 32 (2).

Priority of amounts owed under approved agreement

(3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award. 1992, c. 6, s. 32 (3).

Determination of fees where agreement not approved

(4) If an agreement is not approved by the court, the court may,

(a) determine the amount owing to the solicitor in respect of fees and disbursements;

(b) direct a reference under the rules of court to determine the amount owing; or

(c) direct that the amount owing be determined in any other manner. 1992, c. 6, s. 32 (4).

Agreements for payment only in the event of success

33. (1) Despite the *Solicitors Act* and *An Act Respecting Champerty*, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding. 1992, c. 6, s. 33 (1).

Interpretation: success in a proceeding

(2) For the purpose of subsection (1), success in a class proceeding includes,

(a) a judgment on common issues in favour of some or all class members; and

(b) a settlement that benefits one or more class members. 1992, c. 6, s. 33 (2).

Definitions

(3) For the purposes of subsections (4) to (7),

"base fee" means the result of multiplying the total number of hours worked by an hourly rate; ("honoraires de base")

"multiplier" means a multiple to be applied to a base fee. ("multiplicateur") 1992, c. 6, s. 33 (3).

Agreements to increase fees by a multiplier

(4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier. 1992, c. 6, s. 33 (4).

Motion to increase fee by a multiplier

(5) A motion under subsection (4) shall be heard by a judge who has,

(a) given judgment on common issues in favour of some or all class members; or

(b) approved a settlement that benefits any class member. 1992, c. 6, s. 33 (5).

Idem

(6) Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose. 1992, c. 6, s. 33 (6).

Idem

(7) On the motion of a solicitor who has entered into an agreement under subsection (4), the court,

(a) shall determine the amount of the solicitor's base fee;

(b) may apply a multiplier to the base fee that results in fair and reasonable compensatic the solicitor for the risk incurred in undertaking and continuing the proceeding unde agreement for payment only in the event of success; and

(c) shall determine the amount of disbursements to which the solicitor is entitled, inclu interest calculated on the disbursements incurred, as totalled at the end of each month period following the date of the agreement. 1992, c. 6, s. 33 (7).

Idem

(8) In making a determination under clause (7) (a), the court shall allow only a reasor fee. 1992, c. 6, s. 33 (8).

Idem

(9) In making a determination under clause (7) (b), the court may consider the mann which the solicitor conducted the proceeding. 1992, c. 6, s. 33 (9).

Motions

34. (1) The same judge shall hear all motions before the trial of the common issues. 1 c. 6, s. 34 (1).

Idem

(2) Where a judge who has heard motions under subsection (1) becomes unavailabl any reason, the regional senior judge shall assign another judge of the court for the pur 1992, c. 6, s. 34 (2).

Idem

(3) Unless the parties agree otherwise, a judge who hears motions under subsection ((2) shall not preside at the trial of the common issues. 1992, c. 6, s. 34 (3).

Rules of court

35. The rules of court apply to class proceedings. 1992, c. 6, s. 35.

Crown bound

36. This Act binds the Crown. 1992, c. 6, s. 36.

Application of Act

37. This Act does not apply to,

(a) a proceeding that may be brought in a representative capacity under another Act;

(b) a proceeding required by law to be brought in a representative capacity; and

(c) a proceeding commenced before this Act comes into force. 1992, c. 6, s. 37.

38. OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THIS ACT). 1992. s. 38.

39. OMITTED (ENACTS SHORT TITLE OF THIS ACT). 1992, c. 6, s. 39.

2. *Rules Of Civil Procedure*, R.R.O. 1990, Reg. 194

RULE 10 REPRESENTATION ORDER

REPRESENTATION OF AN INTERESTED PERSON WHO CANNOT BE ASCERTAINED

Proceedings in which Order may be Made

10.01 (1) In a proceeding concerning,

(a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

(b) the determination of a question arising in the administration of an estate or trust;

(c) the approval of a sale, purchase, settlement or other transaction;

(d) the approval of an arrangement under the Variation of Trusts Act;

(e) the administration of the estate of a deceased person; or

(f) any other matter where it appears necessary or desirable to make an order under this subrule,

a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served. R.R.O. 1990, Reg. 194, r. 10.01 (1).

Order Binds Represented Persons

(2) Where an appointment is made under subrule (1), an order in the proceeding is binding on a person or class so represented, subject to rule 10.03. R.R.O. 1990, Reg. 194, r. 10.01 (2).

Settlement Affecting Persons who are not Parties

(3) Where in a proceeding referred to in subrule (1) a settlement is proposed and some of the persons interested in the settlement are not parties to the proceeding, but,

(a) those persons are represented by a person appointed under subrule (1) who assents to the settlement; or

(b) there are other persons having the same interest who are parties to the proceeding and assent to the settlement,

the judge, if satisfied that the settlement will be for the benefit of the interested persons who are not parties and that to require service on them would cause undue expense or delay, may approve the settlement on behalf of those persons. R.R.O. 1990, Reg. 194, r. 10.01 (3).

(4) A settlement approved under subrule (3) binds the interested persons who are not parties, subject to rule 10.03. R.R.O. 1990, Reg. 194, r. 10.01 (4).

REPRESENTATION OF A DECEASED PERSON

10.02 Where it appears to a judge that the estate of a deceased person has an interest in a matter in question in the proceeding and there is no executor or administrator of the estate, the judge may order that the proceeding continue in the absence of a person representing the estate of the deceased person or may by order appoint a person to represent the estate for the purposes of the proceeding, and an order in the proceeding binds the estate

of the deceased person, subject to rule 10.03, as if the executor or administrator of the estate of that person had been a party to the proceeding. R.R.O. 1990, Reg. 194, r. 10.02.

RELIEF FROM BINDING EFFECT OF ORDER

10.03 Where a person or an estate is bound by reason of a representation order made under subrule 10.01 (1) or rule 10.02, an approval under subrule 10.01 (3) or an order that the proceeding continue made under rule 10.02, a judge may order in the same or a subsequent proceeding that the person or estate not be bound where the judge is satisfied that,

(a) the order or approval was obtained by fraud or non-disclosure of material facts;
(b) the interests of the person or estate were different from those represented at the hearing; or
(c) for some other sufficient reason the order or approval should be set aside. R.R.O. 1990, Reg. 194, r. 10.03; O. Reg. 259/14, s. 3.

...

RULE 12 CLASS PROCEEDINGS AND OTHER REPRESENTATIVE PROCEEDINGS

DEFINITIONS

12.01 In rules 12.02 to 12.06,

"Act" means the Class Proceedings Act, 1992; ("Loi")

"Foundation" means The Law Foundation of Ontario; ("Fondation")

"Fund" means the Class Proceedings Fund of the Foundation. ("Fonds") O. Reg. 770/92, s. 5; O. Reg. 465/93, s. 2 (2).

TITLE OF PROCEEDING

12.02 (1) In a proceeding commenced under subsection 2 (1) of the Act, the title of the proceeding shall include, after the names of the parties, "Proceeding under the Class Proceedings Act, 1992". O. Reg. 770/92, s. 5.

(2) In a proceeding referred to in section 3 or 4 of the Act, the notice of motion for an order certifying the proceeding, the order certifying it and all subsequent documents shall include, after the names of the parties, "Proceeding under the Class Proceedings Act, 1992". O. Reg. 770/92, s. 5.

DISCOVERY OF CLASS MEMBERS

12.03 (1) For the purpose of subrule 31.11 (1) (reading in examination), a class member who is examined for discovery under subsection 15 (2) of the Act is examined in addition to the party. O. Reg. 770/92, s. 5.

(2) Rule 31.10 (discovery of non-parties) and clause 34.15 (1) (b) (sanctions for default or misconduct) do not apply when a class member is examined for discovery under subsection 15 (2) of the Act. O. Reg. 770/92, s. 5.

COSTS

Application of Rule

12.04 (1) This rule applies to class proceedings in which the plaintiff or applicant has received financial support from the Fund. O. Reg. 770/92, s. 5.

Notice to Foundation, Opportunity to Participate

(2) If the court is of the opinion that the defendant or respondent may be entitled to an award of costs, the court shall direct the plaintiff or applicant to give notice to the Foundation. O. Reg. 113/01, s. 1.

(3) When the court has made a direction under subsection (2),

(a) no order for costs or assessment of costs shall be made unless the Foundation has had an opportunity to present evidence and make submissions in respect of costs; and

(b) the Foundation is a party for the purpose of an appeal in relation to costs. O. Reg. 113/01, s. 1.

Failure to Accept Defendant's Offer

(4) Subrule 49.10 (2) (costs consequences of offer) does not apply. O. Reg. 113/01, s. 1.

CONTENTS OF JUDGMENTS AND ORDERS

12.05 (1) A judgment in a class proceeding or an order approving a settlement, discontinuance or abandonment of a class proceeding under section 29 of the Act shall contain directions with respect to,

(a) the distribution of amounts awarded under section 24 or 25 of the Act, and the costs of distribution;

(b) the payment of amounts owing under an enforceable agreement made under section 32 of the Act between a lawyer and a representative party;

(c) the payment of the costs of the proceeding; and

(d) the payment of any levy in favour of the Fund under clause 59.5 (1) (g) of the Law Society Act. O. Reg. 770/92, s. 5; O. Reg. 575/07, s. 1.

(2) An order certifying two or more proceedings as a class proceeding under section 3 of the Act or decertifying a class proceeding under section 10 of the Act shall contain directions with respect to pleadings and other procedural matters. O. Reg. 770/92, s. 5.

LEAVE TO APPEAL

Leave to be Obtained from Another Judge

12.06 (1) Leave to appeal to the Divisional Court under subsection 30 (2), (9), (10) or (11) of the Act shall be obtained from a judge other than the judge who made the order. O. Reg. 465/93, s. 2 (3).

Certification Order — Grounds

(2) Leave to appeal from an order under subsection 30 (2) of the Act shall be granted only on the grounds provided in subrule 62.02 (4). O. Reg. 465/93, s. 2 (3).

Order Awarding $3,000 or less or Dismissing Claim — Grounds

(3) Leave to appeal from an order under subsection 30 (9), (10) or (11) of the Act shall not be granted unless,

(a) there has been a miscarriage of justice; or

(b) the order may be used as a precedent in determining the rights of other class members or the defendant in the proceeding under section 24 or 25 of the Act and there is good reason to doubt the correctness of the order. O. Reg. 465/93, s. 2 (3).

Procedure

(4) Subrules 62.02 (2), (3), (5), (7) and (8) (procedure on motion for leave to appeal) apply to the motion for leave to appeal. O. Reg. 465/93, s. 2 (3); O. Reg. 170/14, s. 1.

PROCEEDING AGAINST REPRESENTATIVE DEFENDANT

12.07 Where numerous persons have the same interest, one or more of them may defend a proceeding on behalf or for the benefit of all, or may be authorized by the court to do so. O. Reg. 465/93, s. 2 (3).

PROCEEDING BY UNINCORPORATED ASSOCIATION OR TRADE UNION

12.08 Where numerous persons are members of an unincorporated association or trade union and a proceeding under the Class Proceedings Act, 1992 would be an unduly expensive or inconvenient means for determining their claims, one or more of them may be authorized by the court to bring a proceeding on behalf of or for the benefit of all. O. Reg. 288/99, s. 9.

...

RULE 21 DETERMINATION OF AN ISSUE BEFORE TRIAL

WHERE AVAILABLE

To Any Party on a Question of Law

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (1).

(2) No evidence is admissible on a motion,

(a) under clause (1) (a), except with leave of a judge or on consent of the parties;

(b) under clause (1) (b). R.R.O. 1990, Reg. 194, r. 21.01 (2).

To Defendant

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

Jurisdiction

(a) the court has no jurisdiction over the subject matter of the action;

Capacity

(b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

Another Proceeding Pending

(c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or

Action Frivolous, Vexatious or Abuse of Process

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (3).

3. *Rules of Practice and Procedure*, R.R.O. 1980, Reg. 540

75. Where there are numerous persons having the same interest, one or more may sue or be sued or may be authorized by the court to defend on behalf, or for the benefit of, all.

ARCUS WIDE OF GRANT THORNTON
RITISH VIRGIN ISLANDS) LIMITED et al.
Plaintiffs

- and-

THE TORONTO-
DOMINION BANK
Defendant

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

FACTUM OF
THE TORONTO-DOMINION BANK

(motion returnable March 11, 2016)

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Lawyers for The Toronto-Dominion Bank

TAB O

This is **Exhibit "O"** referred to in the
affidavit of Marcus A. Wide
sworn before me, this 22nd day of September, 2016.

A Commissioner for taking affidavits

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January 13, 2016

Via Email [caylorl@bennettjones.com]

Mr. Lincoln Caylor
Partner, Litigation
Bennett Jones LLP
3400 One First Canadian Place
P.O. Box 130
Toronto ON M5X 1A4

Dear Mr. Caylor:

Re: The Toronto-Dominion Bank ats Marcus Wide
Court File No. CV-12-9780-00CL

We write with regard to your correspondence of December 14, 2015, in which you outline the Joint Liquidators' proposed approach to documentary productions. This letter responds to your proposed approach and outlines the position of The Toronto-Dominion Bank ("**TD Bank**") as to the appropriate approach to documentary productions.

This letter is without prejudice to TD Bank's right to revise its position as appropriate when the scope of this action is clarified pursuant to its motion to challenge the manner in which it is constituted, notice of which was served on January 8, 2016.

[redacted]

TD Bank's Documentary Productions

Document preservation efforts

The CLX Database

Documents were collected primarily from the two groups which had direct dealings with Stanford-related entities on behalf of TD Bank:

1. the Financial Institutions group within TD Securities, which is responsible for correspondent banking and therefore had the bulk of relevant Stanford-related documents in TD Bank's possession; and

2. the Private Investment Counsel group ("PIC").

Documents were also collected from certain other units within TD Bank and third parties which had relevant records.

These documents, which will be described further below, have all been uploaded to a CaseLogistix electronic database maintained by McCarthy Tétrault (the "**CLX Database**"). This database contains approximately 16,800 records. TD Bank proposes to provide production of the entirety of the CLX Database, as we expect that all of the records contained therein will be relevant and responsive to some category of documents of which production is requested in your letter of December 14, 2015 at pages 7-10.

Documents held by the Financial Institutions Group

Within the Financial Institutions group, all documents pertaining to Stanford-related entities [redacted] were collected as follows:

a) all Stanford-related e-mails on the computers of personnel who had involvement with Stanford-related entities were printed off and copied;

b) all paper files in the possession of such personnel were copied;

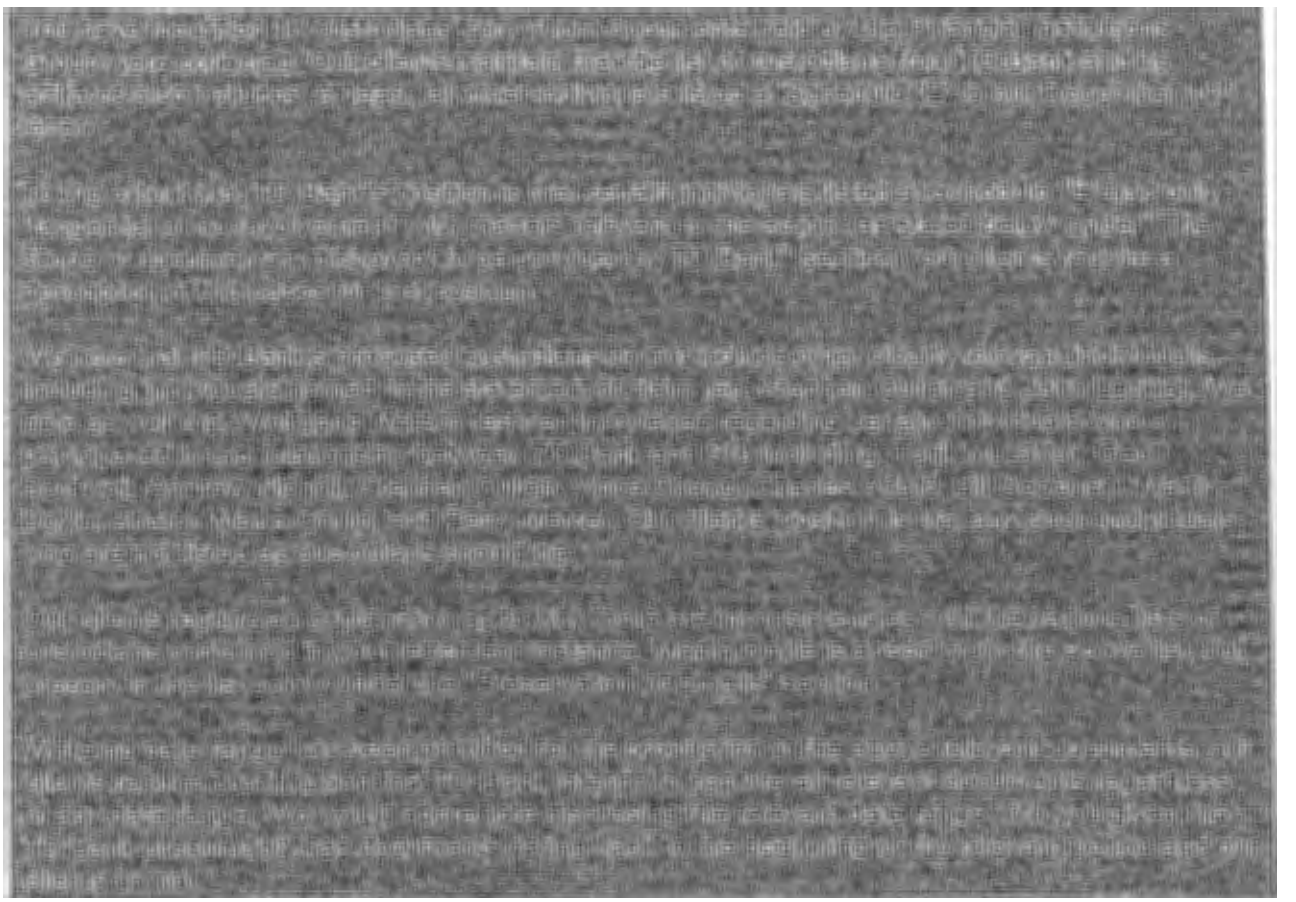
c) all central paper files located on the floor on which the Financial Institutions group is located were copied; and

d) all paper documents which had been sent for off-site storage were copied.

Overall, these records include KYC information, credit information, call reports, account opening information, annual reports, and correspondence with Stanford-related entities.

[redacted]

The custodians from whom these documents were collected were Wolfgang Mersch, Geoff Rothwell, Bill Sebenski, Tarik Muzaffar, Andrew Nicholl, Vince Chang, Wendy Watson, Fui Fui Chang, Patty Holk, Reene Nichols, Ritva Wallenius, and Virginia DiFonzo. Some of the documents were central records and were not associated with a particular custodian. Why have only these custodians been identified?



Documents held by PIC

Within PIC, copies were made of internal notes, correspondence, e-mails which had been printed out and saved in correspondence, client statements for Stanford International Bank ("SIB") from 1999 to 2009, client statements Why haven't internal notes, correspondence, and e-mails also been included? from the Bank of Antigua from 2002 to 2009, What is the basis for these date ranges? and all account opening documentation and investment management agreements signed with SIB, Bank of Antigua and the Bank of Panama.

The custodians from whom these documents were collected were Perry Mercer, Douglas Ball, Gabriel Cabrone, Brian Clark, and Ben Eggers. Some of the documents were central records and were not associated with a particular custodian. Why have only these five custodians been identified? We repeat our above comments in respect of the appropriate custodians.

Documents held by other units or parties

All documents pertaining to Stanford-related entities were also collected from TD Bank's Global Operations Technology group, which provides support to the Financial Institutions group. These records include documents related to account opening, account statements, and drafts. As with the Financial Institutions group, any records sent for off-site storage were copied.

Payment data related to Stanford was also collected from the Technology department. These documents consisted of spreadsheets showing payment information for Stanford-related entities.

Documents were also collected from Symcor, a financial processing services provider for TD Bank. These documents consisted of cash letters (cheques) related to Stanford-related entities.

Finally, documents were gathered from TD Bank's Trade Finance department in Montreal, which had in its possession letters of credit pertaining to Stanford-related entities, and from the Money Market desk, which had documents related to short-term deposits made by Stanford-related entities. What date range was used in order to identify the above four sets of documents?

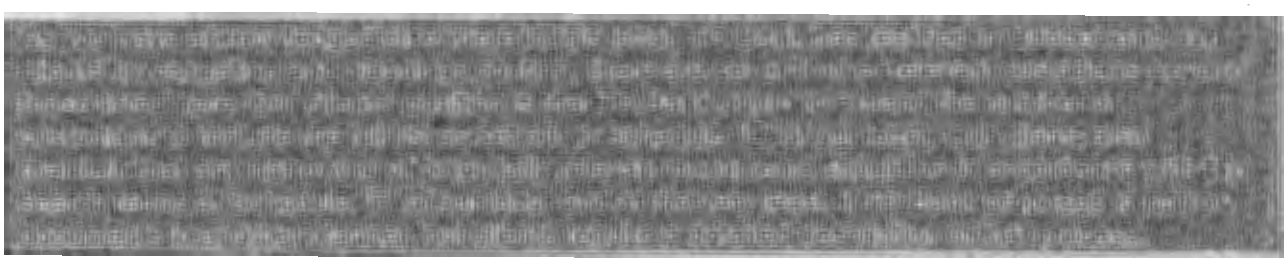
We generally agree with TD Bank's proposal regarding documents held by other units or parties subject to any further discussion at the meeting and receiving further details on such documents.

Preservation of Additional Emails

The entire email accounts of six key custodians have been captured electronically outside of the CLX Database: Wolfgang Mersch, Geoff Rothwell, Tarik Muzaffar, Bill Sebenski, Martin Doyle, and Perry Mercer. What is the basis for limiting the custodians only to these six?

As one would expect, these email accounts were found to contain a large quantity of irrelevant records. We have determined that about 25,000 of the 500,000 records contained in these accounts are potentially relevant to Stanford. How has relevancy been determined?

We would propose to run the search terms listed at Schedule F to your letter on these 25,000 records and produce all of the hits generated by those search terms.



The hard drive of Wolfgang Mersch

The computer hard drive of Wolfgang Mersch has been preserved for the purposes of this litigation. It has not been indexed, searched, or uploaded to any database. Why has only Mersch's hard drive been identified to preserve?

We would propose to identify any relevant records on the hard drive in a similar manner as we have done for the email accounts. First, TD Bank will index the hard drive and run broad search terms to identify and narrow the records most likely to be relevant to Stanford-related entities. [What was the process used to determine the broad search terms? What are those search terms? What is the date range that will be used?] Then, we would propose to run the search terms provided at Schedule F of your letter on that subset of the hard drive and produce any relevant hits generated.

[redacted]

The scope of documentary discovery to be provided by TD Bank

TD Bank is generally in agreement with the scope of relevant records identified at pages 7-10 of your letter, with the following exceptions:

a) Items c), d), h), i), j), and u) are overbroad and should be qualified to specify that such records will only be produced insofar as they relate to TD Bank's relationship with and provision of correspondent banking services to Stanford-related entities;

[redacted]

b) Item e) is overbroad and disproportionate. It has not been established that all of the standards and laws identified in items c) and d) were indeed applicable to the matters at issue, and it is therefore unclear how TD Bank's overall compliance and disclosure efforts related to those standards and laws are relevant to this litigation;

Relevance is defined by the pleadings and the documents addressed at item e) are clearly pleaded.

c) Item n) is overbroad and irrelevant to the matters at issue. TD Bank has agreed to produce the relevant KYC information for the Stanford-related entities;

Our clients have specifically pleaded TD Bank's acquisition of Bank of New York's correspondent banking relationships and are entitled to production of TD Bank's documents relevant to that acquisition of those relationships. Our clients agree that documents not

pertaining to correspondent banking need not be produced at this time.

d) Item o) is irrelevant. No proper basis for the disgorgement of profits has been articulated aside from a bald pleading of "misconduct" at paragraph 331 of the Amended Statement of Claim;

Our clients have specifically pleaded TD Bank's fees generated profits as a result of providing correspondent banking and fee exchange services during the relevant period and are entitled to production of TD Bank's documents relevant to those fees and profits. These documents are relevant both to TD Bank's conduct and the disgorgement remedy sought. In addition, relevance is defined by the pleadings and disgorgement is clearly pleaded.

e) Item t) is overbroad as drafted; and

Our clients are prepared to modify item t) to read: document, whether generated by TD Bank, an affiliate or a third party, that pertains in any way to Montserrat or Antigua and/or the regulatory environment that existed in Montserrat or Antigua during the period that TD Bank provided banking services to SIB.

f) Item v) pertains to documents which are privileged.

[redacted]

With respect to the list of TD Bank custodians at Schedule E to your letter, we are prepared to provide production of records from the relevant custodians, as listed above. However, it would be disproportionate to expect TD Bank to preserve or retrieve all records of custodians with tangential or no involvement in the matters at issue in this action, or whose relevant records are contained within the files of the most relevant custodians. What was the basis for determining what constitutes "tangential or no involvement"?

Joint Liquidators' Documentary Productions

TD Bank is generally agreeable to the approach proposed by the Joint Liquidators as relates to the identification and production of relevant records in their possession, power or control, with the following comments and qualifications.

Search terms

Your letter mentions at page 5 that the search terms you have proposed to be run by TD Bank and the Joint Liquidators are largely similar with the exception of the custodians. We note that certain search terms you have proposed for TD Bank have been omitted from the list of terms to be run by the Joint Liquidators. We would propose that, aside from the custodians, the list of search terms be identical for both parties.

The reason that certain search terms proposed for TD Bank are not proposed for our clients is:

[redacted]

Documents relevant to discoverability of the claims

The discoverability of the Joint Liquidators' claims against TD Bank will be an issue at trial. As such, TD Bank is entitled to production of all records pertaining to the Joint Liquidators' knowledge of and investigation into the relationship between TD Bank and the Stanford-related entities.

Without limiting the generality of the foregoing, TD Bank is entitled to any notes and records produced pursuant to meetings with any witnesses or affected parties in connection with the matters at issue in this claim.

In the event that the Joint Liquidators have a valid claim of privilege over the contents of any such records, TD Bank is entitled to Schedule B disclosure of the nature and date of any such notes and records.

We generally agree to TD Bank's proposal regarding documents relevant to the discoverability of claims, subject to any further discussion at the meeting and privilege considerations. Both our clients will have to provide a detailed Schedule "B"

Documents substantiating damages and the identity and knowledge of the affected parties

Given the scope of the claim being advanced by the Joint Liquidators, they must provide production of records pertinent to the assessment of damages and the knowledge, information and belief of all affected parties. The relevant records would include, at a minimum:

a) Documents which substantiate the damages claimed by the Joint Liquidators in this action, including, but not limited to:

    a. Bank statements and any other documents demonstrating the nominal value of any securities or other holdings held by SIB on behalf of its customers globally as of February 16, 2009; and

    b. Bank statements and any other documents demonstrating the combined net value per customer of all currency or instruments remitted to or withdrawn from SIB by or on behalf of its customers globally for the period during which TD Bank provided correspondent banking services to SIB;

b) Records demonstrating the identities and KYC information of all SIB customers globally for the period during which TD Bank provided correspondent banking services to SIB;

c) All disclosures and other information provided to SIB's customers in relation to the certificates of deposit and any other securities or investment products issued by SIB;

d) All disclosures and other information provided to SIB's customers in relation to SIB's operations generally; and

e) Records pertaining to investment advice provided to SIB's customers in relation to the certificates of deposit, any other securities or investment products issued by SIB, and in relation to investing with SIB generally, whether such advice was provided by SIB or not.

Our clients intend to produce documents relevant to their damages claim and necessary to substantiate that claim. We will wait for the outcome of the upcoming motion to determine if items b) – e) are relevant.

Other issues mentioned in the letter

We understand that the Joint Liquidators are unaware of the whereabouts of the majority of records pertaining to the early years of the relationship between SIB and TD Bank, and that they believe that those records may no longer exist. Please provide us with the details of efforts undertaken by the Joint Liquidators in order to comply with the SIB Estate's discovery obligations in this regard.

Our clients have preserved all electronic and hard-copy records available to them from SIB's Antiguan estate. There are no other records. Our clients intend to review and produce all such records as detailed herein and in our December 14th letter.

It is TD Bank's position that the contents of the USB key provided to the Joint Liquidators by the U.S. Receiver and mentioned at page 2 of your letter are relevant and producible.

Further, we understand that the Joint Liquidators propose not to do a line-by-line review of the spreadsheet indexing the records contained in the Houston warehouse. We are generally agreeable to the ad hoc method proposed by the Joint Liquidators for identifying the records most likely to be relevant from that index. However, it is our position that TD Bank is entitled to production of the spreadsheet index and reserves its right to request production of relevant records therefrom other than those identified by the Joint Liquidators as being relevant in their ad hoc review.

Subject to any further discussion at the meeting, our clients agree with TD Bank's position regarding the USB key (which are documents provided by TD Bank) and the production of the spreadsheet index.

The Dynasty Action

TD Bank agrees with the Joint Liquidators' and Dynasty plaintiffs' position that its productions in both of their actions should be the same. We are also agreeable to receiving the additional productions of the Dynasty plaintiffs in a supplementary affidavit of documents.

Timetable for Documentary Productions

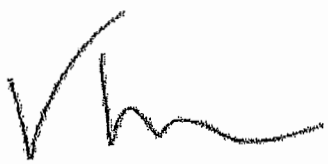
We anticipate that TD Bank's upcoming motion regarding the manner in which this action is constituted will have some bearing on the timing of documentary discovery, particularly if the motion succeeds and the Joint Liquidators are directed to proceed with a certification motion. We would therefore propose to revisit the issue of setting a timetable for documentary productions pending the outcome of TD Bank's motion.

We do not agree. However, we propose that we continue with this process to work on an agreed scope of production and address timing later before Justice Conway.

Yours truly,

McCarthy Tétrault LLP

Per:



Vladimira Ivanov

VI/mj

e.c. Geoff Hall
Junior Sirivar

#15190230

TAB P

This is **Exhibit "P"** referred to in the
affidavit of Marcus A. Wide
sworn before me, this 22nd day of September, 2016.

A Commissioner for taking affidavits

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

AMENDED STATEMENT OF DEFENCE

Response to the Fresh As Amended Statement of Claim

1. The Toronto-Dominion Bank ("**TD Bank**") admits the allegations contained in paragraphs 8, 26, 27, 28, 30, 36, 37, 42, 43, ~~58,~~ 59 (first sentence only; the second and third sentences are denied), ~~66, 67, 69, 84, 86, 92, 93, 95, 96, 111~~, 69, 84 (first sentence only; the balance is denied), 86 (first and second sentences only; TD Bank has no knowledge in respect of the third and fourth sentences), 92, 93, 115, 116, 118, 119, 120, 121, 122, 123, 246, 247, 248, 295, 305, 306, 307, 312, 314, 315 and 335 of the Fresh as Amended Statement of Claim.

2. TD Bank denies the allegations contained in paragraphs 1-7, 9-~~17~~16, 20-25, 29, 31-35, 41 (second sentence only; TD Bank has no knowledge in respect of the first sentence), 44, 59 (second and third sentences only; the first sentence is admitted), 60, 70-83, ~~85, 87, 91, 94, 112, 117, 124, 125, 126~~ 84 (other than the first sentence, which is admitted), 85, 87-91, 94, 95, 96

(third sentence only: TD Bank has no knowledge in respect of the first and second sentences), 112 (second and third sentences only; TD Bank has no knowledge in respect of the first sentence), 117, 139, 140, 144-172, 210-213, 242-245, 249-294, ~~301, 303,~~ 301-304, 308, 309, 310, 311, 313 and 316-334 of the Fresh as Amended Statement of Claim.

3. TD Bank has no knowledge in respect of the allegations contained in paragraphs 17, 18, 19, 38, 39, 40, 41 (first sentence only; the second sentence is denied), 45-~~57, 61, 65, 68, 97-110, 113, 114, 127~~58, 61-67, 68, 86 (third and fourth sentences only; the first and second sentences are admitted), 96 (first and second sentences; the third sentence is denied), 97-111, 112 (first sentence only; the second and third sentences are denied), 113, 114, 124-138, 141-143, 173-~~208,~~ 209, 214-241 and 296-300 of the Fresh as Amended Statement of Claim.

The legal framework

4. The plaintiffs (the "**Joint Liquidators**") purport to assert four claims against TD Bank:

   (a) a negligence claim on behalf of Stanford International Bank Ltd. ("SIB") (the "**SIB Negligence Claim**");

   (b) a negligence claim on behalf of SIB's customers (the "**SIB Customers' Negligence Claim**");

   (c) a knowing assistance claim on behalf of SIB (the "**SIB Knowing Assistance Claim**"); and

   (d) a knowing assistance claim on behalf of SIB's customers (the "**SIB Customers' Knowing Assistance Claim**").

5. With respect to the SIB Negligence Claim:

(a) As a matter of law, the SIB Negligence Claim is not well founded. TD Bank did not owe SIB any duty to detect or warn SIB of any fraud committed by SIB or its principals.

(b) In the alternative, if such a duty would otherwise arise, SIB and its successors are barred from asserting it on the basis of *ex turpi causa*. It would be perverse to hold TD Bank liable to SIB for failing to warn SIB that SIB was committing a fraud.

6. With respect to the SIB Customers' Negligence Claim:

(a) The SIB Customers' Negligence Claim is not properly constituted. The Joint Liquidators do not have the standing or ability to assert a claim on behalf of SIB's customers. Any such claim could only be asserted by way of a class action certified under the *Class Proceedings Act, 1992* and brought by an appropriate representative plaintiff.

(b) The SIB Customers' Negligence Claim is not well founded:

(i) As a matter of law, a bank does not owe a duty of care to third parties that are not the bank's customers.

(ii) In the alternative, if as a matter of law a bank can owe a duty of care to third parties that are not the bank's customers, such a duty of care can only arise if the bank has actual knowledge, or is wilfully blind, or is reckless, to the fact that its customer is committing fraud that is likely to harm third parties. For the reasons set out below, TD Bank had no such actual

knowledge and was not wilfully blind or reckless, meaning that it did not owe a duty of care to SIB's customers.

(iii) In the further alternative, if as a matter of law a bank can owe a duty of care to third parties that are not the bank's customers on the basis of mere constructive knowledge, TD Bank met the requisite standard imposed upon it because, for the reasons set out below, there were never any red flags that would give rise to constructive knowledge on the part of TD Bank that SIB was committing a fraud.

7. With respect to the SIB Knowing Assistance Claim:

(a) As a matter of law, the SIB Knowing Assistance Claim is not well founded. A fraudster cannot sue another party for knowingly assisting a fraud or a breach of fiduciary duty it has itself committed.

(b) In the alternative, if in law the SIB Knowing Assistance Claim can be asserted, SIB and its successors are barred from asserting it on the basis of *ex turpi causa*. It would be perverse to hold TD Bank liable to SIB for knowingly assisting in SIB's own fraud or breach of fiduciary duty.

(c) In any event, as a matter of law knowing assistance requires that a defendant have actual knowledge, or is wilfully blind, or is reckless, to a fraud or breach of fiduciary duty committed by another party. For the reasons set out below, TD Bank had no such actual knowledge and was not wilfully blind or reckless, meaning that it cannot be liable for knowing assistance.

8. With respect to the SIB Customers' Knowing Assistance Claim:

(a) The SIB Customers' Knowing Assistance Claim is not properly constituted. The Joint Liquidators do not have the standing or ability to assert a claim on behalf of SIB's customers. Any such claim could only be asserted by way of a class action certified under the *Class Proceedings Act, 1992* and brought by an appropriate representative plaintiff.

(b) The SIB Customers' Knowing Assistance Claim is not well founded. As a matter of law knowing assistance requires that a defendant have actual knowledge, or is wilfully blind, or is reckless, to a fraud or breach of fiduciary duty committed by another party. For the reasons set out below, TD Bank had no such actual knowledge and was not wilfully blind or reckless, meaning that it cannot be liable for knowing assistance.

Limitations Defence

9. On February 16, 2009, a U.S. District Court in Dallas, Texas issued an order (the "**Freeze Order**") freezing the worldwide assets of ~~Stanford International Bank Ltd. ("SIB")~~ SIB on the basis that SIB had engaged in a Ponzi scheme fraud.

10. From the time of the issuance of the Freeze Order onwards, it was publicly and generally known that SIB had engaged in a fraud.

11. Prior to the Freeze Order, TD Bank had provided correspondent banking services to SIB and related entities. This fact was also generally known as of February 2009.

12. In the months following the Freeze Order, a number of pieces of litigation were commenced worldwide in respect of the matter. In Canada, the litigation included proceedings

brought by Bennett Jones LLP, currently counsel for ~~Marcus Wide and High Dickson in their capacity as joint liquidators of SIB appointed by the Eastern Caribbean Supreme Court (the "~~the Joint Liquidators~~")~~, and proceedings against TD Bank:

(a) on February 25, 2009, Bennett Jones LLP commenced a putative class action in the Alberta Court of Queen's Bench (under the style *Dynasty Furniture Limited (as a representative plaintiff) v. SIB*, Court File No. 0901-02821);

(b) on April 6, 2009, the Joint Liquidators' predecessors, also appointed by the Eastern Caribbean Supreme Court, brought an *ex parte* motion before a bankruptcy registrar of the Québec Superior Court seeking recognition under the *Bankruptcy and Insolvency Act* of the bankruptcy proceedings in the Eastern Caribbean Supreme Court (under the style *Stanford International Bank Ltd. and Stanford Trust Company Ltd. (Receivership of)*, Court File No. 500-11-036045-090);

(c) on April 17, 2009, Bennett Jones LLP, acting for a group of plaintiffs known as the "Dynasty Plaintiffs", commenced a fraud action against Allen Stanford, the owner of SIB, in the Alberta Court of Queen's Bench (under the style *Dynasty Furniture Manufacturing Ltd. v. Stanford*, Court File No. 0901-05677);

(d) on April 17, 2009, the Dynasty Plaintiffs also commenced a Norwich application against TD Bank in the Alberta Court of Queen's Bench (under the style *Dynasty Furniture Manufacturing Ltd. v. The Toronto-Dominion Bank*, Court File No. 0901-05717), with Bennett Jones LLP acting for the Dynasty Plaintiffs;

(e) on April 24, 2009, the Attorney General of Ontario commenced a proceeding in the Ontario Superior Court of Justice under the *Civil Remedies Act*, S.O. 2001, c.

28 in respect of approximately $20 million of SIB's funds that were on deposit with TD Bank at the time of the Freeze Order (under the style *Attorney General of Ontario v. The Contents of Various Financial Accounts Held With The TD Bank and TD Waterhouse (in rem)*, Court File No. CV-09-8154-00CL);

(f) on June 19, 2009, the United States Department of Justice issued a press release announcing that Robert Allen Stanford, the Chairman of SIB, and several other SIB executives had been indicted on fraud and obstruction charges related to SIB's Ponzi scheme fraud; and

(g) after the Dynasty Alberta Action and the Dynasty Alberta Norwich Application were stayed by the Alberta Court of Queen's Bench on the basis of *forum non conveniens*, on July 29, 2009, the Dynasty Plaintiffs, represented by Bennett Jones LLP, reinstituted the Dynasty Alberta Norwich Application by bringing an application in the Ontario Superior Court of Justice (under the style *Dynasty Furniture Manufacturing Ltd. v. The Toronto-Dominion Bank*, Court File No. 09-8300-00CL).

13. As a result, 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, 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.

14. Accordingly, since this action was not commenced until August 22, 2011, it is statute barred and ought to be dismissed. TD Bank pleads and relies on the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B.

~~Defence on the Merits~~

~~15. The various allegations made against TD Bank in the Fresh as Amended Statement of Claim are without merit. If this action is not dismissed on the basis of the limitations defence, TD Bank will amend its statement of defence to respond to the allegations on the merits.~~

~~Reservation of Rights~~

~~16. This statement of defence is filed without prejudice to TD Bank's right to challenge the adequacy of the Fresh as Amended Statement of Claim on any basis, including (without limitation):~~

~~(a) the authority of the Joint Liquidators to bring the action;~~

~~(b) the procedure chosen by the Joint Liquidators to pursue this proceeding; and~~

~~(c) whether reasonable causes of action are pleaded in the Fresh as Amended Statement of Claim.~~

The Freeze Order

15. The Freeze Order was a complete surprise to TD Bank. It was the first time that TD Bank knew, or could reasonably have known, that Mr. Stanford and SIB had engaged in a Ponzi scheme fraud. The fraud had been perpetrated by a small number of SIB insiders led by Mr. Stanford himself. The fraud was hidden from everyone else, including TD Bank, other financial institutions, regulators, and even senior SIB executives who were not part of the small inner circle around Mr. Stanford that committed the fraud.

The history of dealings between TD Bank and SIB prior to the Freeze Order

16. Between 1991 and the Freeze Order, TD Bank provided certain services with three sets of Stanford-related entities: (i) SIB, an Antiguan-based offshore bank that was not permitted by Antiguan law to deal with local Antiguan customers; (ii) Bank of Antigua, a local retail bank in Antigua that was owned by Mr. Stanford; and (iii) Caribbean Sun Airlines and Caribbean Sun Airlines, Antiguan-based airlines that operated in the Caribbean.

17. TD Bank knew that Mr. Stanford, SIB, Bank of Antigua, and Caribbean Star Airlines and Caribbean Sun Airlines were affiliated with the Stanford Financial Group ("SFG"), which was based in Houston, Texas and conducted most of its activities in the United States. TD Bank believed that SFG was regulated by U.S. regulators, which provided comfort to TD Bank in its dealings with SIB, Bank of Antigua, and Caribbean Star Airlines and Caribbean Sun Airlines.

18. As detailed below, TD Bank provided three broad types of services to SIB, Bank of Antigua, and Caribbean Star Airlines and Caribbean Sun Airlines: (i) correspondent banking; (ii) discretionary investment management services; and (iii) trade finance and treasury services.

Correspondent banking

19. TD Bank's first dealings with any Stanford-related entity was in 1991. At the time, Bank of New York had offices in Canada. Through those offices, Bank of New York provided correspondent banking services to a number of customers in the Caribbean, including Bank of Antigua. Bank of New York decided to close its Canadian offices, which meant closing the correspondent bank accounts maintained at those offices. Bank of New York agreed to introduce TD Bank to its correspondent banking customers in the Caribbean, so that those customers would continue to have access to correspondent banking services after Bank of New York closed its Canadian offices. One of the customers that Bank of New York introduced to TD Bank was Bank of Antigua. TD Bank did not pay Bank of New York to acquire the book of business.

20. As a result of the introduction by Bank of New York, TD Bank opened correspondent banking accounts for Bank of Antigua. TD Bank did not breach any KYC and AML ("**KYC**") or anti-money laundering ("**AML**") standards that were applicable at the time.

21. Several months later, TD Bank opened correspondent banking accounts for SIB (known at the time as Guardian International Bank). Again TD Bank did not breach any KYC and AML standards that were applicable at the time. Contrary to the allegations in paragraph 75 of the Fresh As Amended Statement of Claim, there was no allowing of SIB to "access [TD Bank's] services through the 'side door' and not the 'front door'".

22. Bank of Antigua and SIB operated correspondent banking accounts with TD Bank in both Canadian and U.S. dollars. Contrary to the Fresh As Amended Statement of Claim, in the early 1990s there was nothing unusual or improper about Bank of Antigua and SIB maintaining U.S. dollar correspondent banking accounts with TD Bank.

Discretionary investment management services

23. In 1997, SIB opened an account with Private Asset Management ("PAM"), which was part of TD Asset Management. TD Bank did not breach any KYC and AML standards that were applicable at the time. PAM provided discretionary investment management services to SIB. John Pepperall of PAM was the main customer contact for the SIB account at the beginning of the relationship and Perry Mercer of PAM the transitioned into being the main customer contact.

24. In 2002, Bank of Antigua opened an account with PAM. TD Bank did not breach any KYC and AML standards that were applicable at the time. PAM also provided discretionary investment management services to Bank of Antigua. Mr. Mercer was again the main customer contact.

25. Initially, both the SIB account and the Bank of Antigua account at PAM were invested in 100% equities. However, in or around 2004 or 2005, at the request of SIB and Bank of Antigua, both portfolios were shifted to a more balanced portfolio which included equities, fixed income assets, and cash investments.

26. Also in approximately 2005, PAM was merged with Private Investment Counsel ("PIC"), which was part of TD Waterhouse. The accounts of SIB and Bank of Antigua were moved to PIC shortly thereafter in 2006. Mr. Mercer continued to be responsible for the accounts, and remained responsible until the Freeze Order. Mr. Mercer communicated with Zack Davis concerning the SIB and Bank of Antigua accounts from 2005 to 2009.

Trade finance and treasury services

27. TD Bank also provided some trade finance and treasury services, including foreign exchange services and some fully cash collateralized letters of credit to Bank of Antigua and Caribbean Star Airlines and Caribbean Sun Airlines.

The conduct of the relationship

28. Throughout the relationship, and as referenced above, TD Bank engaged in appropriate AML scrutiny to ensure that funds being transmitted to and from SIB and Bank of Antigua were not the proceeds of crime. AML standards changed over time and became more stringent, especially after September 11, 2001. At all material times, TD Bank did not breach any then-applicable AML standards.

29. Among other things, after approximately 2000 all wire transfers to and from SIB and Bank of Antigua were "scrubbed" by checking names against lists of known money launderers. At no point was there ever a positive hit arising from such scrubbing (aside from hits that were determined to be false positives).

30. It appears in retrospect that Mr. Stanford and the small group of insiders perpetrating the fraud were careful to ensure that SIB and Bank of Antigua were not handling funds for money launderers, and that this was part of the *modus operandi* of the fraud. Mindful that Antigua was a higher risk jurisdiction for money laundering and would therefore be closely scrutinized for AML issues by TD Bank and other financial institutions with which they dealt, it appears that Mr. Stanford and his small group of insiders were scrupulous to ensure that funds flowing to and from SIB and Bank of Antigua were not the proceeds of illicit activities. With the focus on AML issues and finding no problems in that regard, TD Bank did not have any suspicion, or any

reason to suspect, that the risk associated with SIB was not AML risk but rather the risk that it might be a Ponzi scheme fraud.

31. Throughout the relationship, TD Bank undertook appropriate KYC and AML due diligence. Over the years TD Bank met with personnel from SIB, Bank of Antigua, and SFG on a number of occasions, including meetings in Toronto, Montreal, Houston, Memphis, and Antigua. These meetings took place at appropriate intervals, and contrary to the allegations at paragraph 157 of the Fresh As Amended Statement of Claim were substantive meetings at which TD Bank learned about the operations of SIB, Bank of Antigua, and SFG – to the extent that such operations were not actively concealed by Mr. Stanford and the small circle around him.

32. At no time prior to the Freeze Order did TD Bank ever learn that SIB maintained a secret set of alleged investments that were illiquid, non-existent, or overinflated in supposed value. It knew nothing of Mr. Stanford's "football" which apparently kept records of these secret investments. Nor was there any basis upon which TD Bank should have learned of these secret investments or the football. The Joint Liquidators plead at paragraph 105 of the Fresh as Amended Statement of Claim that the contents of these secret investments were unascertainable even to SIB's "employees, executives and directors", all the while maintaining the contradictory claim that the fraud ought to have been ascertained by TD Bank.

Events leading up to the Freeze Order

33. In late 2008, SIB began making large withdrawals from its accounts at TD Bank and PIC. At the time the international financial crisis was under way, and many financial institutions around the world were facing liquidity problems. In these circumstances, there was nothing

unusual about the withdrawals, and the fact that withdrawals were being made did not cause TD Bank to suspect that there might be a fraud.

34. On February 12, 2009, a few days before the Freeze Order, TD Bank had a conference call with SIB to discuss recent press reports that SIB was having financial difficulties. TD Bank was told that SIB was facing a liquidity crisis and was liquidating assets in a measured way in order to meet its liquidity needs. At the time, in the midst of the world-wide financial crisis, SIB was not the only customer of TD Bank that was facing liquidity problems. TD Bank was left with the impression that SIB was facing serious financial difficulty, but did not suspect fraud and had no reason to do so.

35. As previously noted, when the Freeze Order was made a few days later and allegations of fraud were levelled at Mr. Stanford and SIB, it was a complete surprise to TD Bank, just as it was to SIB's own senior executives who were not in Mr. Stanford's inner circle.

There were no red flags

36. To TD Bank's knowledge up until the Freeze Order, SIB, Bank of Antigua and Caribbean Star Airlines and Caribbean Sun Airlines operated legitimate businesses:

(a) Based on the information known, and reasonably knowable, to TD Bank, SIB operated as a fund of funds, pooling investors' funds in a portfolio of assets, including those assets managed by PAM and then PIC. It offered investors in CDs rates of return that were higher than the rates of return offered by U.S. banks, but the rates were understandable as blended returns over time. The CDs provided investors the certainty of fixed returns in the face of market fluctuations,

even if in the long run direct investment in the equity markets would have provided them with greater returns.

(b) Based on the information known, and reasonably knowable, to TD Bank, Bank of Antigua was a legitimate local bank that provided retail banking services to residents of Antigua. Indeed, Bank of Antigua was exactly that, and has never been implicated in SIB's fraud.

37. To the extent that TD Bank requested or was provided financial statements for SIB and its affiliated entities, they were not requested or provided for the purpose of conducting an audit or assisting any third parties with making investment decisions. TD Bank was not obliged to fulfil any of these functions as a result of providing banking services to SIB.

38. TD Bank could not have uncovered SIB's fraud. TD Bank managed only a small portion of SIB's investments, and had no way of knowing what SIB's investment portfolio was aside from the assets that PAM and then PIC managed. In retrospect, it is now known that SIB misstated its actual investments and its actual investment returns, so even if TD Bank had requested further information than it possessed it would not have received accurate information. At the time, TD Bank had no more basis than anyone else to know that SIB was misstating its assets or its investment returns.

39. The various facts identified in the Fresh As Amended Statement of Claim as supposed red flags about SIB were assembled by the Joint Liquidators after-the-fact, using 20-20 hindsight and possessing the knowledge that SIB had been a Ponzi scheme fraud. Without 20-20 hindsight and without possessing the knowledge that SIB had been a Ponzi scheme fraud, there were no red flags at the material time. In particular:

(a) TD Bank had no knowledge, actual or constructive, of Mr. Stanford's prior history before the opening of the correspondent banking accounts of Bank of Antigua and SIB in 1991.

(b) TD Bank had no knowledge, actual or constructive, of the fact that certain U.S. banks had refused to provide correspondent banking services to SIB, if that was even the case. In fact a number of reputable banks aside from TD Bank did provide correspondent banking services to SIB, including HSBC Bank plc, Société Générale, and Trustmark National Bank.

(c) TD Bank had no reason to terminate or alter the long-term relationship with SIB and its affiliates, even as SIB grew in size beyond its initial scope.

(d) While the volume of business transacted by SIB increased significantly over time, at no time did this increase cause TD Bank concern or indicate to TD Bank that Mr. Stanford and SIB were engaged in a Ponzi scheme fraud. Nor ought it to have. Every outward indication was that SIB was a successful enterprise that was growing.

(e) While Ponzi schemes have been around for a long time, the world did not have experience with multi-billion dollar Ponzi schemes undertaken by large financial firms until the collapse of Bernard Madoff's Ponzi scheme in December 2008, about two months prior to the Freeze Order. In assessing TD Bank's interactions with SIB, Bank of Antigua, Caribbean Star Airlines and Caribbean Sun Airlines and SFG between the early 1990s and the Freeze Order, it is important not to use post-Madoff knowledge of the possibility that large financial firms may engage in multi-billion dollar Ponzi schemes and apply it to a pre-Madoff time period.

(f) There is nothing inherently unusual or suspicious about transfers in round dollar amounts. There are many legitimate reasons for round-dollar transfers. Indeed, most bank-to-bank transfers of funds, such as between SIB's correspondent banking accounts and SFG, are in round-dollar amounts.

(g) The fact that SIB placed funds with PAM and then PIC was not a red flag. TD Bank was aware that SIB used outside investment managers, of which TD Bank was one. Such use of sub-advisors is not unusual in the industry.

The standard of care

40. The various standards that the Fresh As Amended Statement of Claim terms "Applicable Standards" were not in fact standards that define any duty of care owed by TD Bank to SIB's customers. Among other things:

(a) The OSFI Standards (as that term is defined in paragraph 246 of the Fresh As Amended Statement of Claim) do not define any duty of care owed by banks but instead represent OSFI's interpretation of Canadian banking regulations.

(b) The Basel Standards (as that term is defined in paragraph 249 of the Fresh As Amended Statement of Claim) are standards for bank regulators, not for banks.

(c) The FATF Standards (as that term is defined in paragraph 251 of the Fresh As Amended Statement of Claim) are standards for governments, not for banks.

(d) The Wolfsberg Standards (as that term is defined in paragraph 252 of the Fresh As Amended Statement of Claim) are not binding on anyone, and do not define any duty of care owed by banks.

Instead, to the extent any duty of care arises in law, the applicable standard of care was the standard of a reasonable and prudent Canadian bank providing correspondent banking, discretionary investment management, trade finance and treasury services at the applicable time, as the standard changed from time to time. At all material times, TD Bank met that standard.

Perry Mercer never sat on any SIB advisory board

41. Contrary to the suggestion made at paragraph 41 of the Fresh As Amended Statement of Claim, Perry Mercer never served on any SIB advisory board. If such an advisory board existed, Mr. Mercer was never a member and never attended any meetings of it. Contrary to the suggestion made at paragraph 169(d) of the Fresh As Amended Statement of Claim, neither TD Bank nor Mr. Mercer knew at the time that SIB was representing that Mr. Mercer was a member of a SIB advisory board.

42. Furthermore, contrary to the allegations made at paragraphs 96 and 169(d) of the Fresh As Amended Statement of Claim, Mr. Mercer was not a "long-time friend" of Jim Davis. In fact, Mr. Mercer had only met Mr. Davis on a few occasions, and knew him only in a professional capacity, not as a "friend".

Conclusion

43. TD Bank therefore requests that this action be dismissed with costs.

September 12, 2014/February 29, 2016

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ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

AMENDED STATEMENT OF DEFENCE

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Lawyers for the Defendant

DOCS 15276850

TAB Q

This is **Exhibit "Q"** referred to in the
affidavit of Marcus A. Wide
sworn before me, this 22nd day of September, 2016.

A Commissioner for taking affidavits

Bennett Jones

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Our File No.: 68029.1

April 8, 2016

Delivered Via Email

The Hon. Madame Justice Barbara Conway
Ontario Superior Court of Justice
Judges' Administration
361 University Avenue, Room 170
Toronto, ON M5G 1T3

Dear Madame Justice Conway:

Re: *Marcus Wide et al. v. The Toronto-Dominion Bank*, CV-12-9780-00CL

We write to you jointly with TD Bank's counsel further to the chambers appointment before you on March 31, 2016 and the motions heard on March 11, 2016. The parties have agreed that their respective motions (for a stay and related relief and for early production and related relief) shall be resolved as follows:

(1) TD Bank has delivered to the Joint Liquidators ("the JLs") a PDF file containing Terms and Conditions for Correspondent Banks dated 1987, 1992, 1998 and 2001 and has advised that "this is all pre-August 1, 2007 Terms and Conditions for Correspondent Banks which TD Bank has been able to locate at this time";

(2) the JLs will amend their statement of claim to withdraw the representative claim brought on behalf of SIB's creditors/customers and will deliver an amended pleading by April 11, 2016;

(3) TD Bank will deliver an amended statement of defence by April 25, 2016;

(4) the JLs will deliver an amended reply by May 9, 2016;

(5) the Dynasty action will proceed as currently constituted and the JLs will not convert the Dynasty action into a class proceeding;

(6) TD Bank withdraws their outstanding motion to stay the JLs' main claim and to seek to require the JLs to pursue their representative claim as a class proceeding and the JLs withdraw their outstanding motion for limited early production;

(7) there will be no costs; and

(8) counsel will schedule a chambers appointment during the week of May 9, 2016 to update the court on the discovery plan.

We have enclosed a draft order, approved as to form and content by the parties, for your review and approval.

Should Your Honour have any questions or comments with respect to the above we can attend before you in Chambers or alternatively have a conference call.

Yours truly,

BENNETT JONES LLP
LC/MW
cc: Geoff Hall, Junior Sirivar, *McCarthy Tetrault LLP*

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MADAME	)	, THE
	)	
JUSTICE CONWAY	)	DAY OF , 2016
	)	

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

ORDER

THIS MOTION, made by the Defendant, for an Order staying this action and directing the Plaintiffs to reconstitute the action as a class proceeding pursuant to section 2(3)(b) of the *Class Proceedings Act, 1992* and related relief ("**Motion**"), and this Cross-Motion made by the Plaintiff, for an Order for early productions and related relief (the "**Cross-Motion**"), were heard on March 11, 2016 at Toronto, Ontario.

UPON BEING ADVISED of the consent of the parties:

1. **THIS COURT ORDERS** that all claims brought by or on behalf of the creditors and/or customers of the estate of Stanford International Bank Limited ("SIBL") are hereby dismissed without costs.

2. **THIS COURT FURTHER ORDERS** that the plaintiff shall prepare a Fresh as Amended Statement of Claim which shall be amended to withdraw all claims brought by or on behalf of the creditors and/or customers of SIBL.

3. THIS COURT FURTHER ORDERS that the action styled: *Dynasty Furniture Manufacturing Ltd. et al* v. *The Toronto-Dominion Bank* bearing Court File No. CV-09-8373-00CL shall not be converted into a class proceeding.

4. THIS COURT FURTHER ORDERS that the Motion and Cross-Motion are hereby dismissed.

5. THIS COURT FURTHER ORDERS that the parties shall bear their own costs of the Motion and the Cross-Motion.

_____

Marcus Wide et al v. Toronto-Dominion Bank

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

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at Toronto

ORDER

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Lawyers for The Toronto-Dominion Bank

DOCS 15436825

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TAB R

This is **Exhibit "R"** referred to in the
affidavit of Marcus A. Wide
sworn before me, this 22nd day of September, 2016.

A Commissioner for taking affidavits

AMENDED THIS June 27/16 PURSUANT TO
MODIFIÉ CE CONFORMÉMENT À
☑ RULE/LA RÈGLE 26.02 (C)
☑ THE ORDER OF Justice Conway
L'ORDONNANCE DU
DATED/FAIT LE May 13, 2016

REGISTRAR GREFFIER
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

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

FRESH AS AMENDED STATEMENT OF CLAIM

Notice of Action issued on August 22, 2011

1. The plaintiffs claim from the defendant, The Toronto-Dominion Bank ("TD Bank"):

(a) damages in the Canadian dollar amount equivalent to US$5.5 billion and further amounts to be determined prior to trial;

(b) an accounting and disgorgement of profits in amounts to be determined prior to trial;

(c) prejudgment and post-judgment interest on the foregoing amounts pursuant to the *Court of Justice Act*;

(d) costs of this action on a substantial indemnity basis plus H.S.T.; and

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

I. OVERVIEW

2. The plaintiffs seek to recover damages arising from the defendant's negligence, knowing assistance, recklessness and failure to act as a reasonable bank in response to a multi-billion dollar fraud perpetrated against its customer, Stanford International Bank Limited ("SIB"), an Antiguan bank now in liquidation.

3. SIB, an international banking company based in Antigua, offered opportunities to customers around the world to purchase certificates of deposit ("CDs").

4. Approximately US$10 billion in CDs were sold by SIB to more than 21,000 customers in approximately 113 different countries. Taking into account amounts paid or repaid to SIB depositors in interest or CD redemption payments, SIB had a core capital loss of approximately US$5.5 billion by the time SIB collapsed in February 2009. Purchasers of SIB CDs and SIB employees were led to believe that sums deposited with SIB would be and were invested using a low-risk investment strategy concentrating on maximum liquidity in a well-balanced, widely diversified global portfolio that would provide generous returns.

5. Instead of investing funds received by SIB customers as represented, Robert Allen Stanford ("Stanford") and a small cabal of other insiders (the "Other Insiders") orchestrated a scheme to loot SIB of several billion dollars of its assets (the "SIB Looting"). The Other Insiders consisted of, most notably, James Milton Davis ("Davis"), SIB's Chief Financial Officer.

6. To perform the SIB Looting, Stanford and the Other Insiders misappropriated and misapplied the vast majority of SIB's assets. They placed SIB's assets into speculative, largely illiquid investments, diverted them to other companies owned by Stanford, made approximately US$2 billion in concealed and unsecured SIB shareholder loans to Stanford and used them to

fund their own lavish lifestyles. As a result, Stanford and the Other Insiders breached their fiduciary duties owed to SIB and acted to the detriment of SIB for their own financial gain. On June 12, 2012, Stanford was sentenced to 110 years in prison for orchestrating the SIB Looting. The Other Insiders have also been convicted in connection with the SIB Looting.

7. Beginning in the early 1990s, TD Bank acted as correspondent bank for SIB. In particular, TD Bank opened and maintained multiple correspondent bank accounts for SIB through which flowed the vast majority of all investor funds for the purchase of SIB CDs and payments from SIB to investors and others in multiple jurisdictions around the world. For instance, in the January 1, 2008 to February 2009 period which preceded the date when regulators discovered and terminated the SIB Looting, approximately US$2,539,762,421.22 was credited to SIB's TD Bank account number 360012161670. As a result, SIB was a significant source of revenue for TD Bank. In fact, as the SIB Looting grew, so too did TD Bank's revenue, so much so that SIB became TD Bank's largest correspondent banking customer in the world. In addition, TD Bank provided trade financing and treasury services to SIB.

8. TD Bank also acted as correspondent bank for Bank of Antigua Limited ("BOA"), a Stanford-owned onshore bank based in Antigua, and provided other banking services to Caribbean Star Airlines Ltd. and Caribbean Sun Airlines Inc., both entities owned by Stanford (together, "Caribbean Star Airlines"). Further, TD Asset Management Inc. and TD Waterhouse Private Investment Counsel Inc., both of which were wholly-owned subsidiaries of TD Bank (together, "TD Waterhouse"), managed discretionary investment portfolios for both SIB and BOA.

9. TD Bank opened SIB's correspondent bank accounts without conducting any "know your client" ("KYC") or anti-money laundering ("AML") due diligence. It did so notwithstanding that correspondent banking is the highest risk service provided by banks. In addition, there was clearly no legitimate business purpose for SIB to require correspondent banking services in Canada. For among other reasons, this was because SIB initially did not have any Canadian customers and all of the funds wired to SIB's accounts at TD Bank were in U.S. dollars. Accordingly, TD Bank never should have accepted SIB as a client in the first place.

10. In legitimate circumstances, SIB would have sought and received correspondent banking services from a U.S. bank. However, due to the clear risk occasioned by SIB, U.S. banks had refused to provide correspondent banking services to SIB, a fact that TD Bank was required to be aware of. In fact, throughout the period that TD Bank provided correspondent banking services to SIB, U.S. banks generally refused to provide correspondent banking services to any offshore or Antiguan-based banks or required such banks to be part of a reputable banking group, a quality SIB clearly did not have.

11. TD Bank negligently opened SIB's correspondent bank accounts and compounded its negligence by operating those accounts for nearly 20 years. It was also required under the laws of Canada and mandatory banking industry standards to perform due diligence reviews of SIB's affairs, SIB's use of TD Bank's correspondent banking services, Stanford and the Other Insiders, and other relevant information. These obligations gave rise to the requirement that TD Bank ask for and obtain information from SIB, Stanford and the Other Insiders that would have enhanced TD Bank's exclusive window into SIB's affairs. In the circumstances, such inquiries and the resulting information should have indicated to TD Bank that it was required to terminate SIB's

access to TD Bank's facilities, report the conduct of Stanford and the Other Insiders to the appropriate authorities and freeze SIB's accounts.

12. For instance, if TD Bank undertook even the basic required due diligence reviews, it would have determined that, during the period of time that TD Bank provided banking services to SIB, Antigua's banking regulations and AML practices were subject to extensive, sustained and public condemnation, all of which related to Antigua's known facilitation of fraud and money laundering. It also would have discovered that Stanford himself undertook various well-publicized manipulations of Antigua's regulatory regime.

13. TD Bank had direct experience with the risks occasioned by providing correspondent banking services to an Antiguan-based offshore bank. For instance, in 1996, it closed the correspondent bank accounts of another Antiguan-based offshore bank, American International Bank Limited ("AIB"). It did so after a senior TD Bank executive responsible for TD Bank's relationship with AIB determined that the amounts moving through the AIB account at TD Bank were too large for a legitimate bank in Antigua.

14. Notwithstanding that the volume of funds moving through SIB's correspondent accounts was significantly larger than that moving through AIB's account, TD Bank maintained its relationship with SIB. In fact, by at least 2008, SIB had become TD Bank's single largest correspondent banking customer, not just in the Caribbean, but worldwide. Notably, as virtually all investments with SIB flowed through TD Bank, the exponential growth of SIB's balance sheet created a significant source of revenue for TD Bank.

15. TD Bank was also required to diligently conduct ongoing monitoring of publicly-available information pertaining to SIB and SIB's business operations. During the almost twenty

years that TD Bank provided correspondent banking services to SIB, such publicly-available information repeatedly disclosed clear warning signs with respect to SIB and Stanford. For example, in 1984, just prior to entering the offshore banking industry, Stanford was declared a bankrupt by a Texas court with personal debts in excess of US$13 million. This fact alone should have precluded TD Bank from providing banking services to SIB, as banking industry standards clearly provide that a previously-bankrupt individual should be ineligible to run a bank. Among other issues, World-Check, a reputable organization that gathers information globally on heightened risk individuals and entities, officially deemed Stanford a politically exposed person (a "PEP") in 2004 and designated one of Stanford's companies a financial institution that posed a high risk in 2007.

16. As a result of publicly-available information, even without the benefit of the window into SIB's affairs such as the one enjoyed by TD Bank, other banks and regulators discovered seriously adverse information regarding SIB and Stanford. This information revealed that business should not have been conducted with SIB and/or that the SIB Looting was taking place.

17. For instance, in September 2000, a U.K. consulting firm issued a due diligence report in respect of BOA to the predecessor of Société Générale Private Banking (Suisse) S.A. ("SocGen"), which provided SIB with banking services in Switzerland. That report, which was completed in the course of only a few hours and at a cost of only £500, commented on both SIB and Stanford. In particular, it identified various "red flags" in respect of Stanford and SIB and concluded that "SIB has had a somewhat dubious reputation for many years", that "it is an accepted fact that Stanford International Bank has been used by Mexican drug cartels to launder considerable volumes of criminally obtained funds" and that SocGen should be concerned about

entering into business relationships with SIB or Stanford as "it would be very difficult for [SocGen] to defend itself or its reputation should any problems arise in the future."

18. Even earlier, in 1997, after just six days of field research, the U.S. Securities and Exchange Commission (the "SEC") was even more definitive: red flags about Stanford's operations indicated a likely "Ponzi" scheme. The SEC's failure to act on such conclusions has now been the subject of a comprehensive report that in no way disavowed the conclusion that publicly accessible information revealed Stanford's fraud more than ten years prior to SIB's collapse.

19. Similarly, when international clearing house Pershing LLC ("Pershing") sought to verify SIB's assets in connection with its provision of services to another Stanford-owned entity, it was refused access to any documentation regarding SIB's balance sheet and the supporting paperwork that reflected SIB's assets. Due to the lack of transparency into SIB's portfolio, Pershing withdrew its services and by December 2008 announced publicly that it could not verify that Stanford was not involved in fraud of some nature. Several others also came to the same conclusion, including various U.S. banks, an international clearing house, a private due diligence firm, a prominent U.S. law firm and the National Association of Securities Dealers.

20. TD Bank not only had access to the publicly-available information relied on by other entities that identified the SIB Looting and/or refused to provide services to SIB, but also had extensive additional information as a result of its unique vantage point as SIB's correspondent bank, as well as its other business relationships with SIB, BOA and Caribbean Star Airlines. For instance, in addition to the fact that there was no legitimate business purpose for SIB to have

accounts in Toronto, TD Bank knew that the rates of return purported to be generated by SIB were completely at odds with the rates of return actually generated for SIB by TD Waterhouse.

21. TD Bank not only ignored the information available to it, but did so in the face of a 2001 U.S. Senate report in respect of correspondent banking that specifically named TD Bank. That report indicated that TD Bank had provided correspondent banking services to AIB and confirmed that, as a result, TD Bank had directly acted as a major conduit for improper access to the U.S. financial system. At the very time of the U.S. Senate report and for several years afterward, TD Bank continued unabated in its provision of banking services to SIB and access to the U.S. financial system.

22. In the face of its knowledge about SIB's affairs and the publicly-available information in respect of SIB and Stanford, by at least 2000, the TD Bank executive responsible for the SIB correspondent banking relationship admitted internally that TD Bank did not understand SIB's business and concluded that he was uncomfortable with TD Bank's relationship with SIB and that due diligence under strict KYC and AML standards was required as "something did not seem right". In addition, by at least July 2008, different executives at TD Bank were "nervous" about TD Bank's relationship with SIB. However, TD Bank continued unabated in its provision of banking services to SIB until being ordered by a court to cease doing so nearly a month after SIB's collapse.

23. TD Bank, as a member of the international banking community, should have acted long before regulatory agencies intervened and effectively ended the SIB Looting in early 2009. In opening and maintaining its relationship with SIB, TD Bank was negligent. By its acts and omissions described herein, TD Bank failed to act as a reasonable bank would have acted when

confronted with the same suspicious circumstances. At all times, it had sufficient information such that it knew or ought to have known of, or was recklessly or willfully blind to, the SIB Looting. Despite this knowledge, TD Bank continued to provide correspondent banking services to SIB (as well as the other aforementioned services) until after SIB's collapse.

24. In addition, TD Bank also assisted Stanford and the Other Insiders in breaches of fiduciary duties owed to SIB.

25. TD Bank was required to take reasonable measures to avoid causing loss to SIB. By failing to do so, TD Bank caused significant injuries and losses to SIB which include but are not limited to the damages that arise as a result of its collapse such as its inability to pay creditors.

II. THE PARTIES

A. The Plaintiffs

26. Nigel Hamilton-Smith and Peter Wastell (the "Former Liquidators") were appointed as joint liquidators of SIB by order of an Antiguan Court on April 15, 2009 (entered on April 17, 2009), which determined that it was just and convenient that SIB be liquidated and dissolved under its supervision pursuant to the *International Business Corporations Act*, Cap. 222 of the laws of Antigua and Barbuda (as amended) (the "*IBC Act*").

27. The Former Liquidators were removed further to a removal order of the High Court of Justice Antigua and Barbuda dated June 8, 2010.

28. Marcus A. Wide and Hugh Dickson of Grant Thornton LLP were appointed as joint liquidators of SIB (in liquidation) ("Joint Liquidators") by order of the Eastern Caribbean Supreme Court dated May 12, 2011 (entered on May 13, 2011) (the "Appointment Order").

29. The Appointment Order, among other things, vested all the assets of SIB in the Joint Liquidators and empowered them to sue entities in relation to SIB in any jurisdiction where they believe assets or property of SIB may be located.

30. Pursuant to an Order of the Superior Court of Québec (Commercial Division) dated September 11, 2009, Ernst & Young Inc. ("E&Y") was appointed pursuant to the *Bankruptcy and Insolvency Act* (Canada) as interim receiver of the Canadian assets SIB and authorized to initiate and pursue proceedings in respect of SIB (the "E&Y Order").

31. The E&Y Order expressly precluded the Former Liquidators and subsequently the Joint Liquidators from acting in Canada. However, on August 19, 2011, in light of E&Y's failure to commence claims against TD Bank (or any other third parties), the Joint Liquidators moved before the Superior Court of Québec (Commercial Division) for an Order permitting them to act in the place of E&Y in respect of claims against TD Bank.

32. As a result, on August 19, 2011, the Superior Court of Québec authorized and empowered the Joint Liquidators to institute and litigate, in the place and stead of E&Y, proceedings against TD Bank in any appropriate jurisdiction (the "Authorization Order"). In addition, the Authorization Order specifically recognized the Joint Liquidators as having "the equivalent or substantially similar powers and capacities than those of a trustee in bankruptcy or other insolvency holder within Canada" and authorized the Joint Liquidators to exercise those powers and capacities for the purposes of the institution and litigation of the within action against TD Bank.

33. Accordingly, since obtaining the Authorization Order, the Joint Liquidators are acting with the express authority of a Canadian Court in the same capacity as a trustee in bankruptcy under Canada's federal *Bankruptcy and Insolvency Act* for the benefit of SIB.

34. Upon obtaining the Authorization Order, the Joint Liquidators were granted the capacity to pursue claims against TD Bank in Canada for the first time.

35. The Joint Liquidators have commenced these proceedings in their capacity as representatives of SIB and in this capacity seek damages on behalf of SIB.

B. Robert Allen Stanford and SIB

36. Stanford was born in the United States on March 24, 1950. He is a citizen of the U.S. and Antigua.

37. Stanford wholly owned Stanford International Bank Holdings Ltd., an Antiguan corporation which itself directly and wholly owned SIB. There were no other equity owners of SIB. Stanford was the Chairman of the Board of SIB.

38. SIB was at relevant times the largest private international or "offshore" bank in Antigua. By the time of its collapse in 2009, SIB employed approximately 100 individuals at its headquarters in Antigua and thousands of others were employed at other Stanford-owned entities around the world.

39. Stanford was on SIB's Board of Directors, as were his father, James A. Stanford, Davis, Sir Courtney N. Blackman, O.Y. Goswick, Kenneth C. Allen and Robert S. Winter. At relevant times, Stanford was Chairman of the Board of Directors and Sir Courtney N. Blackman, an

independent director and former Governor to the Central Bank for Barbados, served as the Vice Chairman.

40. SIB's Board of Directors met regularly and was comprised of various sub-committees. For instance, Sir Courtney N. Blackman served as Chairman of the Audit Committee and presented audit committee reports to SIB's Board of Directors on behalf of the other audit committee members.

41. SIB and its affiliates also had an advisory board that was comprised primarily of former politicians and international business persons, most of whom were independent from SIB. It has been reported that a TD Bank executive, Perry Mercer, served on this advisory board, as did Blaise Friedli of SocGen.

C. The Defendant

42. TD Bank is a Schedule I bank, duly constituted by letters patent under the authority of the *Bank Act*, R.S.C. 1991, c. 46, with a head office located in Toronto, in the Province of Ontario.

43. As detailed herein, TD Bank provided correspondent banking, lending, trade financing and treasury services to SIB, BOA, another Antiguan bank owned by Stanford, and at least one other Stanford-owned entity.

III. HISTORY OF SIB'S OPERATIONS AND AFFAIRS

44. TD Bank was required to know the history of SIB, SIB's products and services, the factors giving rise to SIB's collapse and information in respect of Stanford personally. Such history and information is detailed below. It is full of "red flags".

A. Stanford Purchases BOA and Establishes SIB

45. In 1985, with no previous involvement in the banking industry, Stanford incorporated Guardian International Bank Limited ("Guardian") in the British Overseas Territory of Montserrat. At that time, Stanford and his father owned all of the share capital of Guardian.

46. In order to support sales of Guardian CDs, Stanford established representative offices for Guardian in Miami, Florida and Houston, Texas under the name "Guardian International Investment Services".

47. From 1985 until 1990, Stanford operated Guardian in Montserrat with his former college roommate, Davis. They operated Guardian as an "offshore" bank and, as such, it catered almost exclusively to customers outside of Montserrat.

48. Guardian primarily targeted Latin American customers and offered CDs with interest rates of double the then-current standard rate of return. Using this strategy, by the end of 1989, Guardian claimed US$55.5 million in accounts, a number which grew to over US$100 million by the following year.

49. Notwithstanding its apparent success, Guardian came under the scrutiny of bank regulators. By 1989, the Texas Department of Banking had warned Stanford about operating a foreign bank representative office in Texas "without authority under either state or federal law."

50. Thereafter, following investigations by bank regulators in Texas, Florida and California, the U.S. Office of the Comptroller of Currency issued a Banking Circular regarding Stanford's unauthorized banking activities in the U.S. The Texas Department of Banking went further, ordering Guardian to immediately cease its Texas operations or "the Texas Attorney General will

be requested to promptly file charges against the bank, its board of directors and its management for apparent willful and continuing violations of the Texas Banking Code."

51. Around the same time, the banking system in Montserrat at large came under investigation by the Federal Bureau of Investigation and the U.K.'s Scotland Yard. Consequently, Guardian itself came under scrutiny for possible drug money laundering.

52. As a result of reports from those law enforcement agencies, the government of Montserrat determined that Stanford no longer met bank ownership requirements on the island and informed Stanford that Guardian's banking license was going to be revoked. Among other reasons provided, Montserrat informed Stanford this decision was due to the fact that (i) Guardian was operating in a manner "detrimental to its depositors", (ii) Guardian failed to supply adequate details as to its liquidity, and (iii) Stanford was formerly a bankrupt.

53. In response, and before Montserrat could formally revoke Guardian's license, on December 7, 1990, Stanford caused Guardian to migrate its domicile to Antigua and re-incorporate under Antigua's *IBC Act*. Following Guardian's arrival in Antigua, it shared headquarters with BOA.

54. On December 8, 1990, the day after Stanford reincorporated Guardian in Antigua, Stanford completed his acquisition of all of the share capital of BOA in exchange for Eastern Caribbean ("EC") $469,700.80 through his holding company, Guardian Bank Group Holdings Limited (as it was then called). The sellers of BOA's share capital were a group of Antiguan citizens and the Government of Antigua.

55. BOA was originally incorporated on February 10, 1981. As a domestic Antiguan bank, BOA offered banking services primarily to citizens of Antigua, in EC dollars, the local currency.

56. On December 20, 1994, Guardian changed its name to SIB.

57. As an offshore international banking company, and pursuant to s. 240 of the *IBC Act*, SIB was prohibited from knowingly accepting deposits in the legal tender of Antigua or of other countries of the CARICOM region. As the legal tender in Antigua is the EC dollar, SIB was effectively barred from doing business with residents of Antigua. Instead, its deposits derived from customers located in foreign jurisdictions.

58. Since SIB was an offshore Antiguan bank which had no way to receive wire transfers or other payments on its own, it needed to gain access to an onshore bank's facilities as a means for SIB customers to transfer funds to SIB. This was accomplished by way of SIB's procurement of correspondent bank accounts.

59. The term "correspondent account" is defined broadly for banking organizations and includes any account or formal relationship established by a financial institution to receive deposits from, make payments to or other disbursements on behalf of a foreign financial institution, or to handle other financial transactions related to the foreign financial institution. By analogy, SIB needed to "rent" the services of one or more onshore banks in order for it to operate and access the U.S. financial system. Absent such correspondent arrangements, it would have been paralysed operationally.

60. By relying on correspondent banks such as TD Bank, SIB eventually operated in approximately 113 countries and by late 2008 reported that it held approximately US$8.5 billion

in assets under management. SIB's 2007 Annual Report stated that SIB had in excess of 50,000 clients. When any customer of SIB wished to make a U.S. or Canadian dollar deposit with SIB by electronic funds transfer, they were directed to remit their value electronically to SIB's correspondent accounts at TD Bank.

61. In addition to TD Bank, SIB was also provided the following banking services:

(a) correspondent banking services by HSBC Bank PLC ("HSBC") in the United Kingdom. HSBC received all EURO and British Pound Sterling wire transfer payments from SIB's depositors;

(b) Republic Banchsares of Texas, Inc., which was later acquired by Trustmark National Bank (together, "Trustmark"), received U.S. dollar cheque deposits as correspondent bank to SIB, but refused to accept any wire transfers on behalf of SIB. Such cheques were sent by SIB customers to SIB in Antigua, which in turn bundled and delivered them for deposit into SIB's accounts held at Trustmark in Houston; and

(c) SocGen provided what have been referred to as secret "slush fund" accounts for SIB. It has been alleged that bribes to SIB's auditor, to Leroy King of the Financial Services Regulatory Commission of Antigua (the "FSRC"), and to others were funded from accounts at SocGen.

B. SIB's Products and Services

62. SIB offered six different deposit products to customers: fixed CDs, flex CDs, index linked CDs, premium accounts, performance accounts and express accounts. SIB customers

almost exclusively purchased CDs. SIB also offered other products to customers, but the availability of such products was tied to the need for customers to hold accounts with SIB, almost always in the form of CDs. Such products included Visa, Mastercard and American Express credit card services, as well as loan facilities, letters of credit, letters of guarantee and private banking services. Thus, for example, SIB required customers to maintain a CD with SIB as security in order to acquire a credit card and SIB placed holds on customers' CDs in an amount twice that of their credit card limits.

63. In addition, SIB engaged in various investment banking services. Such services included multi-million dollar public equity dealings, private placements, mergers and acquisitions and debt financings, all of which were undertaken for an array of clients in various locations around the world. SIB assembled a team of professionals from various industry-leading financial firms to provide its investment banking services.

64. SIB primarily sold its CDs through SIB-affiliated companies. Most notably, these companies included:

(a) the Stanford Financial Group ("SFG"), which was based in Houston, Texas and reported to have more than US$50 billion "under advisement";

(b) the Stanford Group Company ("SGC"), which was an investment dealer and broker dealer based in Houston, Texas. It registered with the SEC in 1996;

(c) the Stanford Trust Company, Ltd. ("STC"), a trust company organized under the laws of Antigua that as of 1998 operated a foreign trust representative office in

Miami, Florida and carried on business as "Stanford Fiduciary Investory Services";

(d) SIB itself through its Montreal, Quebec office; and

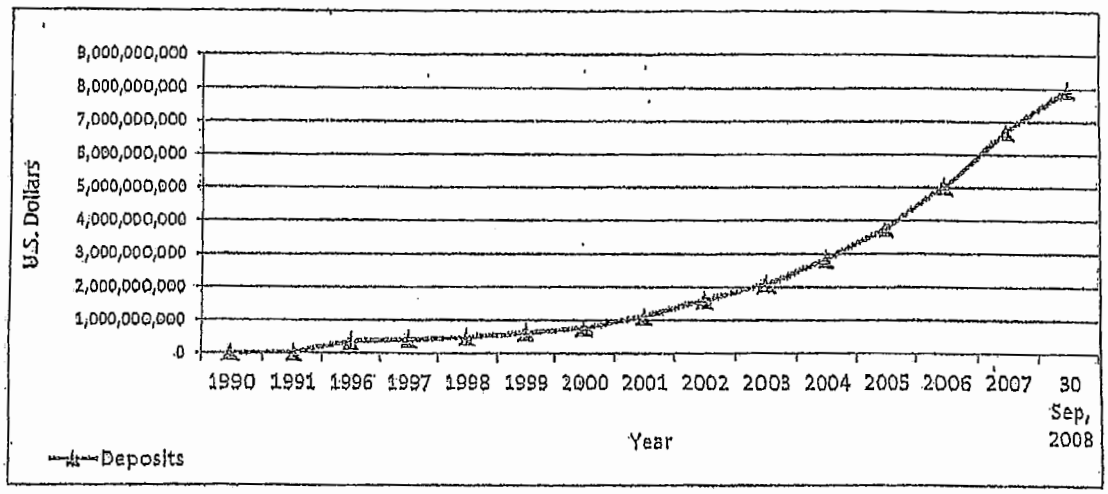
(e) Numerous affiliated company offices in Latin and Central America, as well as in Zürich, Switzerland.

65. SIB's annual reports consistently disclosed that SIB had a portfolio that produced returns of over 10 percent.

66. SIB's Annual Reports disclosed that SIB's auditors were C.A.S. Hewlett & Co. Ltd., a small accounting firm based in Antigua.

67. Financial advisors and SIB employees sold SIB CDs using information such as investment return figures and promotional materials that had been provided or were based on information prepared by Stanford and the Other Insiders. Thus, on the basis of the representations that Stanford and the Other Insiders caused to be made, SIB sold billions of dollars of CDs.

68. As illustrated by the graph below, between approximately 1990 and 2009, SIB grew its business exponentially from approximately US$14 million in CD investments while operating as Guardian in Montserrat to approximately US$8 billion in CD investments by 2009.



C. TD Bank Provided Services to Stanford-Owned Entities

1. TD Bank Improperly Opened the SIB Accounts

69. In approximately 1992, TD Bank acquired some of the Bank of New York's interests in Canada. These interests included the Bank of New York's then existing correspondent banking relationships with approximately 20 banks located throughout the Caribbean. Three of these banks were based in Antigua, namely (i) the Stanford-owned domestic Antiguan bank, BOA, (ii) the domestic Antiguan bank, Antigua Overseas Bank, the share capital of which was owned by William Cooper ("Cooper") and (iii) another Antiguan domestic bank, Antigua Barbuda Investment Bank ("ABIB"). TD Bank thus acquired its way into becoming the correspondent bank for BOA.

70. As domestic Antiguan banks, BOA, Antigua Overseas Bank and ABIB primarily used TD Bank's correspondent banking services to provide limited services to Antiguans who required services in Canada to conduct transfers or effect foreign currency exchanges involving minimal amounts of money. Because TD Bank was not the originator of these correspondent accounts (in that Bank of New York had established them), TD Bank never conducted any KYC or AML due

diligence inquiries in respect of the counter-party banks in the Caribbean. TD Bank thus "grandfathered" the noted three Antiguan banks' correspondent banking relationships. The BOA, Antigua Overseas Bank and ABIB correspondent accounts showed relatively minor activity.

71. Following TD Bank's acquisition of some of the Canadian interests of the Bank of New York, Cooper asked TD Bank to establish a correspondent bank account for AIB, the Antiguan domiciled international banking company also owned by Cooper. The "grandfathering" of Antigua Overseas Bank by TD Bank's acquisition of some of the Bank of New York's Canadian interests thus allowed Cooper to present AIB as an affiliate of a pre-existing correspondent customer of TD Bank. Since TD Bank was already doing business with a Cooper-owned bank, TD Bank agreed to allow AIB to establish its own correspondent account. No KYC or AML due diligence inquiries were completed by TD Bank in respect of AIB or Cooper. AIB and Cooper thus entered into TD Bank's Caribbean correspondent banking division through a "side door" and not the "front door".

72. If it adhered to the KYC and AML compliance standards of a reasonable bank, TD Bank would have insisted that AIB come through the "front door" and, in turn, TD Bank would have properly vetted AIB and Cooper and refused to accept AIB as a customer. TD Bank did not do so. The activities of AIB and Cooper subsequently gave rise to a number of successful criminal prosecutions in the late 1990s by U.S. law enforcement authorities for laundering the proceeds of certain advance fee and other frauds. Cooper remains a fugitive of U.S. Justice.

73. The same explanation for how AIB got to enjoy correspondent banking privileges at TD Bank applies to SIB.

74. Around the same time that TD Bank acquired its correspondent relationship with BOA, SIB (the successor of Guardian, which just previously had its license revoked in Montserrat) attempted to use various U.S.-based banks for its correspondent banking purposes. This made sense, as the vast majority of purchases of SIB CDs were made with U.S. dollars. However, after conducting due diligence, each of these banks ultimately declined to provide correspondent banking accounts to SIB or quickly closed such accounts due to concerns over money laundering or other impropriety. As a result of its inability to acquire correspondent banking services from a U.S.-based bank, SIB applied for such services from TD Bank in Canada.

75. TD Bank did not conduct KYC or AML due diligence inquiries when SIB applied for correspondent bank accounts. Instead, because TD Bank already had a correspondent banking relationship with the Stanford-owned BOA, TD Bank allowed SIB to "piggyback" onto BOA's antecedent relationship for KYC and AML compliance purposes. In other words, like with AIB, TD Bank allowed SIB to access its services through the "side door" and not the "front door".

76. Consistent with this sloppy appr h (and according to TD Bank itself), TD Bank has no record of account opening applicat'ons being completed by SIB or there being any written contracts in respect of SIB's correspondent bank accounts. In fact, it appears the only written contracts that at any time purported to govern the TD Bank's provision of correspondent banking services to SIB were TD Bank's standard form unilateral contracts in respect of correspondent banking that did not address SIB in any specific manner. Such unilateral contracts arose for the first time only in 1998 but did not contain any substantive legal terms until less than two years prior to SIB's collapse.

77. If TD Bank adhered to the KYC and AML compliance standards of a reasonable bank, it would have insisted that SIB come through the "front door" and would have also properly vetted SIB and Stanford and refused to accept SIB as a customer. TD Bank did not do so.

78. The reasons that TD Bank was required to refuse to accept SIB as a customer are extensive and are detailed further below. Most simple and straightforward, however, was that Stanford was formally declared bankrupt in 1984 with personal debts in excess of US$13 million. It is widely accepted in the banking community that an individual who has been personally bankrupted is not a fit and proper person to own or manage a bank.

79. Stanford's personal bankruptcy was a matter of public record. Therefore, a basic public records database search would have revealed Stanford's lack of fitness to own or manage SIB. In fact, this was one of the very reasons that led Montserrat to revoke Guardian's banking license. Similarly, when Guardian sought a license from the Eastern Caribbean Central Bank (the "ECCB") to own a trust company, the ECCB determined that Guardian was not permitted to hold such a license due to Stanford's bankruptcy.

80. Another significant factor indicating that TD Bank should never have provided services to SIB was that there was clearly no legitimate purpose for SIB to hold correspondent bank accounts in Toronto. Among other reasons, this was because, at the time the TD Bank-SIB relationship commenced, SIB had no Canadian customers and thus transacted no business in Canadian dollars. Instead, at that time and throughout the period that TD Bank provided banking services to SIB, the vast majority of investor funds transacted were in U.S. dollars.

81. Wire transfers were critical to the operation of SIB and, in turn, the SIB Looting. Without them, SIB would have had no means to quickly or efficiently complete any transaction, a clearly

necessary feature of modern commerce. Without access to wire transfers, SIB, as an offshore Antiguan bank, would have been dependent on delivery of physical cash or cheques to complete any transaction, a commercially untenable situation particularly since SIB's customers were located around the world.

82. Normal practice is that U.S. dollar correspondent bank accounts are provided by U.S. banks. Although, as a Canadian bank based in Toronto, TD Bank was permitted to undertake U.S. dollar transactions, it was not permitted to clear U.S. dollar wire transfers in Canada. This was significant because the vast majority (if not all) U.S. dollar deposits into SIB's correspondent bank accounts were received by wire transfer. Instead, TD Bank was required to rely on U.S. banks to serve as intermediaries to clear U.S. dollar wire transfers.

83. Accordingly, TD Bank at all relevant times required and relied upon the clearing services of a U.S. bank to complete most basic transactions for SIB. For instance, for at least part of the period that TD Bank provided correspondent banking services to SIB, U.S. wire transfers were routed through and cleared by Bank of America in New York City. This is rather ironic given that Bank of America had previously refused to continue providing correspondent banking services to SIB. Such arrangements were maintained by SIB and TD Bank notwithstanding that reliance on U.S. intermediary banks resulted in fees being incurred by SIB and/or SIB customers that would not have been incurred had SIB simply relied on a U.S. bank for its U.S. dollar correspondent banking services. Using such arrangements, TD Bank provided access to the U.S. financial system that otherwise was unavailable to SIB.

2. The Provision of Banking Services by TD Bank

84. From the time the SIB TD Bank accounts were opened, TD Bank and TD Waterhouse together opened and maintained approximately 11 separate accounts for SIB and other Stanford-owned entities. Among other things, those accounts facilitated all of SIB's U.S. dollar wire transfers. When SIB eventually obtained Canadian customers, TD Bank also provided such services for Canadian dollar transfers. However, in total, SIB only had 159 Canadian customers who together invested less than CAD$50 million with SIB. In contrast, SIB at large had in excess of 21,000 customers that invested approximately US$10 billion, primarily in U.S. dollars.

85. The provision of correspondent banking services is both a competitive and lucrative business for banks. Banks seek out valuable correspondent banking relationships because they can generate substantial "fee from free balances" revenue overnight for the bank that is the provider of the relevant services. Transaction fee revenue is also a source of income from correspondent banking relationships.

86. During the 1990s and early 2000s, TD Bank's largest correspondent bank customers were generally properly capitalised and regulated banks from the United States. In 1999, the total revenue generated by TD Bank from the provision of correspondent banking services to banks in the Caribbean did not exceed CAD$1 million. At that time, SIB's reported assets were also limited. For instance, at the end of 1999, SIB reported having US$676,236,000 in assets and US$623,560,000 in liabilities to depositors.

87. However, the exponential growth of SIB's balance sheet from approximately 2002 until late 2008 (during which time approximately US$9 billion of SIB CDs were sold to depositors)

altered the profile of SIB from that of a relatively minor source of business into that of a major correspondent bank customer and a significant source of revenue for TD Bank.

88. For instance, between December 31, 2005 and December 31, 2007, TD Bank reported annual increases of corporate banking revenue of 8% (for 2006) and 17% (for 2007), which reflected annual corporate banking revenue rising from CAD$266 million in 2005 to CAD$287 million and CAD$337 million in 2006 and 2007, respectively. In both years, these increases in corporate banking revenue were reported by TD Bank as being "largely due to higher net interest income from correspondent banking deposits and higher lending volumes." At the same time, between December 31, 2005 and December 31, 2007, SIB's reported assets grew from US$4.1 billion to US$7.1 billion. By the last year of SIB's operations – between January 2008 and February 2009 – approximately US$2,539,762,421.22 was credited to SIB's TD Bank account number 360012161670.

89. As a result, by 2008, SIB had become TD Bank's single largest correspondent banking customer not just in the Caribbean, but worldwide. This was the case notwithstanding that TD Bank had hundreds if not thousands of correspondent banking relationships, including with major U.S. banks and other globally-recognized banks from around the world. Until the growth of SIB, such banks constituted TD Bank's largest correspondent banking customers.

90. Notably, in 1996, TD Bank closed AIB's correspondent account. This decision was based on, among other things, the fact that the amounts moving through the AIB account at TD Bank were too large to be associated with a legitimate bank in Antigua. TD Bank determined that an offshore bank in Antigua that generated a large sum of money was a "red flag".

91. At that same time, the amounts running through SIB's correspondent bank accounts at TD Bank were comparable to the amounts running through AIB's account and soon after escalated dramatically. This escalation occurred during the period that the risk of doing business with Antiguan financial institutions also greatly increased in notoriety, which is detailed below. However, unlike with AIB, TD Bank continued to provide correspondent banking services to SIB.

92. In addition, TD Bank provided banking services including credit to the Stanford-owned Caribbean Star Airlines. SIB secured the credit provided to these entities through a U.S. dollar account held by SIB at TD Bank.

93. Further, TD Waterhouse managed discretionary investment portfolios for both SIB and BOA throughout the period that TD Bank provided correspondent banking services to SIB. The investment strategy employed by TD Waterhouse was the same for both the SIB and BOA portfolios.

94. TD Bank also provided trade financing and treasury services to SIB. In addition, in connection with loans, advances and other obligations that SIB had with TD Bank, SIB pledged to TD Bank its security holdings with TD Waterhouse.

95. During the years that SIB and BOA maintained investment portfolios with TD Waterhouse, those portfolios were managed by John Pepperell, who was the Vice Chairman of TD Waterhouse, and Perry Mercer.

96. From 2002 until SIB's collapse in 2009, James Zachariah Davis ("Zack Davis"), who is the son of Davis, was a research analyst at SFG. Zack Davis' job as a research analyst at SFG

entailed monitoring and providing instructions with respect to the SIB and BOA portfolios that were managed by TD Waterhouse. He dealt directly with Perry Mercer (who according to Zack Davis was a long-time friend of Davis) and others at TD Bank and TD Waterhouse.

D. Stanford and the Other Insiders Looted SIB

97. As CEO, director and Chairman of the Board of Directors of SIB, Stanford owed fiduciary duties to SIB, as did the Other Insiders, including Davis.

98. Section 95 of the *IBC Act* provides that Stanford and the Other Insiders had a duty to "act honestly and in good faith with a view to the best interests of the corporation" and to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."

99. In addition, Stanford and the Other Insiders owed common law fiduciary duties to SIB. Such duties paralleled those owed by Canadian corporate executives and included, among other things, the duty to:

(a) act with loyalty, good faith, and honesty;

(b) avoid conflicts of interest and duty;

(c) use all of their energy, ability, and imagination in the best interests of SIB;

(d) develop business opportunities for the sole benefit of SIB; and

(e) not conceal any information from SIB.

100. However, in breach of their fiduciary duties, Stanford and the Other Insiders converted customer funds used to purchase CDs from SIB for improper purposes, including for their own use, and implemented and orchestrated the SIB Looting to defraud SIB.

101. In particular, the investment strategy and rates of return promised to SIB customers by Stanford and the Other Insiders were not as claimed. Under the direction and at the instigation of Stanford and the Other Insiders, several billion dollars of funds provided to SIB were diverted for the personal benefit of Stanford and the Other Insiders. As a result, SIB was the victim of acts of larceny and breaches of the fiduciary duties owed to it by Stanford and the Other Insiders.

102. Stanford and the Other Insiders separated the funds received by SIB from its customers into e tiers. Tier I contained cash or cash equivalents, while Tier II consisted of various portfolios of investments that were managed at arm's length by third party financial institutions, including TD Waterhouse, together with a small amount of cash or cash equivalents.

103. By maintaining Tiers I and II and allowing SIB employees and executives to undertake discrete tasks with respect to them, Stanford and the Other Insiders were able to deceive honest SIB employees and others. This deception allowed Stanford and the Other Insiders to use Tier III to effect the SIB Looting.

104. Tier III was the most financially-significant tier at SIB, consisting of the vast majority of SIB's funds. It was managed by Stanford and the Other Insiders and they kept its true contents secret.

105. SIB employees, executives and directors either did not know of the existence of Tier III or, if they did know, had no knowledge whatsoever of its contents and were under the impression

it was being legitimately managed. In fact, information relevant to the true contents of Tier III was not even kept on SIB's computer systems and Stanford and the Other Insiders used forged documents to deceive SIB employees, executives and directors as to the true nature of SIB's underlying assets. The real information in respect of Tier III was stored on an external drive that Stanford and the Other Insiders commonly called "the football" and kept with them at all times.

106. Once Stanford and the Other Insiders had directed SIB's funds into Tier III, instead of investing them as represented to SIB customers, employees, officers, executives and others (the "SIB Stakeholders"), they misappropriated and misapplied the funds by placing them into speculative, largely illiquid investments (namely real estate and private equity), diverting them to other companies owned by Stanford, using them to fund their own lavish lifestyles, and making large concealed and unsecured SIB shareholder loans to Stanford, none of which were repaid. Accordingly, Stanford and the Other Insiders acted to the detriment of SIB and the SIB Stakeholders for their own financial gain.

107. In addition, Tier III funds were used to hide the SIB Looting. In particular, Stanford and the Other Insiders diverted Tier III funds generated by SIB from the sale of CDs to pay purported interest on and redemptions of the CDs as required, thereby deceiving SIB customers, employees, executives and others, and allowing the continuation of the SIB Looting. Concealing the fraud in this manner resulted in the SIB Looting taking on the characteristics of a "Ponzi" scheme.

108. During his orchestration of the SIB Looting, Stanford in particular led a lavish lifestyle financed exclusively with SIB's funds that he had converted to his own use. Among other things, he enjoyed the use of a US$10 million Florida mansion and a fleet of private jets (valued at

approximately US$100 million). He also took extravagant and expensive vacations costing up to US$100,000 and would often rent US$100,000/week yachts.

109. In order to conceal the SIB Looting from the SIB Stakeholders, Stanford and the Other Insiders routinely caused false entries to be made in SIB's accounts. Specifically, Stanford and the Other Insiders caused, among other things:

(a) false entries to be made into SIB's ledgers for the purpose of reporting false or unjustifiably inflated revenues and/or false or unjustifiably inflated investment portfolio balances and asset values, and:

(i) such false entries to be submitted to SIB's regulator in Antigua, the FSRC, and/or

(ii) such false entries to be represented to potential investors in SIB's CDs in order to encourage investments in CDs;

(b) copies of SIB bank statements to be forged; and

(c) false and/or unjustifiably inflated increases in assets to be recorded in SIB's annual reports and promotional materials.

110. As a result of Stanford and the Other Insiders' directions, SIB's annual reports falsely claimed increases in the value of SIB's assets from approximately US$760 million in 2000 to US$8.5 billion in December 2008. In reality, SIB only had approximately US$500 million in identifiable or traceable assets at the time of SIB's collapse only two months later in February 2009.

IV. THE COLLAPSE OF SIB

111. By the Fall of 2008, owners of SIB CDs began demanding redemptions of those CDs in increasing numbers. At the same time, SIB was increasingly experiencing difficulties generating new sales of SIB CDs. This scenario was prompted by the financial crisis in 2008.

112. As a result, by October 2008, SIB was left with no choice but to liquidate its accounts held at TD Bank and TD Waterhouse, among others, in order to pay interest and redemption rates owed to customers. TD Bank facilitated this liquidation primarily at the instruction of the Chief Investment Officer of SFG, Laura Pendergest-Holt ("Pendergest-Holt") and Zack Davis. The liquidation included both SIB and BOA assets. TD Bank did not take any steps to investigate why the liquidations were occurring or alter the services it provided to SIB or BOA except to monitor the situation from the perspective of its own credit risk.

113. By at least January 2009, the SEC began subjecting SIB to intense scrutiny. It demanded that SIB provide an itemized list of all assets in SIB's portfolios and all of SIB's financial and accounting documents. The SEC also informed various SIB executives and officers that it sought their testimony.

114. Soon thereafter, in early February 2009, Davis called a meeting with all of SIB's top executives in Miami, Florida. At that meeting, at which Stanford was not present, Davis informed the executives of the SIB Looting. The executives had no idea about the SIB Looting or the contents of Tier III prior to the meeting. According to Davis, upon hearing of the SIB Looting, the SIB executives' reaction was one of "shock".

115. On February 16, 2009, the SEC filed civil charges against SIB and its related entities, and against Stanford, Davis and Pendergest-Holt. In doing so, the SEC alleged "massive ongoing

fraud" involving SIB CDs. That same day, the SEC obtained an injunction preventing SIB and its related entities from carrying on business and the appointment of an equity receiver from the U.S. District Court in Dallas, Texas.

116. Similarly, on February 19, 2009, the FSRC appointed receiver-managers of SIB. This appointment was continued by the High Court of Justice of Antigua on February 26, 2009, which thereafter determined that SIB should be liquidated and dissolved under the supervision of the Antiguan court pursuant to the *IBC Act*. The Former Liquidators were thereby appointed.

117. Despite the unique window into SIB provided by the extensive banking services it provided and the duty that TD Bank had to understand the true nature of SIB's affairs, until the SEC issued a freezing order on March 12, 2009, TD Bank took absolutely no steps whatsoever to limit SIB's banking activities, to report SIB's numerous irregularities to any regulatory authority or to take any other action that would have prevented the losses suffered by SIB and in connection with the SIB Looting.

118. By Order of the Ontario Superior Court of Justice (Commercial List) dated April 24, 2009 (and subsequently extended) in Court File No. CV-09-8154-00CL (*Attorney General of Ontario v. The Contents of Various Accounts Held with TD Bank and TD Waterhouse* in rem), TD Bank was ordered to pay into court all of the monies it held on behalf of SIB.

119. On June 18, 2009, a federal grand jury returned a 21-count indictment against, among others, Stanford and Pendergest-Holt. The grand jury indictment charged Stanford and Pendergest-Holt with various offences including conspiracy to commit mail, wire and securities fraud, wire fraud, mail fraud, conspiracy to commit money laundering and conspiracy to obstruct an SEC investigation.

120. On March 6, 2012, Stanford was convicted of 13 of the 14 counts remaining against him, including those in relation to his fraud and conspiracy. On June 14, 2012, he was sentenced by U.S. District Judge David Hittner who commented that Stanford had orchestrated "one of the most egregious frauds ever presented to a trial jury in federal court." Stanford was sentenced to 110 years in prison and ordered to forfeit US$5.9 billion.

121. On June 21, 2012, Pendergest-Holt pled guilty to obstructing the SEC's investigation into the misconduct of Stanford and the Other Insiders. However, the other counts against Pendergest-Holt were withdrawn after the SEC's investigation revealed that she did not know of Tier III or the fraud on SIB until Davis disclosed them at the February 2009 meeting in Miami, Florida referred to at paragraph 113. This was the case notwithstanding Pendergest-Holt's role as the Chief Investment Officer of SGF and her close personal relationships with Stanford and Davis. On September 13, 2012, Pendergest-Holt was sentenced to three years in prison and three years of supervised release.

122. On August 27, 2009, Davis entered into a plea arrangement whereby, in exchange for his co-operation, he was convicted of conspiracy to commit mail, wire and securities fraud, and conspiracy to obstruct an SEC investigation. Davis was sentenced to five years of prison, three years of supervised release and had a judgment of US$1 billion ordered against him.

123. SIB has at no point been indicted or charged with any offense in connection with the SIB Looting. Similarly, other than Stanford, members of SIB's Board of Directors have at no point been indicted or charged with any offence in connection with the SIB Looting, nor have any other senior executives of SIB such as its Presidents. SIB and the SIB Stakeholders were deceived by Stanford and the Other Insiders.

V. FURTHER RED FLAGS

A. Banking Services Should Not Have Been Provided to an Offshore Antiguan Bank

124. During the period that TD Bank provided correspondent banking services to SIB, international regulators and government authorities publicly identified that Antigua needed to improve its banking regulations to prevent money laundering and criminal activity.

125. At least as early as 1996, the U.S. State Department's International Narcotics Control Strategy Report ("INCSR") highlighted weaknesses in Antigua's banking system related to money laundering. The report noted inadequate regulation and a surge in questionable banking operations in Antigua. These findings were reiterated in the INCSRs of the subsequent years. The 2003 Report indicated that money laundering in Antigua was related to fraud schemes and that money laundering occurs more often in the offshore sector than in the domestic finance sector.

126. Although the Antiguan government subsequently passed the *Money Laundering (Prevention) Act* of 1996, the U.S. criticism of Antiguan banking laws persisted.

127. Consequently, the Antiguan government formed the Antiguan Offshore Financial Sector Planning Committee to advise the government and recommend additional changes to its banking laws. Despite being likely the most prominent individual in the very industry the Committee was designed to evaluate, and the owner of the largest offshore bank in Antigua, SIB, Stanford was appointed Chairman of the Committee in 1997. Stanford was appointed by then Antiguan Prime Minister Bird, whose election campaign Stanford had been a major contributor to.

128. As Chairman of the Committee, Stanford created a "task force" that was charged with considering improvements to Antigua's banking laws. Stanford paid the expenses of establishing

the task force out of his own pocket, creating a clear conflict of interest. In addition, members of the task force were based in the U.S. and were historically connected with and had received funds from Stanford.

129. Ultimately, the task force recommended removing various offenses from Antigua's banking laws, including "false accounting" and "fraud", all activities that Stanford himself was actively involved in through his operation of the SIB Looting. As a result of the recommendations of the task force, in November 1998, the government of Antigua amended the *Money Laundering (Prevention) Act*. The changes substantially weakened the Act's ability to address money laundering.

130. In addition, the government changed the supervision of its offshore financial sector by vesting authority over that sector in a new International Financial Sector Authority (the "IFSA"). Incredibly, Stanford was appointed Chair of the IFSA and one of Stanford's U.S. lawyers also served on the IFSA along with Stanford's Antiguan lawyer, Errol Cort, who was also the Attorney General of Antigua at that time. In essence, Stanford had been appointed to run the regulator that was tasked with overseeing the very industry that Stanford did business in.

131. The aforementioned process of banking reforms was intensely and publicly criticized, with Stanford's involvement in the process playing a central role in the criticisms. Notably, it also prompted the U.S. Treasury Department, through its Financial Crimes Enforcement Network ("FinCEN"), to issue an extraordinary advisory in April 1999 (the "FinCEN Advisory"), as appears from the FinCEN Advisory No. 11 dated April 1999. The FinCEN Advisory stated, among other things, that:

(a) "In November 1998, the government of Antigua and Barbuda amended its Money Laundering (Prevention) Act in a manner that significantly weakened that Act";

(b) "The [new International Financial Sector Authority's] Board of Directors includes representatives of the very institutions the Authority is supposed to regulate, thus raising serious concerns that those representatives are in fact in control of the Authority, so that the Authority is neither independent nor otherwise able to conduct an effective regulatory program in accordance with international standards";

(c) "The amendment of the Money Laundering (Prevention) Act, combined with changes in Antigua and Barbuda's treatment of its offshore financial services sector, are likely to erode supervision, stiffen bank secrecy, and decrease the possibility for effective international law enforcement and judicial cooperation";

(d) the combination of these actions "raise questions about the purposes of transactions routed into or out of Antigua and Barbuda or involving entities organized or domiciled, or non-resident persons maintaining accounts in Antigua and Barbuda"; and

(e) "Enhanced scrutiny is especially important for transactions involving Antigua and Barbuda offshore banks, transactions involving both Antigua and Barbuda offshore banks and the nine commercial banks licensed to do business in Antigua and Barbuda, and transactions in which one or more of such nine commercial banks act for one or more Antigua and Barbuda offshore institutions."

132. The FinCEN Advisory was significant. It constituted only the second time in history the U.S. Treasury Department had released an advisory targeting a specific country. The United Kingdom also issued a similar advisory in April 1999.

133. Further, it was apparent that the FinCEN Advisory was specifically referring to Stanford when it warned that the Antiguan International Financial Sector Authority's Board of Directors included "representatives of the very institutions the Authority is supposed to regulate" and that the "Authority is neither independent nor otherwise able to conduct an effective regulatory program in accordance with international standards."

134. In May 1999, U.S.-based attorney Carlos E. Loumiet, who was one of Stanford's lawyers and an architect of Antigua's AML laws, publicly responded to the FinCEN Advisory. While ultimately refuting the FinCEN Advisory, Loumiet conceded that there was "considerable, indisputable merit" to the U.S. concerns about the "inherent potential conflicts of interest" with respect to having private banking representatives such as Stanford on Antigua's International Financial Sector Authority.

135. Around the same time, Jonathan Winer, then the head of the U.S. State Department's Bureau for International Narcotics and Law Enforcement Affairs publicly stated that Antigua was "one of the most attractive financial centres in the Caribbean for money launderers."

136. In or around 2000, James Johnson, the U.S. Treasury Department's Undersecretary of Enforcement, complained in a letter to then Antiguan Prime Minister Bird, that Antigua had compromised its laws against money laundering and created a conflict of interest by allowing Stanford and other banking officials to sit on the regulatory board. He noted in the letter that the Financial Sector Authorities' seizure of bank documents from a civil servant "raises substantial

questions as to Antigua and Barbuda's commitment to provide effective supervision of its offshore sector."

137. In 2000, the Organization for Economic Cooperation and Development published a report containing a list of countries whose regulations were deemed designed to help people avoid paying taxes in their home countries and Antigua was on that list.

138. In 2001, the U.S. Senate's Minority Staff of the Permanent Subcommittee on Investigations' issued a report entitled "Report on Correspondent Banking: A Gateway for Money Laundering" dated February 5, 2001 ("U.S. Senate Report"). The U.S. Senate Report specifically named TD Bank as having provided correspondent banking services to AIB, an Antiguan financial institution that had been found to be engaged in fraud.

139. The U.S. Senate Report identified that AIB had fallen into liquidation after it laundered millions of dollars and collapsed from insider abuse, insufficient capital and the sudden withdrawal of deposits. TD Bank's involvement in this fraudulent scheme appeared as a case study in the U.S. Senate Report which identified that correspondent accounts are particularly vulnerable to money laundering and provide corrupt foreign banks access to the U.S. financial system and the freedom to move money around the world. With respect to TD Bank's relationship with the Antiguan AIB, it concluded, among other things, that:

(a) TD Bank was used to receive wire transfers from fraud victims and/or to disburse the illicit funds to accounts controlled by the criminals; and

(b) TD Bank in Canada was a major conduit for AIB funds in to the U.S. banking system and that between June 1996 and January 1997, US$20.9 million was wired to the AIB correspondent account from the account at TD Bank in Canada.

140. It was apparent from the U.S. Senate Report that TD Bank representatives were interviewed and asked to produce documents regarding TD Bank's relationship with AIB. These requests occurred while Stanford orchestrated the SIB Looting and while TD Bank provided correspondent banking services to SIB. Despite this, TD Bank apparently failed to adequately review, investigate or monitor its other Antiguan based correspondent bank accounts, including those of SIB and BOA. In addition, at the same time, TD Waterhouse continued to manage investment portfolios for SIB and BOA.

141. In 2003, and continuing at least until 2007, the U.S. State Department's INCSRs listed Antigua as a "jurisdiction of major concern" on its list of Major Money Laundering Countries.

142. In or around February 2007, Antiguan Prime Minister Baldwin Spencer accused Stanford of "political interference" after Stanford stated he would be touring the 17 constituencies in Antigua outlining his proposals for future development. Stanford also met with a committee of the Antiguan Cabinet and leaders of the opposition party to outline his investment program.

143. Further, at relevant times, the FSRC employed only three individuals to examine the affairs of all Antiguan banks. This was the case despite the fact that Antigua's Gross Domestic Product amounted to only a fraction of the assets claimed to be deposited at SIB alone during the same period.

144. TD Bank was aware of the extensive and public condemnation of Antigua's banking regulations and AML practices, as well as Stanford's well-publicized involvement with and manipulation of Antigua's regulatory regime.

145. The FinCEN Advisory was particularly relevant to TD Bank's relationships with SIB and BOA. This was because, at the time of the FinCEN Advisory, TD Bank had only two correspondent banking relationships with Antigua-based banks: SIB and BOA. The FinCEN Advisory therefore served as an express warning to TD Bank that banking services should not have been provided to SIB or BOA.

146. On September 29, 1999, Davis wrote to John Pepperell of TD Waterhouse to address "reports in the media [of] questionable banking practices, which involve transactions with financial institutions located in offshore jurisdictions", a clear reference to the FinCEN Advisory and associated media reports. At the same time, Davis offered to have SIB's legal department "present [SIB's] comprehensive program to [TD Bank's] compliance department or others within your organization."

147. A TD Waterhouse employee responded to Davis' letter, noting simply that SIB's "cognizance of this problem and commitment to ensure your offshore bank officers know how to deal with this issue is assuring to us" and that it would "not be necessary" to have "[SIB's] legal department present your comprehensive program to our compliance department." Neither TD Bank nor TD Waterhouse took any steps to limit or review the banking services provided to SIB as a result of the FinCEN Advisory.

148. TD Bank was required to know the foregoing information in respect of Antigua and Stanford's influence there. Had TD Bank undertaken reasonable due diligence in respect of SIB

and Stanford, it would have discovered such information. That information alone indicated that banking services should not have been provided to SIB. However, even if banking services continued to be provided, the information revealed by a reasonable amount of due diligence in respect of Antigua at the very least indicated that TD Bank was required to undertake enhanced due diligence with respect to SIB, its business, Stanford and SIB's TD Bank accounts. To the extent that TD Bank did not undertake such enhanced due diligence, TD Bank failed to act as a reasonable bank would have in the same suspicious circumstances.

149. TD Bank was aware of sufficient information such that it knew or ought to have known that, or was recklessly or willfully blind to the fact that, Stanford and SIB were high risk customers that should not have been provided with the privileges and access that a correspondent banking relationship with TD Bank provides.

B. TD Bank Had an Exclusive Window Into SIB's Affairs

150. TD Bank's unique position provided it with sufficient information amounting to knowledge of the SIB Looting. This unique positioning was a result of the fact that:

(a) TD Bank provided correspondent banking services to SIB;

(b) TD Bank provided correspondent banking services to BOA;

(c) TD Bank provided banking services to Caribbean Star Airlines;

(d) TD Bank provided trade financing and treasury services to SIB;

(e) TD Waterhouse managed an investment portfolio for SIB; and

(f) TD Waterhouse managed an investment portfolio for BOA.

151. Each of these relationships required TD Bank and TD Waterhouse to obtain substantial information from a Stanford-owned entity in order to commence and continue the relationship. TD Bank was in the unique position of being able and duty bound to ask questions and require satisfactory answers from SIB, Stanford and the Other Insiders. Each relationship also uniquely positioned TD Bank to understand the transactions that were being undertaken by those Stanford-owned entities, as well as the relationship between those entities.

152. TD Bank has admitted that it had access to SIB's financial statements. It has further admitted that it did not conduct in depth reviews of those statements. This is an example of TD Bank not availing itself of its exclusive window into SIB's affairs as it was required to do.

153. In addition to having complete access to and control of all of SIB's accounts held at TD Bank and TD Waterhouse, TD Bank personnel had the opportunity to and in fact did visit, among other places, SIB's headquarters in Antigua and SFG's headquarters in Houston, Texas. The stated purpose of such visits was to conduct due diligence, including meeting senior SIB personnel and examining first hand SIB's operations.

154. For instance, in 1999 or 2000, a meeting took place between Stephen Cullen ("Cullen"), Bill Sebenski ("Sebenski") and John Leckie ("Leckie"). At that time, Sebenski had recently taken over Cullen's role as TD Bank's Managing Director of Correspondent Banking for the Caribbean and Latin America and both Cullen and Sebenski reported directly to Leckie, TD Bank's General Manager of Trade Finance and Correspondent Banking. At the meeting, Leckie inquired whether TD Bank really understood SIB's business. This inquiry was made notwithstanding that SIB had become a significant correspondent banking client of TD Bank and Leckie was responsible for overseeing the TD Bank-SIB relationship. Since both Cullen and

Sebenski answered that they in fact did not understand SIB's business, both were sent by Leckie to Houston, Texas to meet with SIB and SFG personnel.

155. After the due diligence trip to Houston, Texas, Cullen informed Sebenski that he was uncomfortable with TD Bank's continued correspondent banking relationship with SIB. Cullen further informed Sebenski that TD Bank needed to conduct a due diligence investigation of SIB and apply a strict KYC standard because "something did not seem right". However, TD Bank either did not conduct such an investigation or did so and nonetheless continued to provide correspondent banking services to SIB.

156. In fact, over the period that TD Bank provided correspondent banking services to SIB, TD Bank personnel took at least 15 trips to meet with SIB and/or SFG personnel in Antigua or Houston. TD Bank was able to and did set the agenda for such visits, including by indicating to SIB what information TD Bank would require during such visits. In addition, SIB personnel met with TD Bank personnel responsible for the SIB correspondent banking relationship in Toronto and at SIB's Montreal office on various occasions, as well as in other locations around the world including Miami, Memphis, New York, Vienna and London, England.

157. However, although TD Bank was required to take trips to meet with SIB personnel and thoroughly examine SIB's operations, the visits between TD Bank and SIB personnel consisted primarily of expensive meals, high-priced accommodations and social events such as participating in or attending at PGA golf Pro-Am tournaments and cricket tournaments hosted by Stanford. Further, to the extent that TD Bank did undertake due diligence during such visits, that due diligence was inadequate. For instance, TD Bank focused on questions concerning SIB's customers. Although TD Bank was required to ask such questions, it was also required to ask

questions and demand satisfactory answers in respect of SIB's own operations and affairs, including in respect of Stanford personally, but failed to do so.

158. The Applicable Standards (which are discussed below at paragraphs 241 to 309) required TD Bank to aggregate all of the information acquired by TD Bank and TD Waterhouse in the course of providing the aforementioned services to Stanford-owned entities and to consider that information holistically when determining whether it was appropriate to provide correspondent banking services to SIB.

159. For example, in accordance with the Applicable Standards, TD Bank was required to "know" SIB and understand its business operations prior to agreeing to act as correspondent bank. As a result, at the time that TD Bank began providing correspondent banking services to SIB, TD Bank was required to know that SIB had neither Canadian customers nor business connections to Canada. TD Bank was also required to know that, while it had agreed to accept wire transfers in both Canadian and U.S. dollars, because SIB did not have Canadian customers, the wires processed by TD Bank would be exclusively in U.S. dollars. Similarly, TD Bank should have determined if other financial institutions had denied or ceased to provide correspondent banking services to SIB.

160. Moreover, TD Bank knew that by agreeing to provide SIB with correspondent banking services, it was agreeing to facilitate the transfer of funds into the U.S. and other jurisdictions in a manner which shielded the true nature of those transfers from the recipient banks in those jurisdictions and their regulatory authorities. This very same issue was confronted in the U.S. Senate Report regarding TD Bank's participation in the AIB fraud.

161. Thus, based on the information arising from the necessary due diligence required of TD Bank with respect to SIB, which was required to be conducted in addition to and in place of any due diligence previously undertaken with respect to BOA, TD Bank knew that there was no legitimate business or economic purpose for SIB to require correspondent banking services in Canada.

162. This was even more apparent due to the fact that SIB had an existing banking relationship with Trustmark in Houston, Texas (which a reasonable bank would have determined), making the business case for any correspondent banking services even more dubious. While Trustmark processed cheques for SIB, it declined to provide wire transfer services to SIB. As a practical matter, if SIB could not utilize wire transfers, it would have been virtually impossible for Stanford and the Other Insiders to perpetrate the SIB Looting because they would been forced to rely on mailing cheques in every instance where they caused SIB and its affiliates to conduct transactions. Stanford and the Other Insiders solved this issue by relying on TD Bank. They were able to do so notwithstanding that TD Bank was required by the Applicable Standards to decline to provide correspondent banking services to SIB.

163. In addition, having chosen to establish correspondent bank accounts for SIB, TD Bank was required, in accordance with the Applicable Standards, to undertake enhanced ongoing monitoring of SIB and the appropriateness of its relationship with SIB. Among other reasons, this was particularly true in light of the fact that:

(a) SIB was located in Antigua, one of the highest risk jurisdictions in the world;

(b) TD Bank was providing correspondent banking services, the highest risk type of banking services ; and

(c) all funds transferred to and from SIB's TD Bank accounts were done by wire transfer, a method which itself constitutes a high risk.

164. However, TD Bank has admitted that it did not undertake enhanced monitoring of SIB's accounts until late 2008 and only did so then because of concerns over SIB's liquidity.

165. The ongoing monitoring of SIB that TD Bank was required to undertake should have continuously ensured that SIB was utilizing its correspondent bank accounts in a manner consistent with how TD Bank understood those accounts would be utilized when it agreed to open them, or in accordance with its updated understanding of what normal usage of SIB's accounts entailed.

166. As such, when TD Bank compared its understanding of how SIB's accounts operated to the actual use of those accounts, TD Bank should have realized either (i) that it did not have an understanding of the normal use of SIB's correspondent bank accounts, or (ii) that its understanding of how SIB should have been using its correspondent bank accounts indicated that there was no legitimate business or economic purpose for SIB to require correspondent bank accounts in Canada. Either way, TD Bank's review of SIB should have led to the conclusion that TD Bank should not continue to provide correspondent banking services to SIB.

167. Alternatively, to the extent that TD Bank failed to conduct the necessary ongoing monitoring of SIB's correspondent bank accounts, it acted in direct contravention of the Applicable Standards, acted recklessly and fell clearly below the standard of a reasonable bank.

168. As a result, every day that TD Bank provided services to SIB, it did so in reckless disregard of the fact that there was no legitimate business or economic purpose to SIB's banking

relationship with TD Bank. This recklessness only got worse as the relationship continued and TD Bank obtained further information that amounted to actual knowledge of the SIB Looting.

169. In addition to the fact that there was no legitimate economic or business purpose to SIB's banking relationship with TD Bank, as a result of the aforementioned relationships, TD Bank was also uniquely positioned to have knowledge of SIB's general history (discussed at paragraphs 44 to 109) and also knowledge of the fact that:

(a) Prior to engaging TD Bank to provide correspondent banking services, Guardian or SIB used financial institutions in the U.S. for its correspondent banking purposes, including Chase Manhattan Bank ("Chase"), First Interstate Bank and Bank of America, all of which chose to end their relationships with Guardian or SIB. For instance, Bank of America's Compliance Department repeatedly insisted to Bank of America's management that providing services to SIB stituted an intolerable risk. After one year of providing such services, Bank of America's management came to agree with the warning of the Compliance Department and ended Bank of America's relationship with SIB;

(b) TD Bank previously provided correspondent banking services to AIB, another Antiguan financial institution. TD Bank was aware that its relationship with AIB caused TD Bank to become a conduit for the transfer of significant volumes of fraudulent transfers. In fact, the very same TD Bank executive who administered AIB's TD Bank account also was responsible for the SIB and BOA correspondent bank accounts with TD Bank. As such, TD Bank was aware of the clear and

present need to subject its other Antiguan correspondent bank customers, including SIB, to particular scrutiny;

(c) TD Bank contributed to the U.S. Senate investigation into correspondent banking. That investigation resulted in the U.S. Senate Report, which not only concluded that correspondent banking was a gateway for money laundering, but specifically noted the use of TD Bank's accounts to facilitate the fraud committed by AIB and Guardian Bank and Trust (Cayman) Ltd. Since TD Bank was aware of the U.S. Senate Report, TD Bank's awareness of the risks associated with providing correspondent banking was high, including with respect to providing such services to an Antiguan financial institution;

(d) SIB represented that Mercer, who was also a long-time friend of Davis, sat on an advisory board for SIB. If indeed Mercer sat on the advisory board, this relationship also provided TD Bank with access to information concerning the SIB Looting. If he did not, and SIB represented that he did, TD Bank ought to have been aware of this. Such a misrepresentation would have been a red flag, to say the least, to TD Bank that required TD Bank to investigate and take action;

(e) The rates of return generated by TD Waterhouse were at odds with the rates of return that SIB purportedly generated; and

(f) SIB directed TD Bank to send funds held in its correspondent bank accounts to locations and to entities in a manner that clearly indicated such funds were not being used as represented to SIB's customers, a clear "red flag" within the exclusive knowledge of TD Bank.

170. TD Bank, by virtue of its banking relationship with SIB, was also uniquely positioned to demand further particulars about the publicly available information concerning SIB and Stanford, all of which TD Bank was required to be aware of. If TD Bank demanded such further particulars, those particulars were denied by Stanford and the Other Insiders or, if provided, revealed further cause for concern. Any such result should have led TD Bank to determine that banking services should not have been provided to SIB. Alternatively, Stanford and the Other Insiders provided TD Bank with further particulars that were inconsistent with the publicly available information. Such inconsistencies were themselves a "red flag" that should have been properly investigated, with the result being that TD Bank determined banking services should not be provided to SIB.

171. As a result of such information, TD Bank was uniquely situated to identify the breaches of duty owed to SIB committed by Stanford and the Other Insiders through the orchestration of the SIB Looting.

C. TD Bank Knew or Ought to Have Known of Relevant Open Source Information

172. Over the period of time that TD Bank provided correspondent banking services to SIB, it knew or ought to have known, or was recklessly or willfully blind to, information that was discoverable with even limited investigative efforts. In accordance with the Applicable Standards, TD Bank was required to diligently conduct ongoing monitoring of such publicly-available or "open source" information pertaining to SIB and its business operations. A summary of such information follows.

173. Stanford petitioned himself into personal bankruptcy on February 17, 1984 before the U.S. Bankruptcy Court (for the Western District of Texas, Waco Division) under Case No. 6-84-00263-T on the basis of personal debts of US$13,648,618.75.

174. From 1985 until 1990, Guardian operated in Montserrat, a jurisdiction which was historically known to have inadequate AML regulations.

175. By 1988, Stanford had been accused of violating banking laws in Texas by running unlicensed "feeder" sales offices in Houston for Guardian. The U.S. Office of the Comptroller of the Currency in 1988 and again in 1989 issued advisories concerning Stanford's similar violations of banking laws in Florida and California.

176. By 1989, the banking system in Montserrat came under investigation by U.S. and British authorities. Consequently, Guardian itself came under scrutiny for possible drug money laundering. When Guardian was forced to report to the Montserrat banking authorities, Stanford and Davis fabricated account statements and ledgers.

177. On November 28, 1990, the Financial Secretary of Montserrat notified Stanford that it was going to revoke Stanford's banking licenses because:

(a) Guardian's auditor, C.A.S. Hewlett & Co. Ltd., was not an approved auditor;

(b) Guardian was operating in a manner "detrimental to its depositors";

(c) Guardian failed to supply satisfactory details as to its liquidity;

(d) Stanford was formerly a bankrupt; and

(e) Guardian had failed to submit annual financial statements.

178. However, before the threatened revocation could be imposed, Stanford caused Guardian to change its domicile to Antigua.

179. Stanford moved Guardian from Montserrat to Antigua at the very time that Montserrat was scrutinizing its banks. At the same time, Antigua subjected its offshore banking industry to limited regulation and had the reputation of being the most corrupt island in the Caribbean.

180. There were extensive deficiencies in Antigua's offshore banking industry and Stanford played a major role in Antigua's actions with respect to its offshore banking industry.

181. Having moved to Antigua, Guardian/SIB reported that it was audited by C.A.S. Hewlett & Co. Ltd., which is a small firm based in Antigua that clearly did not possess sufficient competence to adequately audit a financial institution the size and scale of SIB. This was evidenced by the fact that it did not have a website and basic internet-based searches would not reveal any information on the firm. Further, on account of being based in Antigua, C.A.S. Hewlett & Co. Ltd was not subject to significant regulatory oversight. Notably, it was also the same audit firm that Montserrat had deemed to be an unapproved auditor of Guardian.

182. In 1991, the U.S. Federal Bureau of Investigation, U.S. Customs and Texas law enforcement authorities investigated Stanford's possible involvement in drug money laundering. This investigation resulted in U.S. Customs officials searching Stanford's private jet when he returned from the Caribbean.

183. In 1994, then Antiguan Prime Minister Lester Bird allowed Stanford to organize and arrange financing for a public hospital project in Antigua. Stanford purportedly funded an interim loan to the Antiguan Government to finance 100 percent of the project's architectural and

engineering costs. Eventually, Stanford lent the Antiguan Government over US$40 million through BOA, thereby heavily indebting the Antiguan Government – BOA and SIB's only regulator – to Stanford. Stanford's involvement in the hospital project prompted a 1996 U.S. congressional investigation into corruption in Antigua.

184. In both 1995 and 1996, SIB disclosed *identical* rates of return of exactly 15.71 percent, a result that was highly unusual and unlikely.

185. In addition, SIB's Annual Reports disclosed rates of return far higher than those offered by traditional banks, including TD Bank. From 1997 until 2006, SIB disclosed returns on its CDs that were, at their worst, 140 percent greater than the average return generated by U.S. banks' CDs. At their best, the returns disclosed by SIB on its CDs were 388 percent greater than the average return generated by U.S. banks' CDs.

186. The SIB promotional materials, which induced prospective customers to purchase CDs, advertised rates of return in excess of those offered by TD Bank or other major financial institutions. The promotional materials did not explain how those rates of return were earned or could be paid.

187. On April 29, 1997, a verdict was rendered against Stanford by a U.S. Tax Court in his case against the Internal Revenue Service. The Court ruled that Stanford failed to file a 1990 tax return and owed in excess of US$500,000 in taxes and penalties related to his ownership of Guardian in Montserrat.

188. In July 1998, U.S. authorities obtained a warrant to freeze funds controlled by suspected money launderers. The seizure warrant was executed by U.S. authorities and sought to freeze a

total of US$3.3 million. While the seizure warrant sought to freeze funds in U.S. financial institutions, including SGC, most of the funds – nearly US$3.2 million – were found to be in an SIB account.

189. In November 1998, Stanford caused SIB to file a Regulation D ("Reg. D") exemption with the SEC. The exemption allowed SFG, via SGC, to sell SIB CDs to U.S. "accredited investors" in the U.S. without registering them as securities. SIB's initial Reg. D filing listed SIB CD offerings totalling only US$50 million. SIB's filed an amended Reg. D in November 2001 to increase the Reg. D offering to US$150 million. SIB filed additional amendments in March and November of 2004, increasing the size of SIB's CD offerings to US$200 million and then US$1 billion, clearly evidencing the massive sales of SIB CDs taking place in the U.S. In November 2007, SIB filed yet another Reg. D amendment to increase the size of the offering to US$2 billion.

190. From 1999 to 2008, SFG spent approximately US$4.8 million on government lobbying activities — spending US$2.2 million of that in 2008 alone — and its employees and its political action committee gave US$2.4 million to federal Democratic and Republican candidates since 2000. At the same time, SFG lobbied against aspects of proposed U.S. legislation aimed at cracking down on offshore banks and money laundering.

191. Beginning in or around 2001 and continuing until at least 2008, various employees of Stanford-owned entities filed individual cases with the American Financial Industry Regulatory Authority ("FINRA"), or its predecessor, claiming that they had been wrongfully dismissed and alleging fraudulent business practices in violation of U.S. securities laws.

192. In or around 2002, media reports indicated that Stanford and employees of SFG donated US$90,350 to the legal defense fund of Robert Torricelli ("Torricelli"), then a U.S. Senator from New Jersey. This represented the largest block of contributions to Torricelli's legal defense fund in the preceding reporting period. The legal defense fund existed to pay Torricelli's legal bills stemming from a criminal investigation into his involvement with Korean-American businessman David Chang. Torricelli notably sat on the Senate Subcommittee on Investigations and the Senate Finance Committee, both of which deal with money laundering issues. Torricelli was also a member of the Senate Finance Committee's Subcommittee on the Internal Revenue Service. At that time, the Internal Revenue Service was moving to obtain records of offshore bank credit cards that U.S. officials had said may be used to avoid taxes. Those same media reports noted the accusations that had been leveled against Stanford with respect to his influence in Antigua.

193. In or around November 2003, Stanford gave two Antiguan government officials – Antiguan Tourism Minister, Molwyn Joseph, and Antiguan Planning Minister, Gaston Browne – each US$37,000. At the time, both officials were part of a team negotiating with Stanford for a proposed exchange of two properties in St John's, Antigua. Civic groups publicly urged their removal, calling the payments "apparent inducements" and saying that the two had "serious conflicts of interest".

194. In or around 2004, World-Check, a reputable organization that gathers information globally on heightened risk individuals and entities, added Stanford to its database of high risk individuals and classified him as a PEP on account of, among other things, his association with then Antiguan Prime Minister Bird. By virtue of their positions or influence they may hold, PEPs present a high risk for potential involvement in bribery and corruption.

195. In or around 2005, a civil complaint against SIB and SGC was filed in the U.S. District Court for the Southern District of Florida by two investors. The investors claimed they were the victims of a "Ponzi" scheme which targeted South Florida residents of Venezuelan origin and that SIB and SGC knowingly aided and abetted the other individual defendants in their perpetration of the scheme.

196. In or around 2006, a former employee of a Stanford-owned entity filed a private whistle-blower lawsuit against Stanford and SGC. The suit, filed in Miami-Dade County Circuit Court in Florida, charged that SGC was attracting clients by selling CDs with artificially high yields and was operating a "Ponzi" scheme. The plaintiff also alleged that he was fired for raising concerns that the firm's practices violated federal and state laws. In addition, it was alleged that Stanford was bribing Antiguan regulators to keep them from passing money laundering legislation. After the presiding judge gave the plaintiff permission to depose Stanford, SGC became interested in settling and did so in December 2007.

197. In or around June 2007, the National Association of Securities Dealers (the "NASD") censured SGC and fined it US$20,000 for failing to establish and maintain a supervisory system reasonably designed to achieve compliance with applicable securities laws, regulations and NASD rules, and failing to maintain its required minimum capital.

198. In or around June 2007, World-Check added SGC to its database as a financial institution that posed a heightened risk. The resulting World-Check report reported that SGC was connected to, among others, Stanford, Davis and Pendergest-Holt. At the time that World-Check added SGC to its database, World-Check indicated that one or more public sources had reported that SGC distributed sales literature that failed to present a fair and balanced treatment of investment

risks and benefits, and contained misleading, unfair and unbalanced information. In addition, it appears on the face of the World-Check report that, prior to SIB being shut down in February 2009, World-Check updated its database to note that FINRA had censured and fined SGC on various occasions, that SGC had failed to adopt necessary supervisory procedures with respect to public disclosure and that SGC was alleged to be involved in a US$8 billion pyramid scheme.

199. SIB's 2007 Annual Report claimed that SIB's investment portfolio consisted of 58.6 percent equity, 18.6 percent fixed income, 15.6 percent alternative investments (i.e. hedge funds) and 7.2 percent precious metals. The 2007 Annual Report thus described SIB's portfolio as a "well-diversified portfolio of highly marketable securities issued by stable governments, strong multi-national corporations and major international banks". Other than the fixed income, the typical performance of every component of this investment allocation was volatile and subject to significant risk. SIB's 2007 Annual Report was therefore internally inconsistent because the purported composition of SIB's portfolio was at odds with the consistently high rates of return that SIB claimed to generate.

200. In or around January 2008, FINRA censured SGC and fined it US$10,000 for distributing misleading, unfair and unbalanced information about the CDs, as well the fact that the relationship between SIB and SGC could create a conflict of interest.

201. In 2008, SIB also disclosed that it had incurred a loss of 1.3 percent amidst one of the worst financial crises in history. In that same year, the S&P 500 lost 39 percent and the Dow Jones STOXX Europe 500 Fund lost 41 percent of their respective values.

202. In September 2008, the U.S. Federal Reserve Board served a subpoena on the Miami office of STC. The subpoena requested documents relating to, among other things, the

relationship between STC and Stanford Trust Company Ltd. (Antigua), as well as documents related to SIB CDs between STC and other SFG entities.

203. In or around September 2008, FINRA censured SGC and fined it US$10,000. Among other things, FINRA's findings stated that SGC's supervisory system did not provide for supervision reasonably designed to achieve compliance with applicable securities laws, as appears from the September 2008 FINRA report.

204. As detailed further below, in or around 2008, a major international clearing house, Pershing, announced that it could not verify Stanford was not involved in fraud of some nature.

205. In or around January 2008, two former top executives of SGC, Mark Tidwell ("Tidwell") and Charles Rawl ("Rawl") filed a wrongful dismissal claim against SGC. The claim alleged that SGC failed to file necessary forms with the U.S. Treasury disclosing its clients' offshore holdings and did not advise clients to file those forms. It also alleged that SGC purged files and destroyed documents as early as 2007 related to what Tidwell and Rawl claimed was an ongoing SEC investigation regarding practices relating to the sale of CDs. The suit also alleged that SGC gave clients false historical performance data for its securities.

206. In or around 2008, media reports indicated that the SEC was investigating SIB's CD sales and that it had issued subpoenas to two former SGC employees, Tidwell and Rawl, who, as previously noted, had sued SGC.

207. In or around January 2009, media reports described SIB as being a fraud. These reports noted that it was a "red flag" that the interest rates on CDs were as high as they were and that SIB's business model required depositors giving funds to the bank to invest in the market. They

also noted that it was suspicious that SIB had consistently achieved above-average results in all of its investment categories.

208. In or around January 2009, FINRA censured SGC and fined it US$30,000 for failing to adequately disclose the research methods used to report certain securities valuations and that it was making a market in the company's securities.

209. On or around February 11, 2009, *Bloomberg Businessweek* reported that the SEC, the Florida Office of Financial Regulation and FINRA were all investigating SFG. The report stated that the probe's focus was on the high-yield CDs and the investment strategy behind them, as well as how SFG could afford to provide employees with large bonuses, luxury cars and expensive vacations, especially in light of the fact that selling CDs is usually a low-margin business. The report also noted that SIB was audited by a small accounting firm, the principal of which had died on January 1, 2009.

210. TD Bank was actually aware of certain of the publicly-available information in respect of SIB. For instance, in response to a July 2008 *Bloomberg* article entitled "SEC Investigating Stanford Group Offshore-Back CDs", TD Bank contacted personnel from SIB and/or SFG and indicated that its "main question and concern about the Bloomberg article is about the alleged SEC investigation into SIB's sale of CDs into the US. This is the central and more significant issue in the media reports." Soon thereafter, Davis advised another SIB employee that TD Bank "was beginning to get nervous because of all the rumors circulating about SFG."

211. Notwithstanding TD Bank's concerns and the extensive publicly-available information in respect of Antigua, SIB and Stanford, all of which TD Bank was required to be aware of and consider, TD Bank took absolutely no steps whatsoever to limit SIB's banking activities or report

to any regulatory authority at all until receiving the freeze order dated March 12, 2009 from the SEC, nearly a month after SIB's collapse.

D. Similarly Situated Entities Knew of the SIB Looting or Refused to Provide Services

212. As a result of the extensive publicly-available information, even without the benefit of the window into SIB's affairs such as the one enjoyed by TD Bank, the SIB Looting was widely known in the law enforcement, AML and banking communities from at least 1997. TD Bank is part of these communities.

213. Notably, and as described below, other entities and regulators that were part of these communities concluded that business should not have been conducted with SIB or, in some cases, that the SIB Looting was taking place.

SocGen

214. For instance, on July 5, 2000, a report in respect of BOA was provided by a U.K. consulting firm, "Proximal Consulting", to a Swiss-based bank, Compagnie Bancaire Genève, which was subsequently acquired by SocGen in 2003 (the "Proximal Report"). The Proximal Report is a due diligence report that was completed in only a few hours and at a cost of only £500. It summarizes a compliance review of the affairs of BOA. In doing so, it also commented on both Stanford and SIB. For instance, paragraphs 4.3 – 4.4 of the Proximal Report state:

> In a controversial move in 1997, Lester Bird asked Stanford to undertake the task of tightening anti money laundering regulation in Antigua as a response to international pressure. Stanford created a board with himself as President to implement the changes and over 18 months, new laws to control money laundering were implemented. Five offshore "banks" were closed and 20 more were reviewed; "know your customer" laws were strengthened. However, the US authorities viewed Stanford's financing and participation of the board and his ownership of banks on the island as a conflict of interests. Moreover, the new law is reviewed as having substantial loopholes and making it more difficult to obtain

bank records. This led to the issue of the FinCEN advisory notice that is attached to this report.

The attached FinCEN advisory appears to have been conceived by the US State Department's Bureau of International Narcotics and Law Enforcement Affairs who are particularly concerned with the role and influence of R. Allen Stanford. One senior official from another US Government agency has been quoted on Stanford as saying, "Try as we might, we have never been able to come up with anything on him."

215. At paragraph 4.5, the Proximal Report states that "in relation to SIB, court documents we have seen show that":

Juan Zepeda Mendes, an influential member of the Carlillo Fuentes organization [Mexico's largest drug cartel at the time], opened an account in his name at SIB on 6 June 1997 with a transfer of $104,000 from Bear Stearns that we [sic] followed by subsequent transfers from Bear Stearns of $400,000 (19 June 1997) and $200,000 (2 July 1997).

Jorge Bastida, another influential member of the Carlillo Fuentes organization, deposited $1,191,332 in his account at SIB that consisted of five cheques all dated 18 April 1997 with consecutive numbers all drawn on an account of a Mexican Casa de Cambio.

216. Paragraph 4.6 of the Proximal Report addresses Stanford's involvement in and departure from banking in Montserrat. It states:

It is alleged that RAS previously owned a bank in Montserrat but he relinquished the licence in 1989/90. Further claims are that his voluntary relinquishment was due to the fact that the British Police were just about to engineer the formal revoking of the licence. Based on this information, there is a widely held view that SIB has had a somewhat dubious reputation for many years, but this has never been the subject of official action.

217. Paragraphs 5.1 and 5.2 of the Proximal Report discuss Antigua. They state:

Antigua has obtained a reputation as being a jurisdiction that has done very little about money laundering and has thus been the target of (in particular) South American and Russian criminals who have used the financial infrastructure of the island to successfully launder funds. This was highlighted by the collapse of the European Union Bank.

> Following the issue of the US Government Advisory Notice (which is attached to this report in full) many financial institutions based in Antigua have found it difficult to establish or continue correspondent banking relationships particularly with US based or owned banks. Unconfirmed reports suggest that one large US bank has closed all of its correspondent relationships with banks in Antigua.

218. In light of the foregoing, the Proximal Report concludes:

> The Bank of Antigua itself as a prospective partner and/or client of [SocGen] poses no problem in itself, as the bank is a domestic one operating solely in Antigua with no direct links to money laundering or other criminal activity. However, if the Bank of Antigua is being used as a channel to introduce clients from Stanford International Bank (or other customers not resident in Antigua) to [SocGen] we have concerns as to the consequences of this. Firstly it is an accepted fact that Stanford International Bank has been used by Mexican drug cartels to launder considerable volumes of criminally obtained funds. Secondly, because of the very high level of attention given to Antigua as a money laundering centre, it would be very difficult for [SocGen] to defend itself or its reputation should any problems occur in the future.

219. Notwithstanding its actual knowledge of the fact of "widely accepted" criminal money laundering activity at SIB and in Antigua generally, SocGen continued to provide banking services to SIB and Stanford until the collapse of SIB in February 2009. However, it has been alleged by Davis that Blaise Friedli, the principal officer at SocGen, was a friend of Stanford. He also alleged that both Friedli and other unnamed officials at SocGen received bribes from Stanford to ensure that SIB and SFG would continue to receive SocGen's services.

The SEC

220. The SEC office in Forth Worth, Texas reviewed the operations of SGC and its sale of SIB CDs in 1997. At that time, after only six days of field work in examination of Stanford and his companies, the SEC came to the conclusion that Stanford was likely operating a "Ponzi" scheme. SEC examiners concluded that SIB's statements promoting SIB CDs appeared to be misrepresentations. Those examiners noted that the interest rates purportedly paid on SIB CDs, combined with the large referral payments being made to SGC and SFG, were simply too high to

be achieved through the purported low-risk investments. Taking into account these and other facts, the SEC's Fort Worth branch chief concluded that the returns on SIB CDs were "absolutely ludicrous".

221. The SEC's office in Forth Worth conducted additional investigations into SGC and SIB in 1998, 2002 and 2004. Each examination resulted in the conclusion that the SIB CDs could not have been "legitimate" and that it was "highly unlikely" that the returns Stanford claimed to generate could have been achieved with the purported conservative investment approach. The only significant difference in the SEC's findings over the years was that the fraud grew exponentially from US$250 million to US$1.5 billion.

222. The SEC brought an end to the SIB Looting in February 2009, but its failure to do so earlier was the subject of a March 2010 report by the SEC's Office of the Inspector General. That report concluded that the SEC's failure to end the fraud on SIB and bring Stanford to justice did not result from a lack of evidence that the fraud on SIB was taking place. Rather, the report found that senior officials at the SEC's Fort Worth office felt that prosecuting large novel or complex cases was disfavoured in comparison to prosecuting numerous "quick-hit" cases.

223. In addition, the report found that the former head of the enforcement branch at the SEC's Fort Worth office, Spencer Barasch, who played a significant role in the multiple decisions to quash investigations of Stanford, sought to represent Stanford as legal counsel on three separate occasions after he left the SEC and, in fact, did represent Stanford briefly in 2006 before the SEC informed him he could not do so. As a result, he received the maximum allowable fine for a violation of U.S. conflict-of-interest rules and was barred from practicing before the SEC for one year due to his actions in connection with Stanford.

Pershing LLC

224. SGC entered into a "clearing agreement" with international clearing house Pershing in December 2005. Initially, Pershing processed wire transfers from client accounts it held for the purchase of SIB CDs. However, by approximately mid-2006, Pershing became concerned about the financial reliance of SGC on SIB because SGC was losing money and a significant portion of its revenue consisted of referral payments from SIB.

225. As a result, in the summer of 2006, Pershing began to ask for verification of SIB's assets and the returns generated by the SIB portfolio. When SGC responded with only generalities about SIB's investment policy, Pershing increased its due diligence efforts in respect of SIB. These efforts included, among other things, attempting to acquire a complete SIB CD prospectus and travelling to Antigua to meet with SIB personnel and SIB's regulator, the FSRC, to see documentation regarding SIB's balance sheet and the supporting paperwork that reflected the assets. However, in each instance, Pershing was met with stonewalling and excuses by SIB personnel, as well as by Leroy King, the senior-most official at the FSRC, who Stanford had bribed.

226. Ultimately, due to its continued concerns over its inability to gain transparency into SIB's portfolio, Pershing notified SGC that it would no longer process wire transfers from SIB. In connection with doing so, in December 2008, Pershing announced that it could not verify Stanford was not involved in fraud of some nature.

Ferrier Lullin & Cie

227. At least as of 2000, Swiss-bank Ferrier Lullin & Cie (now Julius Bar Group Ltd.) ("Ferrier Lullin") acted as the custodian for SIB's investments with Axia Investments in Switzerland.

228. Ferrier Lullin commissioned and received a due diligence report in respect of SIB dated May 10, 2002. Among other things, that report noted that:

(a) in the 1990s, "Antigua's offshore sector became more worrisome as individuals believe to have ties to Russian organized crime moved in";

(b) Stanford was appointed to spearhead the effort to reform Antigua's banking laws and later appointed to the board of authority to oversee Antigua's offshore banks. This was the case notwithstanding that Stanford owned the largest bank to be supervised;

(c) the U.S. State Department issued a report calling Antigua "one of the most attractive financial centers in the Caribbean for money launderers" and later stated that "[i]ndividuals suspected of involvement in money laundering and other illicit economic activities used their considerable influence to weaken Antigua's AML legislation", a clear reference to Stanford; and

(d) the U.S. had issued the FinCEN Advisory and that U.K. and French officials soon after voiced similar concerns.

229. In July 2003, an internal Ferrier Lullin memorandum confirmed concerns about Stanford and SIB. It noted that Ferrier Lullin employees from various departments had made inquiries

about SIB and had asked, among other things, whether SIB was truly a bank and if SIB was a shell bank being used to avoid rules in the U.S.

JP Morgan Chase

230. Between 1994 and 2003, the Middle Market division of JP Morgan Chase opened 22 bank accounts for SFG. During the same period, the Private Banking division of JP Morgan Chase held bank accounts for Stanford in his personal capacity. However, as a result of monitoring Stanford's accounts, the Private Banking division of JP Morgan Chase found "significant unfitting activities occurring in the accounts of R. Allen Stanford" and therefore closed those accounts.

231. Upon being notified that the Private Banking division of JP Morgan Chase had ended its relationship with Stanford, the Middle Market division began reviewing and more closely monitoring SFG's accounts. As a result of doing so, the Middle Market divison determined that it was "unable to obtain a reasonable explanation of the customer's account activities" and subsequently filed a Suspicious Activties Report in respect of SFG transactions totaling more than $170 million between January 1, 2003 and August 29, 2003. The Suspicious Activities Report identified various transactions giving rise to concerns about violations of the U.S. *Bank Secrecy Act* and money laundering. Such transactions included those with entities in Antigua, entities related to SFG (including SIB) and with TD Bank.

Synder Kearney LLC

232. In 2008, SGC engaged Snyder Kearney LLC ("Snyder Kearney"), a prominent U.S. law firm, to perform due diligence in respect of two private fund offers that were sponsored by SGC and managed by another Stanford-owned entity, Stanford Capital Management. Synder Kearney

initially accepted the engagement and thereafter requested verification of SIB's portfolio. However, SGC refused to provide the relevant information and Snyder Kearney promptly withdrew from the engagement.

First Advantage Investigative Services

233. Due diligence in respect of SIB CDs was also undertaken by or on behalf of certain prospective investors. For instance, Randy Shain ("Shain") of the New York-based First Advantage Investigative Services was retained to conduct due diligence in respect of SIB and SIB CDs on behalf of a client.

234. In completing such due diligence, Shain identified and reviewed certain of the "open source" information in respect of SIB and Stanford outlined above. Such information pertained to, among other things, various lawsuits filed against Stanford or his companies, all of which alleged money laundering and other impropriety, Antigua's AML deficiencies and Stanford's involvement therewith, and certain of Stanford's bribes and conflicts of interest.

Fidelity Investments

235. Fidelity Investments commenced providing services to SIB and SGC. However, following its attempt to conduct certain due diligence activities, it soon thereafter terminated the relationship.

Chase Manhattan Bank

236. In its earlier years, SIB (then known as Guardian) had a correspondent banking relationship with Chase. However, Chase ended its relationship with SIB over concerns about double endorsed cheques.

First Interstate Bank

237. First Interstate Bank began providing correspondent banking services to SIB (then known as Guardian) to SIB in the late 1980s. It ended its relationship with SIB in the early 1990s. It has been reported that First Interstate Bank provided money laundering services to alleged narcotics traffickers and was placed under investigation by U.S. Federal authorities. Stanford reportedly personally knew the directors of First Interstate Bank at the time, who were themselves suspected of being involved in the alleged money laundering activities.

Citizens & Southern Bank

238. In December 1990, when BOA was purchased by Stanford, Citizens & Southern Bank ("C&S") of Atlanta, Georgia was BOA's correspondent bank. Stanford attempted to "piggyback" SIB into a correspondent banking relationship with C&S based upon BOA's pre-existing relationship. C&S, however, promptly closed the SIB U.S. dollar account of BOA and informed Stanford that he could not indirectly use BOA's correspondent banking relationship for SIB. As a result, Stanford and some of the Other Insiders flew to C&S Headquarters in Atlanta to try to convince C&S to independently approve a correspondent banking relationship with SIB. C&S did not approve SIB for a correspondent banking relationship, so the entire group travelled to Thibodaux, Louisiana in an attempt to rectify problems that SIB was also then having with its correspondent banking relationship with First Interstate Bank.

Bank of America

239. Bank of America provided SIB with correspondent banking services over the course of approximately one year, which occurred in or around 1993 and 1994. During that period, Bank of America's Compliance Department repeatedly insisted to Bank of America's management that providing services to SIB constituted an intolerable risk as a result of AML concerns. After one

year of providing such services, Bank of America's management came to agree with the warning of the Compliance Department and ended its relationship with SIB.

The NASD

240. The NASD concluded as early as 2006 that SGC violated NASD rules through "unwarranted and misleading" assertions that SIB's portfolio investments were "prudent" at a time when SGC admitted that it did not know what was in SIB's portfolio.

U.S. Customs

241. Even as far back as the early 1990s, U.S. Customs officials noted that SIB (then known as Guardian) had "constant cash flow" from foreign depositors but "no regulation of its activities" and U.S. Customs took an interest in the "possible smuggling activities of principals in the Stanford organization."

242. The aforementioned conclusions were reached by the above-listed entities, all of which did not have TD Bank's extensive access to SIB and its operations. TD Bank's approach differed from other entities that were similarly required to and did undertake due diligence on SIB. For instance, when Pershing was met with stonewalling and excuses by SIB personnel, Pershing stopped providing services to SIB. By comparison, TD Bank:

(a) did not ask questions or demand answers as it was required to do and that would have revealed the secret kept by Stanford and the Other Insiders in respect of Tier III and the SIB Looting, in which case it fell below the standard of care;

(b) asked the required questions but was denied answers and nonetheless continued to provide banking services to SIB, in which case it fell the standard of care; or

(c) asked the required questions and was provided the answers and thereby became expressly aware of the true nature of Tier III and the SIB Looting, but nonetheless continued to provide banking services to SIB, in which case it fell below the standard of care.

243. In all of the circumstances, TD Bank should not have provided banking services to SIB.

VI. APPLICABLE BANKING STANDARDS AND LAWS

244. The standard practices and procedures undertaken by Canadian financial institutions that enter into correspondent banking relationships derive from a combination of standards developed by financial regulators and relevant financial industry organizations, as well as legislative and statutory duties. The banking standards and laws that were applicable to TD Bank during the period that it provided correspondent banking services to SIB are set out below.

A. Financial Regulators and International Organizations Set the Standards

1. The Applicable Standards

245. Financial regulators and international organizations focused on the global financial system have for decades developed, monitored and implemented standards aimed at detecting, deterring and preventing money laundering. In addition to establishing standards for financial institutions concerning client identification and account monitoring, these regulators and organizations have long warned that correspondent banking relationships with foreign financial institutions often facilitate money laundering and that, as a result, correspondent accounts merit particular care, as well as enhanced due diligence and monitoring. This is especially the case with respect to accounts involving the provision of services in jurisdictions known to have relaxed regulatory standards for banks, since failure to exercise such care may result in the

correspondent bank holding and/or transmitting money linked to corruption, fraud or other illegal activity.

246. In Canada, federally regulated financial institutions ("Financial Institutions") such as TD Bank are regulated by the Office of the Superintendent of Financial Institutions ("OSFI"). Since 1990, OSFI has developed standards for Financial Institutions concerning AML compliance. These standards are contained in the following relevant documents:

(a) OSFI Best Practices: Deterring and Detecting Money Laundering, 1990 (the "1990 OSFI Standards");

(b) OSFI Guideline B-8, Deterring and Detecting Money Laundering, September 1996 (the "1996 OSFI Standards");

(c) OSFI Guideline B-8, Deterring and Detecting Money Laundering, April 2003 (the "2003 OSFI Standards");

(d) OSFI Guideline B-8, Deterring and Detecting Money Laundering, November 2004 (the "2004 OSFI Standards");

(e) OSFI Guideline B-8, Deterring and Detecting Money Laundering, November 2008 (the "2008 OSFI Standards")

(collectively, the "OSFI Standards").

247. TD Bank was consulted by OSFI when the OSFI Standards were drafted.

248. Since 2000, the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC") has been responsible for ensuring Financial Institutions' compliance with

Canadian AML standards pursuant to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 (the "PCMLTFA"). However, OSFI has continued to include AML compliance in its examinations of Financial Institutions for its own purposes, and as part of its memorandum of understanding with FINTRAC to perform AML compliance on its behalf.

249. Financial Institutions are also subject to the standards developed by the Basel Committee on Banking Supervision, which are contained in the following relevant documents:

(a) Customer Due Diligence for Banks, October 2001 (the "2001 Basel Standards");

(b) (i) General Guide to Account Opening and Customer Identification, February 2003, and (ii) Initiatives by the Basel Committee on Banking Supervision et al to combat money laundering and the financing of terrorism, June 2003 (together, the "2003 Basel Standards"); and

(c) Consolidated KYC Risk Management, October 2004 (the "2004 Basel Standards")

(collectively, the "Basel Standards").

250. Canada endorsed the Basel Standards.

251. The Financial Action Task Force (the "FATF") is an intergovernmental body that develops, monitors and evaluates countries' AML standards. The FATF has established standards applicable to Financial Institutions, which are contained in the following relevant documents:

(a) FATF 40 recommendations, 1990 (the "1990 FATF Standards");

(b) FATF 40 recommendations, 1996 (the "1996 FATF Standards");

(c) FATF 40 recommendations, 2003 (the "2003 FATF Standards"); and

(d) FATF Guidance on the Risk-Based Approach to Combating Money Laundering and Terrorist Financing, 2007 (the "2007 FATF Standards")

(collectively, the "FATF Standards").

252. Similarly, Financial Institutions are required to meet the standards developed by the Wolfsberg Group ("Wolfsberg"). Wolfsberg is an international association of banks which aims to develop financial service industry standards for, among other things, AML policies pertaining to correspondent banking. Such standards were established in AML Principles for Correspondent Banking, 2002 (the "2002 Wolfsberg Standards" or the "Wolfsberg Standards").

253. During the time period that TD Bank provided correspondent banking services to SIB, the OSFI Standards, the Basel Standards, the FATF Standards and the Wolfsberg Standards (together, the "Applicable Standards") were binding on TD Bank and informed the standard of reasonable banking that it was obliged to meet. By providing banking services to SIB, TD Bank failed to meet the Applicable Standards.

254. Notably, throughout the period that TD Bank provided correspondent banking services to SIB, it completed and submitted questionnaires to Wolfsberg. In each instance, TD Bank's completed questionnaires indicated that it had in place and adhered to strong KYC and AML policies, all of which were in compliance with the Wolfsberg Standards. However, it is clear that TD Bank was in fact not in such compliance.

2. Timeline of the Standards' Implementation

255. The Applicable Standards informed the standard of reasonable banking that TD Bank was obliged to meet during the time that it provided correspondent banking services to SIB. The Applicable Standards evolved as each of the individual standards was revised. The result of each revision to one of the OSFI Standards, the Basel Standards, the FATF Standards or the Wolfsberg Standards was that the Applicable Standards were continuously updated, strengthened and made more onerous over the time period that TD Bank provided correspondent banking services to SIB.

The 1990 Applicable Standards

256. Beginning in 1990, approximately two years prior to TD Bank beginning to act as correspondent bank for SIB, TD Bank was required to implement and follow policies and procedures that were compliant with the 1990 FATF Standards. Among other things, the 1990 FATF Standards required Financial Institutions to:

(a) undertake due diligence on all clients;

(b) develop AML policies, procedures and controls;

(c) develop screening procedures for prospective employees and provide those employees with ongoing training with respect to AML compliance;

(d) pay special attention to business relationships and transactions with clients and other financial institutions that did not sufficiently apply the FATF Standards; and

(e) report all suspicious transactions to the appropriate authorities, with particular emphasis placed on funds Financial Institutions suspected were derived from criminal activity.

257. As a result of the 1990 FATF Standards, Financial Institutions were required to take care when entering into relationships with new clients, but also to review and monitor the accounts of existing clients.

258. The 1990 FATF Standards also required Financial Institutions to gather sufficient client identification information about respondent institutions and assess respondent institutions' AML controls when acting as a correspondent bank. This was true with respect to both new and existing correspondent bank clients.

The 1996 Applicable Standards

259. By 1996, in addition to complying with the previously implemented Applicable Standards, Financial Institutions were required to comply with the 1996 OSFI Standards and the 1996 FATF Standards.

260. The 1996 OSFI Standards explicitly recognized that Financial Institutions' most important weapon against money laundering was knowledge of their clients. In keeping with this recognition, among other things, the 1996 OSFI Standards required Financial Institutions to:

(a) take special care when opening accounts for foreign deposit-taking institutions;

(b) subject the activities of all clients, regardless of their risk profile, to some form of ongoing monitoring to detect transactions or attempted transactions that may be suspicious;

(c) establish an annual self-assessment program to assess the effectiveness of their AML programs and procedures, the purpose of which was to enable management to identify areas of risk or assess the need for additional controls;

(d) have, as part of their deterrence and detection procedures, a process to promptly identify and report suspicious transactions, particularly transactions relating to pass-through accounts, such as correspondent banking accounts, both internally to senior management and to the appropriate authorities; and

(e) undertake enhanced monitoring of pass-through accounts, such as correspondent banking accounts, using high risk indicators, such as, for example, the accumulation of balances inconsistent with known revenue or turnover and subsequent transfers to accounts held overseas.

261. In addition, among other things, the 1996 FATF Standards required Financial Institutions to:

(a) identify and verify through official or other reliable documents the identity of their clients;

(b) designate compliance officers at the senior management level to ensure compliance with their AML programs;

(c) implement enhanced due diligence procedures to be utilized in higher risk situations; and

(d) pay particular attention to complex or unusual transactions with no apparent economic purpose or visibly lawful purpose and examine the background of such transactions, with the findings being documented in writing and made available to supervisors, auditors and law enforcement agencies.

The 2001 Applicable Standards

262. By 2001, in addition to complying with the previously implemented Applicable Standards, Financial Institutions were required to comply with the 2001 Basel Standards.

263. Among other things, the 2001 Basel Standards required Financial Institutions to:

(a) obtain financial statements and descriptions of clients' principal lines of business with respect to large corporate accounts;

(b) understand the normal and reasonable account activity of all clients in order to reduce risk;

(c) perform enhanced due diligence if the Financial Institution had any reason to believe that an applicant was being refused banking facilities by another bank;

(d) conduct regular reviews of existing client identification records in order to ensure that those records remained up-to-date;

(e) conduct regular reviews of a client's account whenever a significant transaction took place, client documentation standards changed or the way the account operated changed;

(f) develop KYC risk management programs that included proper management oversight, systems and controls, segregation of duties, training and other related policies;

(g) determine whether they were engaged in business relationships with any PEPs and identify any individuals or entities associated with a PEP;

(h) ensure that senior managers knew the circumstances of high risk private banking clients and, with respect to those clients, were aware of relevant third party information; and

(i) ensure that internal audit teams were adequately staffed with individuals who were well-versed in risk management policies and controls.

264. The 2001 Basel Standards also required Financial Institutions to have in place clear client acceptance policies and procedures that described the types of customers that posed a higher risk and ensured enhanced due diligence took place with respect to such higher risk clients. Where high risk clients posed problems in the banking relationship that could not be resolved, Financial Institutions were required to close the account and return money to its source.

265. The 2001 Basel Standards also recognized that certain types of transactions should alert Financial Institutions to the possibility that a client is conducting unusual or suspicious activities. Such transactions were specifically recognized to include those that did not readily appear to

make economic or commercial sense, or those that involved large amounts of cash deposits that were inconsistent with the normal and expected transactions of a particular variety of client.

266. Notably, the 2001 Basel Standards noted that very high account turnover, inconsistent with the size of the balance, may indicate that funds were being moved through the account for an improper purpose.

267. In addition, the 2001 Basel Standards specifically addressed correspondent banking. In particular, the Basel Standards required that Financial Institutions conduct appropriate levels of client identification in order to fully understand the nature of a respondent bank's business and that Financial Institutions employ enhanced due diligence procedures with respect to any transactions carried out through correspondent banking accounts.

268. Finally, pursuant to the 2001 Basel Standards, Financial Institutions were required to pay particular attention when undertaking or continuing correspondent banking relationships with a respondent bank located in a jurisdiction with poor KYC standards.

The 2002 Applicable Standards

269. By 2002, in addition to complying with the previously implemented Applicable Standards, Financial Institutions were required to comply with the 2002 Wolfsberg Standards.

270. The 2002 Wolfsberg Standards required Financial Institutions to utilize a risk-based approach to decide whether to initiate a relationship with a correspondent banking client and the level of due diligence required to continue such relationships. When conducting due diligence with respect to a correspondent banking client, among other things, Financial Institutions were required to consider:

(a) the client's domicile and organization;

(b) the client's ownership and executive management;

(c) the nature of the client's business;

(d) the products and services offered by the client;

(e) the client's regulatory status and history;

(f) the client's AML controls;

(g) whether the client had any business arrangements with shell banks; and

(h) the client's adherence to the Wolfsberg Standards.

271. The 2002 Wolfsberg Standards also required required Financial Institutions to conduct independent, risk-based reviews of all existing correspondent banking accounts to ensure compliance with the policies and procedures of the Financial Institution, and determine whether additional due diligence was required. When conducting such reviews, Financial Institutions were required to consider the same type of information as was required for new correspondent banking clients.

272. The 2002 Wolfsberg Standards required that at least one person senior to and other than the banker responsible for a particular correspondent account approve all correspondent banking relationships, including previously existing relationships. The 2002 Wolfsberg Standards also required a representative of the Financial Institution to visit the premises of correspondent banking clients in order to conduct due diligence.

273. The 2002 Wolfsberg Standards also noted that enhanced due diligence may be required for correspondent banking clients whose risk profile was higher than that of a typical correspondent banking client. This enhanced due diligence was required to focus on:

(a) ownership and management of the correspondent banking client;

(b) involvement of any PEP with the correspondent banking client;

(c) the correspondent banking client's AML controls; and

(d) any downstream correspondent clearing.

274. Finally, the 2002 Wolfsberg Standards required Financial Institutions to establish organization-wide policies and programs to address unusual or suspicious transactions. These policies and programs were required to provide examples and guidance as to what was to be considered unusual or suspicious and establish reporting protocols in accordance with applicable laws.

The 2003 Applicable Standards

275. By 2003, in addition to complying with the previously implemented Applicable Standards, Financial Institutions were required to comply with the 2003 OSFI Standards, the 2003 FATF Standards and the 2003 Basel Standards.

276. Among other things, the 2003 OSFI Standards required Financial Institutions to:

(a) ensure that senior management was responsible for the development of AML and risk management programs;

(b) keep their boards of directors adequately informed about their AML and risk management programs and those programs' effectiveness;

(c) obtain their boards of directors' approval of their AML and risk management programs at both the initial implementation stage and whenever those programs were reviewed; and

(d) report all suspicious transactions in accordance with applicable legislation.

277. Among other things, the 2003 FATF Standards required Financial Institutions to:

(a) have a risk management system in place to determine the existence of any clients or potential clients who were PEPs; and

(b) incorporate AML policies that addressed the risks associated with non-face-to-face business relationships and transactions.

278. With respect to PEPs, in addition to normal due diligence measures, according to the 2003 FATF Standards, Financial Institutions were required to ensure that senior management approval was granted before establishing the business relationship. They were also required to establish the source of any PEP's wealth and funds and to conduct enhanced, ongoing monitoring of their business relationship with any PEP.

279. With respect to correspondent banking clients, the 2003 FATF Standards also required Financial Institutions to determine from publicly available information the reputation of the respondent institution and whether it had been the subject of past money laundering or terrorist financing investigations or regulatory action.

280. Among other things, the 2003 Basel Standards required Financial Institutions to take decisions to enter into business relationships with higher risk clients, including correspondent banking clients, at the senior management level.

281. The 2003 Basel Standards also required Financial Institutions to develop risk management programs that ensured consistent client identification and account monitoring across the Financial Institutions' business lines and geographic locations.

282. Finally, the 2003 Basel Standards explicitly required that Financial Institutions implement rigorous standards for due diligence in high risk areas and develop policies and standards for handling relationships in such areas. One type of high risk relationship identified by the 2003 Basel Standards were those between a Financial Institution and a PEP.

The 2004 Applicable Standards

283. By 2004, in addition to complying with the previously implemented Applicable Standards, Financial Institutions were required to comply with the 2004 OSFI Standards and the 2004 Basel Standards.

284. Among other things, the 2004 OSFI Standards required Financial Institutions to:

(a) conduct higher levels of due diligence when dealing with clients from countries with AML requirements that were considered inadequate; and

(b) have customer identification and verification processes which were fully compliant with the PCMLTFA.

285. In addition, the 2004 Basel Standards required Financial Institutions to implement risk management policies and procedures to be applied across their various business lines and geographic locations. In particular, among other things, the 2004 Basel Standards required Financial Institutions to:

(a) develop standards on what records are to be obtained and retained for customer identification across their banking groups as a whole;

(b) maintain client identification information in a readily retrievable format that was accessible globally by their banking groups as a whole;

(c) have in place systems and processes to monitor and share information on the identity of clients and client account activity throughout their banking groups as a whole;

(d) be alert to clients that use their various business lines across different banking groups (for example, banking, securities and insurance) and undertake transaction monitoring on both a local and centralized basis;

(e) have their internal and external audits evaluate adherence to compliance with relevant standards across their banking groups as a whole; and

(f) implement policies and procedures to identify unusual account activity throughout their banking groups as a whole, regardless of how those accounts were utilized.

The 2007 Applicable Standards

286. By 2007, in addition to complying with the previously implemented Applicable Standards, Financial Institutions were required to comply with the 2007 FATF Standards.

287. Among other things, the 2007 FATF Standards required Financial Institutions to:

(a) utilize information generated by competent third parties to identify suspicious activity;

(b) exercise increased awareness of higher risk clients and any transactions such clients undertook across their various business lines; and

(c) develop policies and procedures so that senior management could independently validate the development and operation of their risk assessment and risk management processes.

The 2008 Applicable Standards

288. By 2008, in addition to complying with the previously implemented Applicable Standards, Financial Institutions were required to comply with the 2008 OSFI Standards.

289. Among other things, the 2008 OSFI Standards required Financial Institutions to:

(a) comply with all PCMLTFA requirements, including with respect to correspondent banking;

(b) take reasonable measures to obtain the names and occupations of all directors and beneficial owners of 25 percent or more of their corporate clients;

(c) report all transactions or attempted transactions that were suspicious to FINTRAC;

(d) conduct self-assessment of AML controls at least annually; and

(e) have independent auditors conduct effectiveness testing of their AML controls at least every two years, with the results thereof being reviewed by a senior officer.

290. In addition, the 2008 OSFI Standards explicitly recognized that the identity and beneficial ownership of a client can be determined using a credible public or other database and that enhanced account monitoring should include the gathering of information from open public sources.

291. The 2008 OSFI Standards also required that, where a Financial Institution determined that a foreign financial institution for which it provided correspondent banking services did not have in place AML policies consistent with the PCMLTFA, ongoing monitoring of all transactions should occur to mitigate the higher risk.

292. Further, the 2008 OSFI Standards required Financial Institutions to determine whether a client is a politically exposed foreign person ("PEFP"). When making that determination, Financial Institutions were required to consult public databases. According to the 2008 OSFI Standards, if a Financial Institution had a client who was a PEFP, the Financial Institution was required to:

(a) take measures to determine the source of the PEFP's funds;

(b) obtain senior management approval to open or maintain the PEFP's account; and

(c) conduct enhanced ongoing monitoring of the PEFP's account.

293. Similarly, where a Financial Institution was aware that a PEFP owned or control 25 percent or more of a corporate client, or if a PEFP was a director or officer of a corporate client, the 2008 OSFI Standards required the Financial Institution to assess the risk of providing banking services and apply enhanced due diligence as appropriate.

3. Financial Institutions Adopt the Standards

294. At all times, Financial Institutions were required to adhere to the Applicable Standards. As a result, it was customary for Financial Institutions to adopt the Applicable Standards into their banking practices.

295. For example, as a result of the Applicable Standards, since at least 1990, it was customary for Financial Institutions to continuously review existing correspondent accounts to ensure they met required standards and to close accounts and decline to provide service to correspondent banking customers that were not in compliance with such standards.

296. For instance, in 2001, several major American banks testified before the U.S. Permanent Subcommittee on Investigations that their practices in respect of correspondent banking included heightened due diligence, heightened monitoring and strict KYC procedures. More specifically, these practices included:

(a) evaluating the overall adequacy of banking supervision in the jurisdiction of the respondent bank;

(b) reviewing media reports for information on the respondent bank;

(c) establishing a detailed understanding of correspondent banking customers' ownership structure;

(d) establishing an understanding of correspondent banking customers' cash flows; and

(e) regularly preparing memoranda summarizing contacts with the bank and information about its staff and operations, all of which appears from the U.S. Senate Report.

297. Notably, one bank testified that it reviewed individual accounts, particularly Antiguan accounts, and would close the account if the review was unsatisfactory.

298. Further, in February 2000, the Ranking Minority Member of the Permanent Subcommittee on Investigations distributed a survey on correspondent banking to 20 banks providing correspondent banking services from locations in the U.S., at least two of which were Canadian banks. All 20 banks responded to the survey. The survey responses revealed the following:

(a) of the 12 banks that detailed their specified account opening procedures in response to the survey, all but three banks said that they evaluate the overall adequacy of banking supervision in the jurisdiction of the respondent bank and review media reports for information on the applicant; and

(b) a majority of the surveyed banks said they inquire about the applicant with the jurisdiction's bank regulator, check with local bank branches (if applicable), check

with bank rating agencies, obtain bank references and complete a customer profile.

299. The survey also specifically addressed the provision of correspondent banking services to offshore banks, such as SIB. In response, nine banks said they would not in any circumstance open a correspondent account for an offshore bank, while eight of the banks said there are times when they would open such an account, but that they would do so only when the offshore bank is part of a well-known financial group or a subsidiary or affiliate of an internationally reputable bank.

300. Responses to the survey also addressed the provision of correspondent banking services to an Antiguan respondent bank. The report in respect of the survey results states that "most banks have no relationships" with banks in Antigua. It further noted that one bank responded that it monitors every transaction involving Antigua, while another bank said that it does not accept any transfers from or to Antigua at all.

B. Canadian AML Legislation

301. In addition to complying with the Applicable Standards, Financial Institutions such as TD Bank are also required to comply with the laws of Canada which address AML and banking practices and directly incorporate the Applicable Standards. In Canada, such practices are primarily addressed by way of the PCMLTFA and its regulations.

302. The PCMLTFA, which was originally titled the *Proceeds of Crime (Money Laundering) Act*, came into force in 2000. Section 7 of the Act came into force in 2001 and required Financial Institutions to:

> report to [FINTRAC], in the prescribed form and manner, every financial transaction that occurs in the course of their activities and in respect of which there are reasonable grounds to suspect that the transaction is related to the commission of a money laundering offence or a terrorist activity financing offence.

303. In 2007, the PCMLTFA was amended to include codification of many of the aforementioned Applicable Standards. For instance, subsection 9.4(1) required Financial Institutions to

> take the following measures before entering into a correspondent banking relationship with a prescribed foreign entity:
>
> (a) obtain prescribed information about the foreign entity and its activities;
>
> (b) ensure that the foreign entity is not a shell bank as defined in the regulations;
>
> (c) obtain the approval of senior management;
>
> (d) set out in writing their obligations and those of the foreign entity in respect of the correspondent banking services; and
>
> (e) any prescribed measures.

304. In 2002, the General Regulation to the PCMLTFA, SOR/2002-184 (the "Regulations") came into force. The Regulations were amended in 2007 to include further codification of the aforementioned Applicable Standards. For instance, subsections 15.1(2) and 15.1(3) of the Regulations state:

> (2) Every financial entity shall, when it enters into a correspondent banking relationship, keep a record in respect of the foreign financial institution containing the following information and documents:
>
> (*a*) the name and address of the foreign financial institution;
>
> (*b*) the names of the directors of the foreign financial institution;
>
> (*c*) the primary business line of the foreign financial institution;

(*d*) a copy of the most recent annual report or audited financial statement of the foreign financial institution;

(*e*) a copy of the foreign financial institution's banking licence, banking charter, authorization or certification to operate from the relevant regulatory agency or certificate of corporate status or a copy of another similar document;

(*f*) a copy of the correspondent banking agreement or arrangement, or product agreements, defining the respective responsibilities of each entity;

(*g*) the anticipated correspondent banking account activity of the foreign financial institution, including the products or services to be used;

(*h*) a statement from the foreign financial institution that it does not have, directly or indirectly, correspondent banking relationships with shell banks;

(*i*) a statement from the foreign financial institution that it is in compliance with AML and anti-terrorist financing legislation in its own jurisdiction; and

(*j*) the measures taken to ascertain whether there are any civil or criminal penalties that have been imposed on the foreign financial institution in respect of AML or anti-terrorist financing requirements and the results of those measures.

(3) The financial entity shall take reasonable measures to ascertain whether the foreign financial institution has in place AML and anti-terrorist financing policies and procedures, including procedures for approval for the opening of new accounts and, if not, shall, for the purpose of detecting any transactions that are required to be reported to [FINTRAC] under section 7 of the Act, take reasonable measures to conduct ongoing monitoring of all transactions conducted in the context of the correspondent banking relationship.

305. Further, since 2007, Section 55.1 of the Regulations states the following with respect to correspondent banking relationships:

55.1 Every financial entity that enters into a correspondent banking relationship shall

(*a*) ascertain the name and address of the foreign financial institution by examining a copy of the foreign financial institution's banking licence, banking charter, authorization or certification to operate from the relevant regulatory agency or certificate of corporate status or a copy of another similar document; and

(*b*) take reasonable measures to ascertain, based on publicly available information, whether there are any civil or criminal penalties that have been imposed on the foreign financial institution in respect of AML or anti-terrorist

financing requirements and, if so, to conduct, for the purpose of detecting any transactions that are required to be reported under section 7 of the Act, ongoing monitoring of all transactions in the context of the correspondent banking relationship.

306. Section 9.6 of the PCMLTFA came into force in 2008 and required Financial Institutions to establish and implement compliance programs for correspondent banking relationships, and required enhanced due diligence in higher risk circumstances. Pursuant to section 9.6:

> (1) Every person or entity referred to in section 5 shall establish and implement, in accordance with the regulations, a program intended to ensure their compliance with this Part.
>
> (2) The program shall include the development and application of policies and procedures for the person or entity to assess, in the course of their activities, the risk of a money laundering offence or a terrorist activity financing offence.
>
> (3) If the person or entity considers that the risk referred to in subsection (2) is high, the person or entity shall take prescribed special measures for identifying clients, keeping records and monitoring financial transactions in respect of the activities that pose the high risk.

307. The requirements of section 9.6(3) of the PCMLTFA are further articulated in the 2008 amendments to Regulations. In particular, section 71 lays out the requirements that Financial Institutions must follow when implementing a compliance program:

> (1) For the purpose of subsection 9.6(1) of the Act, a person or entity referred to in that subsection shall, as applicable, implement the compliance program referred to in that subsection by
>
> (*a*) appointing a person — who, where the compliance program is being implemented by a person, may be that person — who is to be responsible for the implementation of the program;
>
> (*b*) developing and applying written compliance policies and procedures that are kept up to date and, in the case of an entity, are approved by a senior officer;
>
> (*c*) assessing and documenting, in a manner that is appropriate for the person or entity, the risk referred to in subsection 9.6(2) of the Act, taking into consideration
>
> (i) the clients and business relationships of the person or entity,

(ii) the products and delivery channels of the person or entity,

(iii) the geographic location of the activities of the person or entity, and

(iv) any other relevant factor;

(*d*) if the person or entity has employees, agents or other persons authorized to act on their behalf, developing and maintaining a written ongoing compliance training program for those employees, agents or persons; and

(*e*) instituting and documenting a review of the policies and procedures, the risk assessment and the training program for the purpose of testing their effectiveness, which review is required to be carried out every two years by an internal or external auditor of the person or entity, or by the person or entity if they do not have such an auditor.

(2) For the purposes of the compliance program referred to in subsection 9.6(1) of the Act, every entity referred to in that subsection shall report the following in written form to a senior officer within 30 days after the assessment:

(*a*) the findings of the review referred to in paragraph (1)(*e*);

(*b*) any updates made to the policies and procedures within the reporting period; and

(*c*) the status of the implementation of the updates to those policies and procedures.

308. In addition, section 71.1 of the Regulations require Financial Institutions to take the following steps when faced with a higher risk client:

The prescribed special measures that are required to be taken by a person or entity referred to in subsection 9.6(1) of the Act for the purpose of subsection 9.6(3) of the Act are the development and application of written policies and procedures for

(*a*) taking reasonable measures to keep client identification information and the information referred to in section 11.1 up to date;

(*b*) taking reasonable measures to conduct ongoing monitoring for the purpose of detecting transactions that are required to be reported to [FINTRAC] under section 7 of the Act; and

(*c*) mitigating the risks identified in accordance with subsection 9.6(3) of the Act.

309. The 2008 amendments to the Regulations also incorporated subsection 11.1(1). That subsection requires Financial Institutions to, having confirmed the existence of a corporate client, take reasonable measures to obtain the name and occupation of all directors of the corporation and the name, address and occupation of all persons who own or control, directly or indirectly, 25 percent or more of the shares of the client corporation.

310. Since 2008, pursuant to section 9.3 of the PCMLTFA, Financial Institutions are required to determine whether they were dealing with a PEFP. In instances where a Financial Institution determines that it is dealing with a PEFP, senior management approval is required for the banking relationship to proceed. Moreover, since 2008, subsection 14(n) of the Regulations require Financial Institutions to undertake enhanced, ongoing monitoring of their relationships with any PEFP.

311. Pursuant to section 462.31(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, anyone commits a "money laundering offense" for the purposes of the PCMLTFA who

> uses, transfers possession of, sends, delivers, transports, transmits, alters, disposes or otherwise deals with, in any manner and by any means, any property or any proceeds or any property with intent to conceal or convert that property or those proceeds, knowing or believing that all or a part of that property or of those proceeds was obtained as a result of fraud.

312. Any transaction in respect of which there were reasonable grounds for a Financial Institution to suspect any of these activities automatically required that Financial Institution to report to FINTRAC.

C. TD Bank's Internal Policies

313. During the time that it provided correspondent banking services to SIB, TD Bank was required to have in place and execute internal polices ("Internal Policies") that reflected the

rules and requirements laid out in the Applicable Standards, the PCMLTFA, the Regulations and the *Criminal Code*. TD Bank's Internal Policies were required and sought to address such areas as identification, client relationship reviews, enhanced due diligence, open source intelligence monitoring, transaction monitoring and reporting, risk assessment and risk mitigation practices.

314. In April 2000, Frank Craddock, TD Bank's Chief Security Officer and the person responsible for TD Bank's deterrence programs, gave evidence before the Canadian Parliament's Standing Committee on Finance on Bill C-22. Commenting on money laundering, he stated:

> In order to protect against this criminal activity, we have established sound policies and programs that detect and prevent money laundering.
>
> Just a few of the preventative measures taken by Canadian banks include: the right to refuse financial transactions suspected of being proceeds of crime as defined by the Criminal Code; a requirement that a declaration of source of funds be signed by customers for financial transactions involving $10,000 or more; a requirement for bank employees to report any financial transactions that are judged to be suspicious, regardless of the amount; the placement of a senior bank officer in every branch, known as the designated officer, to whom suspicious transactions are reported; a strong emphasis on the know-your-customer rule, whereby employees must obtain appropriate identification and documentation from clients, as well as understand the client's usual pattern of financial transactions; an audit of branch compliance with AML policies; and various staff awareness and education programs, including the distribution of related videos produced by the CBA corporate security committees.
>
> We all work within the scope of the existing legislation, together with the guidelines issued by the Office of the Superintendent of Financial Institutions, known as OSFI, and we believe we have developed a very effective measure to identify money-laundering activities while avoiding high volumes of irrelevant reports.

315. Similarly, by at least April 2006, TD Bank publicly stated on its website that it had in place a Global AML Program. In particular, the TD Bank Financial Group of Companies' AML Statement provided:

> Although a Canadian based financial institution, TDBFG is subject to the AML statutes and regulations in various countries around the globe. TDBGF's AML program (described below) contemplates and accommodates these statutes and establishes minimum standards and requirements across all our businesses throughout the world.
>
> In order to comply with applicable Canadian and AML laws in the countries in which we operate, TDBGF has implemented a Global AML Program. The Global AML Progam includes appointing a Chief AML Officer who is responsible to senior management and the board of directors for establishing and maintaining the TD Bank Financial Group's AML Compliance Program; a risk-based Global AML Policy including Know Your Customer and Enhanced Due Diligence, record keeping & retention (the Global AML Policy establishes minimum standards across all our business units and often adopts standards higher than local requirements); currency transaction and suspicious transaction monitoring and reporting; a hierarchy of designated AML officer functions; periodic training of appropriate employees; and independent internal audits.
>
> This program is routinely evaluated, updated and enhanced in order to reflect changes to TDBFG's business activities and applicable supervisory standards and legal requirements.
>
> All employees are required to read and acknowledge the TDBGF Code of Conduct & Ethics annually. The guidelines require that and employee not knowingly initiate or be a party to a money laundering scheme. TDBGF is committed to complying with the *United Nations Suppression of Terrorist Regulations*. No employee shall deal, directly or indirectly, with any person or group known or reasonably known to be involved in or supporting terrorism activities. Employees are require to report illegal, suspicious or unusual activity.
>
> Annually all employees are required to complete an enterprise wide AML training program which includes a test indicating they have mastered the concepts.

316. To the extent that TD Bank's Internal Policies did not comply with the requirements of the Applicable Standards, the PCMLTFA, the Regulations and the *Criminal Code*, TD Bank violated of the laws of Canada and breached the standard of care required by a reasonable bank.

317. Alternatively, TD Bank also violated the laws of Canada and breached the standard of care required by a reasonable bank if its Internal Polices adhered to the Applicable Standards, the PCMLTFA, the Regulations and the *Criminal Code* but failed to implement its Internal Policies.

VII. TD BANK'S FAILURE TO ACT

318. For the reasons described above, TD Bank should never have opened correspondent bank accounts for SIB (then Guardian) and, having done so, should have determined that those accounts needed to be closed. Instead, TD Bank at all relevant times continued unabated in its provision of banking services to SIB. It did so notwithstanding that it was uniquely situated to uncover the secret in respect of Tier III and the SIB Looting. As a result, TD Bank is liable to SIB in negligence and knowing assistance.

A. TD Bank's Negligence

1. Duty of Care

(a) TD Bank Owed a Duty of Care to SIB

319. The plaintiffs plead that TD Bank owed SIB duties by virtue of its position as SIB's correspondent bank. Such duties were an implied term of the contract that governs the relationship between a banker and its customer (even if no written contract existed) and were otherwise the result of the relationship between TD Bank and SIB.

320. It was at all times reasonably foreseeable that SIB would suffer the damages described herein as a result of the failure of TD Bank to adhere to the applicable standard of care, namely by way of its acts and omissions described herein.

2. Standard of Care

321. At the very least, a reasonable banker was required to act at all times in accordance with the Applicable Standards, the PCMLTFA, the Regulations and the *Criminal Code*.

322. Had TD Bank acted as a reasonable banker, it would have, through the exercise of reasonable care and skill, never provided banking services to SIB, discovered the SIB Looting,

terminated SIB's access to TD Bank's facilities, reported the conduct of Stanford and the Other Insiders to the appropriate authorities and/or frozen SIB's accounts. Due to the acts and omissions described herein (including breach of contract), TD Bank failed to act as a reasonable banker in the circumstances. As a result, TD Bank breached the duties it owed to SIB.

B. TD Bank's Knowing Assistance

1. TD Bank's Liability to SIB for Knowing Assistance

323. The plaintiffs plead that TD Bank is liable for knowing assistance in the breaches of fiduciary duty and breaches of trust by Stanford and the Other Insiders.

324. TD Bank knew that Stanford and the Other Insiders were directors and/or corporate officers of SIB and thus owed fiduciary duties to SIB.

325. TD Bank had sufficient information such that it also knew of, or was reckless or willfully blind to, the SIB Looting and of Stanford's and the Other Insiders' breaches of their fiduciary duties and breaches of trust through their orchestration of the SIB Looting. Despite such knowledge, TD Bank continued to provide correspondent banking services to SIB, which enabled Stanford and the Other Insiders to maintain the SIB Looting and thereby continue their misappropriation. Accordingly, TD Bank participated in the breaches of fiduciary duty and breaches of trust of Stanford and the Other Insiders.

326. SIB ultimately became insolvent and was put into liquidation. Having knowingly assisted Stanford and the Other Insiders, TD Bank is liable for the damages caused by those breaches. Such damages include the full amounts improperly diverted from SIB by Stanford and the Other Insiders through the SIB Looting after TD Bank had sufficient information that it knew of, or

was recklessly or willfully blind to, the SIB Looting. The Joint Liquidators estimate that the amounts for which TD Bank is liable are approximately US$5.5 billion and potentially higher.

C. Damages Caused by TD Bank and Other Relief

327. TD Bank's acts and omissions described herein are the proximate cause of the harm suffered by SIB. As a result of TD Bank's breaches of duty, it repeatedly missed opportunities to reveal and stop the SIB Looting being orchestrated and undertaken by Stanford and the Other Insiders and/or turned a blind eye to the SIB Looting. Instead, TD Bank allowed the SIB Looting to continue and Stanford and the Other Insiders were allowed to continue misappropriating SIB's funds. In addition, customers continued to make investments in SIB CDs, most or all of which were subsequently misappropriated from SIB by Stanford and the Other Insiders. The plaintiffs plead that if TD Bank had performed even its basic duties to SIB as required, the discovery of the SIB Looting at an earlier date would have avoided the increased liabilities of SIB and otherwise reduced or eliminated the losses and damages incurred by SIB after that date.

328. It was reasonably foreseeable that SIB would suffer the damages described herein as a result of the acts and omissions of TD Bank described herein.

329. By failing to act as a reasonable banker, TD Bank facilitated and allowed the SIB Looting to continue when it ought to have been reported and prevented. But for TD Bank's conduct, the fraudulent transactions at issue would not have been completed and damages would not have been suffered by SIB.

330. SIB suffered substantial damages and losses, in an amount that is presently not fully known, but that will be quantified prior to trial, and that is at least in the amount of US$5.5 billion.

331. Given its misconduct as pleaded herein, TD Bank is also liable to provide a full accounting of all revenues and profits from its dealings with SIB and to disgorge and make full restitution of all such revenues and profits.

VIII. LOCATION OF THE TRIAL

332. The plaintiffs propose that this action be tried in Toronto.

Date: May 12, 2014

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Plaintiffs

v.

TORONTO-DOMINION BANK
Defendant

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

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

FRESH AS AMENDED STATEMENT OF CLAIM

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Lawyers for the plaintiffs

TAB S

This is **Exhibit "S"** referred to in the
affidavit of Marcus A. Wide
sworn before me, this 22nd day of September, 2016.

A Commissioner for taking affidavits

AMENDED THIS July 6/16 PURSUANT TO
MODIFIÉ CE CONFORMÉMENT À
☒ RULE/LA RÈGLE 26.02 (C)
☐ THE ORDER OF Justice Conway
L'ORDONNANCE DU
DATED / FAIT LE May 13, 2016

REGISTRAR GREFFIER
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

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

FRESH AS AMENDED STATEMENT OF DEFENCE

Response to the Fresh As Amended Statement of Claim

1. The Toronto-Dominion Bank ("TD Bank") admits the allegations contained in paragraphs 8, 26, 27, 28, 30, 36, 37, 42, 43, 59 (first sentence only; the second and third sentences are denied), 69, 84 (first sentence only; the balance is denied), 86 (first and second sentences only; TD Bank has no knowledge in respect of the third and fourth sentences), 92, 93, 115, 116, 118, 119, 120, 121, 122, 123, 246, 247, 248, 295, 305, 306, 307, 312, 314, 315 and 335 of the Fresh as Amended Statement of Claim.

2. TD Bank denies the allegations contained in paragraphs 1-7, 16, 20-25, 29, 31-35, 41 (second sentence only; TD Bank has no knowledge in respect of the first sentence), 44, 59 (second and third sentences only; the first sentence is admitted), 60, 70-83, 84 (other than the first sentence, which is admitted), 85, 87-91, 94, 95, 96 (third sentence only; TD Bank has no

knowledge in respect of the first and second sentences), 112 (second and third sentences only; TD Bank has no knowledge in respect of the first sentence), 117, 139, 140, 144-172, 210-213, 242-245, 249-294, 301-304, 308, 309, 310, 311, 313 and 316-330 of the Fresh as Amended Statement of Claim.

3. TD Bank has no knowledge in respect of the allegations contained in paragraphs 17, 18, 19, 38, 39, 40, 41 (first sentence only; the second sentence is denied), 45-58, 61-67, 68, 86 (third and fourth sentences only; the first and second sentences are admitted), 96 (first and second sentences; the third sentence is denied), 97-111, 112 (first sentence only; the second and third sentences are denied), 113, 114, 124-138, 141-143, 173, 209, 214-241 and 296-300 of the Fresh as Amended Statement of Claim.

The legal framework

4. The plaintiffs (the "**Joint Liquidators**") purport to assert two claims against TD Bank:

   (a) a negligence claim on behalf of Stanford International Bank Ltd. ("SIB") (the "**SIB Negligence Claim**"); and

   (b) a knowing assistance claim on behalf of SIB (the "**SIB Knowing Assistance Claim**").

5. With respect to the SIB Negligence Claim:

   (a) As a matter of law, the SIB Negligence Claim is not well founded. TD Bank did not owe SIB any duty to detect or warn SIB of any fraud committed by SIB or its principals.

(b) In the alternative, if such a duty would otherwise arise, SIB and its successors are barred from asserting it on the basis of *ex turpi causa*. It would be perverse to hold TD Bank liable to SIB for failing to warn SIB that SIB was committing a fraud.

(c) In the further alternative, if such a duty arises and SIB and its successors are not barred from asserting it on the basis of *ex turpi causa*, SIB was contributorily negligent for its failure to detect the fraud of its principals, and for its failure to put in place appropriate mechanisms to safeguard its investors from being defrauded. TD Bank's liability, if any, on the basis of the SIB Negligence Claim must be reduced by the degree of fault attributable to SIB's contributory negligence.

6. With respect to the SIB Knowing Assistance Claim:

(a) As a matter of law, the SIB Knowing Assistance Claim is not well founded. A fraudster cannot sue another party for knowingly assisting a fraud or a breach of fiduciary duty it has itself committed.

(b) In the alternative, if in law the SIB Knowing Assistance Claim can be asserted, SIB and its successors are barred from asserting it on the basis of *ex turpi causa*. It would be perverse to hold TD Bank liable to SIB for knowingly assisting in SIB's own fraud or breach of fiduciary duty.

(c) In the further alternative, if such a duty arises and SIB and its successors are not barred from asserting it on the basis of *ex turpi causa*, SIB was contributorily negligent for its failure to detect the fraud of its principals, and for its failure to put in place appropriate mechanisms to safeguard its investors from being

defrauded. TD Bank's liability, if any, on the basis of the SIB Knowing Assistance Claim must be reduced by the degree of fault attributable to SIB's contributory negligence.

(d) In any event, as a matter of law knowing assistance requires that a defendant have actual knowledge, or is wilfully blind, or is reckless, to a fraud or breach of fiduciary duty committed by another party. For the reasons set out below, TD Bank had no such actual knowledge and was not wilfully blind or reckless, meaning that it cannot be liable for knowing assistance.

Limitations Defence

7. On February 16, 2009, a U.S. District Court in Dallas, Texas issued an order (the "Freeze Order") freezing the worldwide assets of SIB on the basis that SIB had engaged in a Ponzi scheme fraud.

8. From the time of the issuance of the Freeze Order onwards, it was publicly and generally known that SIB had engaged in a fraud.

9. Prior to the Freeze Order, TD Bank had provided correspondent banking services to SIB and related entities. This fact was also generally known as of February 2009.

10. In the months following the Freeze Order, a number of pieces of litigation were commenced worldwide in respect of the matter. In Canada, the litigation included proceedings brought by Bennett Jones LLP, currently counsel for the Joint Liquidators, and proceedings against TD Bank:

(a) on February 25, 2009, Bennett Jones LLP commenced a putative class action in the Alberta Court of Queen's Bench (under the style *Dynasty Furniture Limited (as a representative plaintiff) v. SIB*, Court File No. 0901-02821);

(b) on April 6, 2009, the Joint Liquidators' predecessors, also appointed by the Eastern Caribbean Supreme Court, brought an *ex parte* motion before a bankruptcy registrar of the Québec Superior Court seeking recognition under the *Bankruptcy and Insolvency Act* of the bankruptcy proceedings in the Eastern Caribbean Supreme Court (under the style *Stanford International Bank Ltd. and Stanford Trust Company Ltd. (Receivership of)*, Court File No. 500-11-036045-090);

(c) on April 17, 2009, Bennett Jones LLP, acting for a group of plaintiffs known as the "Dynasty Plaintiffs", commenced a fraud action against Allen Stanford, the owner of SIB, in the Alberta Court of Queen's Bench (under the style *Dynasty Furniture Manufacturing Ltd. v. Stanford*, Court File No. 0901-05677);

(d) on April 17, 2009, the Dynasty Plaintiffs also commenced a Norwich application against TD Bank in the Alberta Court of Queen's Bench (under the style *Dynasty Furniture Manufacturing Ltd. v. The Toronto-Dominion Bank*, Court File No. 0901-05717), with Bennett Jones LLP acting for the Dynasty Plaintiffs;

(e) on April 24, 2009, the Attorney General of Ontario commenced a proceeding in the Ontario Superior Court of Justice under the *Civil Remedies Act*, S.O. 2001, c. 28 in respect of approximately $20 million of SIB's funds that were on deposit with TD Bank at the time of the Freeze Order (under the style *Attorney General of*

Ontario v. The Contents of Various Financial Accounts Held With The TD Bank and TD Waterhouse (in rem), Court File No. CV-09-8154-00CL);

(f) on June 19, 2009, the United States Department of Justice issued a press release announcing that Robert Allen Stanford, the Chairman of SIB, and several other SIB executives had been indicted on fraud and obstruction charges related to SIB's Ponzi scheme fraud; and

(g) after the Dynasty Alberta Action and the Dynasty Alberta Norwich Application were stayed by the Alberta Court of Queen's Bench on the basis of *forum non conveniens*, on July 29, 2009, the Dynasty Plaintiffs, represented by Bennett Jones LLP, reinstituted the Dynasty Alberta Norwich Application by bringing an application in the Ontario Superior Court of Justice (under the style *Dynasty Furniture Manufacturing Ltd. v. The Toronto-Dominion Bank*, Court File No. 09-8300-00CL).

11. As a result, 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, 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.

12. Accordingly, since this action was not commenced until August 22, 2011, it is statute barred and ought to be dismissed. TD Bank pleads and relies on the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B.

The Freeze Order

13. The Freeze Order was a complete surprise to TD Bank. It was the first time that TD Bank knew, or could reasonably have known, that Mr. Stanford and SIB had engaged in a Ponzi scheme fraud. The fraud had been perpetrated by a small number of SIB insiders led by Mr. Stanford himself. The fraud was hidden from everyone else, including TD Bank, other financial institutions, regulators, and even senior SIB executives who were not part of the small inner circle around Mr. Stanford that committed the fraud.

The history of dealings between TD Bank and SIB prior to the Freeze Order

14. Between 1991 and the Freeze Order, TD Bank provided certain services with three sets of Stanford-related entities: (i) SIB, an Antiguan-based offshore bank that was not permitted by Antiguan law to deal with local Antiguan customers; (ii) Bank of Antigua, a local retail bank in Antigua that was owned by Mr. Stanford; and (iii) Caribbean Sun Airlines and Caribbean Sun Airlines, Antiguan-based airlines that operated in the Caribbean.

15. TD Bank knew that Mr. Stanford, SIB, Bank of Antigua, and Caribbean Star Airlines and Caribbean Sun Airlines were affiliated with the Stanford Financial Group ("SFG"), which was based in Houston, Texas and conducted most of its activities in the United States. TD Bank believed that SFG was regulated by U.S. regulators, which provided comfort to TD Bank in its dealings with SIB, Bank of Antigua, and Caribbean Star Airlines and Caribbean Sun Airlines.

16. As detailed below, TD Bank provided three broad types of services to SIB, Bank of Antigua, and Caribbean Star Airlines and Caribbean Sun Airlines: (i) correspondent banking; (ii) discretionary investment management services; and (iii) trade finance and treasury services.

Correspondent banking

17. TD Bank's first dealings with any Stanford-related entity was in 1991. At the time, Bank of New York had offices in Canada. Through those offices, Bank of New York provided correspondent banking services to a number of customers in the Caribbean, including Bank of Antigua. Bank of New York decided to close its Canadian offices, which meant closing the correspondent bank accounts maintained at those offices. Bank of New York agreed to introduce TD Bank to its correspondent banking customers in the Caribbean, so that those customers would continue to have access to correspondent banking services after Bank of New York closed its Canadian offices. One of the customers that Bank of New York introduced to TD Bank was Bank of Antigua. TD Bank did not pay Bank of New York to acquire the book of business.

18. As a result of the introduction by Bank of New York, TD Bank opened correspondent banking accounts for Bank of Antigua. TD Bank did not breach any KYC and AML ("KYC") or anti-money laundering ("AML") standards that were applicable at the time.

19. Several months later, TD Bank opened correspondent banking accounts for SIB (known at the time as Guardian International Bank). Again TD Bank did not breach any KYC and AML standards that were applicable at the time. Contrary to the allegations in paragraph 75 of the Fresh As Amended Statement of Claim, there was no allowing of SIB to "access [TD Bank's] services through the 'side door' and not the 'front door'".

20. Bank of Antigua and SIB operated correspondent banking accounts with TD Bank in both Canadian and U.S. dollars. Contrary to the Fresh As Amended Statement of Claim, in the early 1990s there was nothing unusual or improper about Bank of Antigua and SIB maintaining U.S. dollar correspondent banking accounts with TD Bank.

Discretionary investment management services

21. In 1997, SIB opened an account with Private Asset Management ("PAM"), which was part of TD Asset Management. TD Bank did not breach any KYC and AML standards that were applicable at the time. PAM provided discretionary investment management services to SIB. John Pepperall of PAM was the main customer contact for the SIB account at the beginning of the relationship and Perry Mercer of PAM the transitioned into being the main customer contact.

22. In 2002, Bank of Antigua opened an account with PAM. TD Bank did not breach any KYC and AML standards that were applicable at the time. PAM also provided discretionary investment management services to Bank of Antigua. Mr. Mercer was again the main customer contact.

23. Initially, both the SIB account and the Bank of Antigua account at PAM were invested in 100% equities. However, in or around 2004 or 2005, at the request of SIB and Bank of Antigua, both portfolios were shifted to a more balanced portfolio which included equities, fixed income assets, and cash investments.

24. Also in approximately 2005, PAM was merged with Private Investment Counsel ("PIC"), which was part of TD Waterhouse. The accounts of SIB and Bank of Antigua were moved to PIC shortly thereafter in 2006. Mr. Mercer continued to be responsible for the accounts, and remained responsible until the Freeze Order. Mr. Mercer communicated with Zack Davis concerning the SIB and Bank of Antigua accounts from 2005 to 2009.

Trade finance and treasury services

25. TD Bank also provided some trade finance and treasury services, including foreign exchange services and some fully cash collateralized letters of credit to Bank of Antigua and Caribbean Star Airlines and Caribbean Sun Airlines.

The conduct of the relationship

26. Throughout the relationship, and as referenced above, TD Bank engaged in appropriate AML scrutiny to ensure that funds being transmitted to and from SIB and Bank of Antigua were not the proceeds of crime. AML standards changed over time and became more stringent, especially after September 11, 2001. At all material times, TD Bank did not breach any then-applicable AML standards.

27. Among other things, after approximately 2000 all wire transfers to and from SIB and Bank of Antigua were "scrubbed" by checking names against lists of known money launderers. At no point was there ever a positive hit arising from such scrubbing (aside from hits that were determined to be false positives).

28. It appears in retrospect that Mr. Stanford and the small group of insiders perpetrating the fraud were careful to ensure that SIB and Bank of Antigua were not handling funds for money launderers, and that this was part of the *modus operandi* of the fraud. Mindful that Antigua was a higher risk jurisdiction for money laundering and would therefore be closely scrutinized for AML issues by TD Bank and other financial institutions with which they dealt, it appears that Mr. Stanford and his small group of insiders were scrupulous to ensure that funds flowing to and from SIB and Bank of Antigua were not the proceeds of illicit activities. With the focus on AML issues and finding no problems in that regard, TD Bank did not have any suspicion, or any

reason to suspect, that the risk associated with SIB was not AML risk but rather the risk that it might be a Ponzi scheme fraud.

29. Throughout the relationship, TD Bank undertook appropriate KYC and AML due diligence. Over the years TD Bank met with personnel from SIB, Bank of Antigua, and SFG on a number of occasions, including meetings in Toronto, Montreal, Houston, Memphis, and Antigua. These meetings took place at appropriate intervals, and contrary to the allegations at paragraph 157 of the Fresh As Amended Statement of Claim were substantive meetings at which TD Bank learned about the operations of SIB, Bank of Antigua, and SFG – to the extent that such operations were not actively concealed by Mr. Stanford and the small circle around him.

30. At no time prior to the Freeze Order did TD Bank ever learn that SIB maintained a secret set of alleged investments that were illiquid, non-existent, or overinflated in supposed value. It knew nothing of Mr. Stanford's "football" which apparently kept records of these secret investments. Nor was there any basis upon which TD Bank should have learned of these secret investments or the football. The Joint Liquidators plead at paragraph 105 of the Fresh as Amended Statement of Claim that the contents of these secret investments were unascertainable even to SIB's "employees, executives and directors", all the while maintaining the contradictory claim that the fraud ought to have been ascertained by TD Bank.

Events leading up to the Freeze Order

31. In late 2008, SIB began making large withdrawals from its accounts at TD Bank and PIC. At the time the international financial crisis was under way, and many financial institutions around the world were facing liquidity problems. In these circumstances, there was nothing

unusual about the withdrawals, and the fact that withdrawals were being made did not cause TD Bank to suspect that there might be a fraud.

32. On February 12, 2009, a few days before the Freeze Order, TD Bank had a conference call with SIB to discuss recent press reports that SIB was having financial difficulties. TD Bank was told that SIB was facing a liquidity crisis and was liquidating assets in a measured way in order to meet its liquidity needs. At the time, in the midst of the world-wide financial crisis, SIB was not the only customer of TD Bank that was facing liquidity problems. TD Bank was left with the impression that SIB was facing serious financial difficulty, but did not suspect fraud and had no reason to do so.

33. As previously noted, when the Freeze Order was made a few days later and allegations of fraud were levelled at Mr. Stanford and SIB, it was a complete surprise to TD Bank, just as it was to SIB's own senior executives who were not in Mr. Stanford's inner circle.

There were no red flags

34. To TD Bank's knowledge up until the Freeze Order, SIB, Bank of Antigua and Caribbean Star Airlines and Caribbean Sun Airlines operated legitimate businesses:

(a) Based on the information known, and reasonably knowable, to TD Bank, SIB operated as a fund of funds, pooling investors' funds in a portfolio of assets, including those assets managed by PAM and then PIC. It offered investors in CDs rates of return that were higher than the rates of return offered by U.S. banks, but the rates were understandable as blended returns over time. The CDs provided investors the certainty of fixed returns in the face of market fluctuations,

even if in the long run direct investment in the equity markets would have provided them with greater returns.

(b) Based on the information known, and reasonably knowable, to TD Bank, Bank of Antigua was a legitimate local bank that provided retail banking services to residents of Antigua. Indeed, Bank of Antigua was exactly that, and has never been implicated in SIB's fraud.

35. To the extent that TD Bank requested or was provided financial statements for SIB and its affiliated entities, they were not requested or provided for the purpose of conducting an audit or assisting any third parties with making investment decisions. TD Bank was not obliged to fulfil any of these functions as a result of providing banking services to SIB.

36. TD Bank could not have uncovered SIB's fraud. TD Bank managed only a small portion of SIB's investments, and had no way of knowing what SIB's investment portfolio was aside from the assets that PAM and then PIC managed. In retrospect, it is now known that SIB misstated its actual investments and its actual investment returns, so even if TD Bank had requested further information than it possessed it would not have received accurate information. At the time, TD Bank had no more basis than anyone else to know that SIB was misstating its assets or its investment returns.

37. The various facts identified in the Fresh As Amended Statement of Claim as supposed red flags about SIB were assembled by the Joint Liquidators after-the-fact, using 20-20 hindsight and possessing the knowledge that SIB had been a Ponzi scheme fraud. Without 20-20 hindsight and without possessing the knowledge that SIB had been a Ponzi scheme fraud, there were no red flags at the material time. In particular:

(a) TD Bank had no knowledge, actual or constructive, of Mr. Stanford's prior history before the opening of the correspondent banking accounts of Bank of Antigua and SIB in 1991.

(b) TD Bank had no knowledge, actual or constructive, of the fact that certain U.S. banks had refused to provide correspondent banking services to SIB, if that was even the case. In fact a number of reputable banks aside from TD Bank did provide correspondent banking services to SIB, including HSBC Bank plc, Société Générale, and Trustmark National Bank.

(c) TD Bank had no reason to terminate or alter the long-term relationship with SIB and its affiliates, even as SIB grew in size beyond its initial scope.

(d) While the volume of business transacted by SIB increased significantly over time, at no time did this increase cause TD Bank concern or indicate to TD Bank that Mr. Stanford and SIB were engaged in a Ponzi scheme fraud. Nor ought it to have. Every outward indication was that SIB was a successful enterprise that was growing.

(e) While Ponzi schemes have been around for a long time, the world did not have experience with multi-billion dollar Ponzi schemes undertaken by large financial firms until the collapse of Bernard Madoff's Ponzi scheme in December 2008, about two months prior to the Freeze Order. In assessing TD Bank's interactions with SIB, Bank of Antigua, Caribbean Star Airlines and Caribbean Sun Airlines and SFG between the early 1990s and the Freeze Order, it is important not to use post-Madoff knowledge of the possibility that large financial firms may engage in multi-billion dollar Ponzi schemes and apply it to a pre-Madoff time period.

(f) There is nothing inherently unusual or suspicious about transfers in round dollar amounts. There are many legitimate reasons for round-dollar transfers. Indeed, most bank-to-bank transfers of funds, such as between SIB's correspondent banking accounts and SFG, are in round-dollar amounts.

(g) The fact that SIB placed funds with PAM and then PIC was not a red flag. TD Bank was aware that SIB used outside investment managers, of which TD Bank was one. Such use of sub-advisors is not unusual in the industry.

The standard of care

38. The various standards that the Fresh As Amended Statement of Claim terms "Applicable Standards" were not in fact standards that define any duty of care owed by TD Bank to SIB's customers. Among other things:

(a) The OSFI Standards (as that term is defined in paragraph 246 of the Fresh As Amended Statement of Claim) do not define any duty of care owed by banks but instead represent OSFI's interpretation of Canadian banking regulations.

(b) The Basel Standards (as that term is defined in paragraph 249 of the Fresh As Amended Statement of Claim) are standards for bank regulators, not for banks.

(c) The FATF Standards (as that term is defined in paragraph 251 of the Fresh As Amended Statement of Claim) are standards for governments, not for banks.

(d) The Wolfsberg Standards (as that term is defined in paragraph 252 of the Fresh As Amended Statement of Claim) are not binding on anyone, and do not define any duty of care owed by banks.

Instead, to the extent any duty of care arises in law, the applicable standard of care was the standard of a reasonable and prudent Canadian bank providing correspondent banking, discretionary investment management, trade finance and treasury services at the applicable time, as the standard changed from time to time. At all material times, TD Bank met that standard.

Perry Mercer never sat on any SIB advisory board

39. Contrary to the suggestion made at paragraph 41 of the Fresh As Amended Statement of Claim, Perry Mercer never served on any SIB advisory board. If such an advisory board existed, Mr. Mercer was never a member and never attended any meetings of it. Contrary to the suggestion made at paragraph 169(d) of the Fresh As Amended Statement of Claim, neither TD Bank nor Mr. Mercer knew at the time that SIB was representing that Mr. Mercer was a member of a SIB advisory board.

40. Furthermore, contrary to the allegations made at paragraphs 96 and 169(d) of the Fresh As Amended Statement of Claim, Mr. Mercer was not a "long-time friend" of Jim Davis. In fact, Mr. Mercer had only met Mr. Davis on a few occasions, and knew him only in a professional capacity, not as a "friend"..

Conclusion

41. TD Bank therefore requests that this action be dismissed with costs.

May 9, 2016

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ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

FRESH AS AMENDED
STATEMENT OF DEFENCE

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DOCS 15517125

TAB T

This is **Exhibit "T"** referred to in the
affidavit of Marcus A. Wide
sworn before me, this 22nd day of September, 2016.

A Commissioner for taking affidavits

AMENDED THIS June 27/16 PURSUANT TO
MODIFIÉ CE CONFORMÉMENT À
☒ RULE/LA RÈGLE 26.02 (C)
☐ THE ORDER OF Justice Conway
L'ORDONNANCE DU
DATED / FAIT LE May 31, 2016

REGISTRAR GREFFIER
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

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

FRESH AS AMENDED REPLY TO DEFENCE

1. The plaintiffs, Marcus A. Wide and Hugh Dickson of Grant Thornton LLP (the "Joint Liquidators"), repeat and rely upon the allegations set out in the statement of claim.

2. The Joint Liquidators deny the allegations contained in the statement of defence except as expressly admitted herein.

TD Bank Has Improperly Withdrawn Admissions

3. The Toronto-Dominion Bank ("TD Bank") made several admissions in its original statement of defence, including admitting the entirety of paragraphs 58, 66, 67, 84, 86, 95, 96, 111, 209 and 302 of the statement of claim. In its amended statement of defence, TD Bank has improperly withdrawn these admissions.

SIB's Negligence and Knowing Assistance Claims

4. Contrary to paragraphs 5 and 6 of TD Bank's statement of defence, the Joint Liquidators' claims in negligence and knowing assistance are well-founded.

5. TD Bank owed its customer, SIB, a duty to act as would a reasonable and prudent banker as an implied contractual term and in negligence. In the circumstances of this case, the duty encompassed, among other things, the need for TD Bank to make inquiries regarding unusual circumstances and "red flags", and to prevent Robert Allen Stanford ("Stanford") and a small cabal of other insiders (the "Other Insiders") from defrauding SIB using TD Bank's facilities (the "SIB Looting"). The Joint Liquidators repeat and rely on the facts pleaded in their statement of claim in this regard.

6. The doctrine of *ex turpi causa* is inapplicable to the Joint Liquidators' claims in negligence and knowing assistance. SIB was not a perpetrator of any fraud but rather was a victim of the fraud. The fraud was committed by Stanford and the Other Insiders, a fact TD Bank admits at paragraphs 13, 28 and 29 of its statement of defence. Any damages payable by TD Bank will not result in Stanford or the Other Insiders profiting from their wrongdoing, and Stanford and the Other Insiders have not evaded criminal sanctions. Damages will be payable to SIB as a victim of the fraud and, once recovered, ultimately distributed to SIB's innocent creditors as part of the assets of SIB under the liquidation proceeding. The fraud cannot be attributed to SIB for the purposes of applying the *ex turpi causa* doctrine (even if it could be attributed to SIB for certain other purposes, which is denied). The Joint Liquidators' claims do not give rise to one of the strictly limited circumstances in which failure to apply the *ex turpi causa* doctrine would introduce an inconsistency into the fabric of the law or damage the integrity of the justice system.

7. SIB was not contributorily negligent. Aside from Stanford and the Other Insiders, no one at SIB knew or ought to have known that SIB was the victim of fraud. TD Bank had a unique window into the affairs of SIB that should have indicated to TD Bank that it was required to terminate SIB's access to TD Bank's banking services, report the conduct of Stanford and the Other Insiders to the appropriate authorities, and freeze SIB's accounts. TD Bank failed to do so and instead continued unabated in its provision of services to SIB until receiving the freeze order dated March 12, 2009, nearly a month after SIB's collapse. To find SIB, the victim of the fraud, contributorily negligent would produce an unjust result, particularly since without the provision of correspondent banking services by TD Bank, the fraud committed on SIB could not have occurred.

TD Bank Unreasonably Believed Stanford Financial Group Was Regulated by U.S. Regulators

8. TD Bank alleges at paragraph 15 of its amended statement of defence that TD Bank, "believed that the Stanford Financial Group was regulated by U.S. regulators, which provided comfort to TD Bank in its dealings with SIB, Bank of Antigua, and Caribbean Star Airlines and Caribbean Sun Airlines". This allegation is inconsistent with the standard required to be met by a reasonable correspondent banker and such a belief is indicative of the fact that TD Bank fell well below that standard.

9. At all relevant times, TD Bank was required to identify and consider all regulators that supervised its correspondent banking clients and the regulations applicable to its clients. TD Bank knew that significant aspects of SIB's business, including the management of SIB's assets, were undertaken by the affiliated Stanford Financial Group ("SFG") based in Houston, Texas. As a result of this knowledge, TD Bank ought to have identified and considered the nature and

extent of the regulation of SFG when deciding whether to provide correspondent banking services to SIB.

10. If TD Bank had undertaken the level of due diligence in respect of SFG required of a reasonable correspondent bank, it would have determined that SFG was not regulated by any regulator in the U.S. or otherwise. SFG operated an unlicensed banking business in the U.S. This fact was determined by others who owed duties to SIB during the relevant period. Accordingly, there was no basis for any "comfort" regarding the regulation of SFG. To the contrary, the fact that SFG was managing SIB's assets in a completely unregulated environment is another reason that TD Bank ought to have declined to provide correspondent banking services to SIB or cease providing those services at all relevant times.

11. In particular, at the relevant times, the International Banking Regulations promulgated by the Federal Reserve Board (the "FRB"), and the *International Banking Act* 12 U.S.C. 3101, applied to the conduct of foreign banks operating within the U.S. Pursuant to such Regulations and Act, SIB and its affiliates, including SFG, were required to obtain approval of the FRB before establishing a branch, agency or representative office in the U.S. Although neither SIB nor SFG ever obtained such approval, SFG undertook significant aspects of SIB's operations on a contractual basis within the U.S., including from Houston, Texas and Memphis, Tennessee. In doing so, SFG improperly operated as a wholly unregulated and unregistered business. There was therefore no basis for TD Bank to "take comfort" and, by doing so, TD Bank failed to act as would a reasonable bank in the same circumstances.

12. Further, if TD Bank did take comfort from the assumed regulation of SFG, this confirms and highlights that TD Bank was aware that there was a risk associated with providing

correspondent banking services to an Antiguan offshore bank or was otherwise suspicious of SIB.

13. TD Bank was required to know and consider SIB's regulators, which included the Financial Services Regulatory Commission of Antigua and the Antiguan Offshore Financial Sector Planning Committee, which was at relevant times chaired by Stanford. A reasonable bank would have identified the high risks arising from SIB being an Antiguan-based offshore bank, including its inadequate regulation and Stanford's clear conflict of interest, and would not have provided SIB with the privileges and access resulting from a correspondent banking relationship with TD Bank. Obviously, some form of "comfort" would be required for a reasonable bank to take on these risks. If TD Bank did take comfort, it did so where no comfort was warranted. To the contrary, the circumstances of SFG's lack of regulation should have been cause for further concern.

TD Bank Improperly Opened the SIB Accounts and Provided Services

14. TD Bank alleges at paragraph 18 of its statement of defence that "as a result of the introduction by Bank of New York, TD Bank opened correspondent banking accounts for Bank of Antigua". Even if TD Bank was introduced to Bank of Antigua by Bank of New York, TD Bank was still required to do its own due diligence when opening the correspondent banking accounts for both Bank of Antigua and SIB. If TD Bank had done so, it would have determined that the provision of correspondent banking services to SIB would have been classified as extremely high risk by a competent financial institution, and worthy of detailed scrutiny for potential credit and anti-money laundering ("AML") risks.

15. In any event, TD Bank's allegations at paragraphs 18 and 19 of its statement of defence relate only to "know your client" ("KYC") and AML requirements at the time it opened correspondent accounts for SIB. In addition to the fact that a reasonable correspondent bank would never have opened those accounts, TD Bank was required to undertake regular ongoing KYC and AML due diligence at all times while providing correspondent banking services to SIB. TD Bank either failed to properly undertake such ongoing due diligence or, if it did undertake such due diligence, failed to act as was required in response to information obtained as a result.

A Reasonable Canadian Bank Would Not Have Provided U.S. Dollar Correspondent Banking Services to SIB

16. Contrary to paragraph 20 of TD Bank's statement of defence, in the circumstances, it was not normal or reasonable practice for U.S. dollar correspondent banking services to be provided by a Canadian bank. TD Bank ought to have identified that there was no legitimate business purpose for SIB to obtain U.S. dollar correspondent banking services from a Canadian bank, particularly given that SIB and SFG, which managed SIB's assets, had banking relationships in the U.S., and SFG was carrying on business in the U.S. (all of which TD Bank knew). TD Bank never should have accepted SIB as a client in the first place and at all relevant times ought to have stopped providing correspondent banking services to SIB.

17. All U.S. dollar wire transfers credited or debited to SIB's correspondent account at TD Bank were required to be settled in New York by a U.S. bank with direct access to a domestic U.S. dollar payment settlement system. TD Bank's Canadian offices did not (and could not) have the ability to settle such wire transfers on its own. TD Bank therefore required the services of a U.S. bank in order to complete all U.S. dollar correspondent banking transactions for SIB. The

result was further costs and time associated with all such transactions than would have resulted had SIB used a U.S. bank for U.S. dollar correspondent banking services. TD Bank's provision of U.S. dollar correspondent banking services to SIB in these circumstances made no commercial sense and SIB's request for such services was a significant red flag that TD Bank was required to be aware of and act upon.

18. TD Bank communicated with other financial institutions, including by way of the SWIFT messaging system. In the course of such communications, TD Bank deliberately or negligently structured or presented the information provided to such other financial institutions in a manner that hid or obscured the fact that it was, for no legitimate purpose, transacting U.S. dollars on behalf of an Antiguan offshore bank, SIB, and/or at the ultimate direction of Stanford.

19. By providing U.S. dollar correspondent banking services to SIB, and along with the applicable banking standards and laws pleaded at paragraphs 244 to 317 of the statement of claim, TD Bank became subject to U.S. KYC and AML statutes and regulations. Such U.S. statutes and regulations also contributed to the standard practices and procedures that TD Bank was required to adhere to in order to act as a reasonable correspondent banker in the circumstances.

TD Bank's Trade Finance and Treasury Services Revealed Further Red Flags

20. TD Bank alleges at paragraph 25 of its statement of defence that it provided Bank of Antigua, Caribbean Star Airlines and Caribbean Sun Airlines with "fully cash collateralized letters of credit". At the relevant times, reasonable Canadian banks would not typically issue standby letters of credit to another bank with the requirement that they be fully cash collateralized in addition to a counter-indemnity. Such collateral is typically only a requirement

when the issuing bank (in this case TD Bank) considers the applicant bank for the standby letter of credit (in this case SIB) to be an extreme credit risk requiring the full cash collateralization of a contingent liability. The requirements imposed by TD Bank on SIB for TD Bank's provision of the aforementioned letters of credit indicate that TD Bank had a highly negative view of SIB's credit risk position and further indicates that TD Bank was deeply suspicious of SIB.

21. TD Bank also entered into a netting and set-off agreement whereby SIB customer deposits were subject to being set-off in relation to the aforementioned letters of credit. The fact that TD Bank viewed SIB to be a credit risk, and the fact that TD Bank used SIB depositor funds as a form of cash collateral for the letters of credit used to finance a Stanford-owned business, is further evidence of TD Bank's failure to act as a reasonable banker and its willingness to ignore the red flags indicating that correspondent banking services should not have been provided to SIB.

TD Bank's Alleged Due Diligence Was Inadequate

22. Contrary to paragraphs 26-29 of TD Bank's statement of defence, TD Bank's KYC and AML due diligence was wholly inadequate. TD Bank's alleged attempts to identify whether investor funds incoming to SIB's correspondent accounts were from known money launderers is insufficient due diligence in the circumstances and was not in keeping with the standard of a reasonable correspondent banker. Rather, TD Bank was obligated to act as a reasonable bank by adhering to the Applicable Standards as pleaded at paragraphs 241 to 309 of the statement of claim, which required TD Bank to conduct enhanced due diligence in respect of its own client, SIB. Had TD Bank adhered to such Applicable Standards it would have uncovered the fraud being committed on SIB or, at a minimum, would have stopped providing correspondent banking services to SIB or filed suspicious activity reports with the relevant AML regulators.

23. Contrary to paragraph 30 of TD Bank's statement of defence, there is no contradiction in the Joint Liquidators' claim. TD Bank was required to act as would a reasonable banker in the circumstances, including by undertaking ongoing KYC and enhanced AML due diligence on SIB, Stanford and other Stanford-owned entities. Apart from Stanford and the Other Insiders, SIB's employees, executives and directors were not similarly obligated, did not have the information available to TD Bank, and did not enjoy TD Bank's position that allowed it to require SIB and SFG to provide information.

24. Contrary to paragraph 37 of TD Bank's statement of defence:

(a) Although the red flags regarding SIB and Stanford were assembled by the Joint Liquidators after-the-fact, all of those red flags (and more) were available to TD Bank throughout the period that it provided correspondent banking services to SIB and in many cases for years prior to the collapse of SIB. TD Bank did not require "20-20 hindsight" to identify those red flags at the material time. To the contrary, TD Bank was required to (and in some instances did) identify red flags regarding SIB, Stanford and other Stanford-owned entities, and was required to act as a reasonable correspondent bank in response to those red flags under both Canadian and U.S. AML statutes and regulations in force at the relevant times.

(b) TD Bank was required to know Stanford's history prior to opening any correspondent bank accounts for SIB. TD Bank has admitted that it failed to acquire such knowledge and, as a result, failed to act as would a reasonable banker in the circumstances.

(c) TD Bank ought to have known that certain U.S. banks had refused to provide correspondent banking services to SIB. TD Bank has admitted that it failed to acquire such knowledge and, as a result, failed to act as would a reasonable bank in the circumstances. Further, in order to act as would a reasonable bank, TD Bank ought not to have taken any comfort from the fact that certain other banks provided services to SIB. TD Bank was required to undertake its own due diligence on its own customers.

(d) TD Bank was required to consider the risks associated with the significant increase in SIB's correspondent transactions over time, particularly given that SIB was an Antiguan offshore bank and the other risks pleaded and relied upon by the Joint Liquidators. The enormous rise in the magnitude of U.S. dollar payments managed by TD Bank on behalf of SIB should have been noted as a red flag to TD Bank's AML function, and given the risks associated with the business of clearing USD from a branch in Toronto, the geographic risk of an Antiguan-based financial institution and the obvious politically exposed person classification of Stanford, it should have at a minimum triggered an enhanced due diligence process on SIB.

(e) Contrary to TD Bank's allegation, the "world" did indeed "have experience with multi-billion dollar Ponzi schemes" during the period that TD Bank provided correspondent banking services to SIB. Large scale Ponzi schemes have been well-known to exist since at least 1920 when Charles Ponzi defrauded thousands of investors of USD $222 million in today's dollars. There are a multitude of examples of the revelation of large scale Ponzi schemes since that time and during

the time TD Bank provided services to SIB, all of which indicate that TD Bank's requirement to act as a reasonable bank included the need to take into account potential large scale fraud, particularly given that SIB was an Antiguan-based offshore bank owned by Stanford. Such Ponzi schemes occurred within the international financial services industry and therefore ought to have been a concern of any prudent correspondent bank. Therefore, having Bernard Madoff as an example to learn from is wholly unnecessary to determine that large scale financial fraud, including Ponzi schemes, is and was a severe problem faced by financial institutions, especially those offering global correspondent banking services.

The Joint Liquidators' Claim is Not Limitations Barred

25. Ontario's *Limitations Act, 2002*, SO 2002, c 24, Sch B (the "*Limitations Act, 2002*") requires consideration of whether the Joint Liquidators' predecessors (the "Former Officeholders") actually discovered the facts giving rise to the Joint Liquidators' claim against TD Bank prior to August 22, 2009 (the "Limitations Date"), two years prior to the commencement of the within action, and, if not, whether a reasonable person with the abilities and in the circumstances of the Former Officeholders ought to have discovered such facts by that date. With their abilities and in their circumstances, the Former Officeholders could not reasonably have discovered the claim before August 22, 2009 and therefore the Joint Liquidators' claim is not limitations barred.

26. In paragraph 10 of TD Bank's statement of defence, TD Bank seeks to rely on certain proceedings arising from SIB's collapse in support of discovery on the part of the Joint Liquidators. However, there was no action commenced anywhere in the world prior to August

22, 2009 that alleged that TD Bank (or any other banker, accountant or lawyer to SIB) acted or failed to act in any manner that caused or contributed to SIB's losses or damages. The actions referred to by TD Bank, which exclusively include claims not against TD Bank or a Norwich claim against TD Bank for information, cannot be relied on to suggest that discovery of SIB's claim against TD Bank ought to have occurred prior to August 22, 2009.

There Was No Person Capable of Commencing a Proceeding in Respect of the Claim Against TD Bank Until After the Limitations Date

27. SIB was incapable of commencing proceedings, and there was no person capable of commencing a proceeding, in respect of a claim against TD Bank on behalf of SIB until, at the earliest, September 11, 2009. Accordingly, the limitations period did not begin to run until September 11, 2009. Since this date is after the date of the commencement of the Joint Liquidators' claim, August 22, 2009, the Joint Liquidators' claim is not limitations barred.

28. On February 16, 2009, the U.S. Securities and Exchange Commission (the "SEC") obtained an injunction preventing SIB from carrying on business and an order appointing an equity receiver over SIB and its affiliated entities (the "U.S. Receiver"). At that time, the U.S. Receiver did not seek recognition of his appointment in Canada.

29. On February 19, 2009, the Former Officeholders were appointed on an emergency basis as joint receiver-managers of SIB and Stanford Trust Company Ltd. ("STC") in Antigua. Soon after, the High Court of Justice of Antigua issued an order defining the capacity of the Former Officeholders to act as receiver-managers of SIB and STC (the "Antiguan Receivership Order").

30. The Antiguan Receivership Order did not provide the Former Officeholders with the capacity required to investigate or pursue claims against third party individuals or entities with which SIB had done business. Accordingly, the Antiguan Receivership Order did not provide the Former Officeholders with the capacity required to investigate or pursue an action against TD Bank.

31. On April 6, 2009, the Former Officeholders received an order of the Registrar of the Quebec Superior Court recognizing their appointment as receiver-managers in Antigua (the "First Quebec Recognition Order"). However, consistent with the Antiguan Receivership Order, the First Quebec Recognition Order did not provide the Former Officeholders with the capacity required to pursue third party claims in Canada.

32. Accordingly, while acting as receiver-managers of SIB, the Former Officeholders did not have the capacity required to investigate or pursue third party claims, including against TD Bank.

33. On April 15, 2009, the Former Officeholders were appointed as joint liquidators of SIB by the Eastern Caribbean Supreme Court (the "Antiguan Liquidation Order"). As of that date, the Former Officeholders were no longer receiver-managers of SIB.

34. The Antiguan Liquidation Order provided the Former Officeholders with the capacity to investigate and pursue third party claims on behalf of SIB for the first time. In particular, it provided that the Former Officeholders "shall have the right to bring any proceeding or action in Antigua and Barbuda and/or in a foreign jurisdiction" and "shall have the authority to initiate, prosecute and continue the prosecution of any and all proceedings".

35. However, notwithstanding that the Antiguan Liquidation Order provided the Former Officeholders with the capacity to investigate and pursue third party claims, as a matter of Canadian law, the Former Officeholders required recognition of their appointment as liquidators by a Canadian court and an order of a Canadian court providing the Former Officeholders with the capacity to pursue third party claims in Canada. The Antiguan Liquidation Order also expressly acknowledged the need for such recognition and approval before the Former Officeholders could act in foreign jurisdictions such as Canada.

36. On April 22, 2009, the Former Officeholders delivered a motion to the Quebec Superior Court seeking the recognition of their Antiguan appointment as liquidators and approval to act in Canada, including an express request for authorization "to institute or continue any present legal proceedings initiated by [SIB] in Quebec, and generally in Canada". However, at the same time, the U.S. Receiver sought, for the first time, recognition and approval to act in Canada through his Canadian representative, Ernst & Young Inc. ("E&Y").

37. On September 11, 2009, the Quebec Superior Court rendered two decisions and corresponding orders in respect of the competing motions by the Former Officeholders and the U.S. Receiver (the "Second Quebec Recognition Order").

38. Among other things, the Second Quebec Recognition Order appointed E&Y as interim receiver of the Canadian assets of SIB and authorized E&Y to initiate and pursue proceedings in respect of SIB in Canada. This was the first time that E&Y was recognized and empowered with the capacity to pursue proceedings in Canada.

39. The Second Quebec Recognition Order expressly excluded the Former Officeholders from acting in Canada. It provided: "In each case where [E&Y] takes any such actions or steps

[including initiating or pursuing proceedings in Canada], it shall be exclusively authorized and empowered to do so, to the exclusion of the Respondents and the [Former Officeholders]."

40. The Former Officeholders unsuccessfully appealed the Second Quebec Recognition Order. Leave to appeal to the Supreme Court of Canada was then sought by the Former Officeholders and, later, the Joint Liquidators. However, leave to appeal was denied.

41. In light of the foregoing, at the earliest, it was only upon the rendering of the Second Quebec Recognition Order on September 11, 2009 that there became a person capable of commencing a proceeding in respect of a claim on behalf of SIB against TD Bank. At that time, the "person with a claim" was E&Y and not the Former Officeholders.

42. Following their appointment in May 2011, the Joint Liquidators determined that the only person capable of commencing a proceeding in respect of a claim against TD Bank in Canada was E&Y and that E&Y had not yet commenced such an action.

43. As a result, on August 19, 2011, the Joint Liquidators sought and received an order of the Quebec Superior Court authorizing and empowering the Joint Liquidators to institute and litigate, in place and stead of E&Y, proceedings against TD Bank in any appropriate Canadian jurisdiction (the "Authorization Order"). The Authorization Order specifically recognizes the Joint Liquidators as having "the equivalent or substantially similar powers and capacities than those of a trustee in bankruptcy or other insolvency holder within Canada" and authorized the Joint Liquidators to exercise those powers and capacities for the purposes of the institution and litigation of the within action against TD Bank.

44. On August 22, 2011, the Joint Liquidators commenced the within action against TD Bank.

45. On June 12, 2012, the Quebec Superior Court ordered that, if TD Bank intended to challenge the validity of the Authorization Order, it must bring a motion in respect of such a challenge by June 30, 2012, failing which TD Bank would be barred from bringing such a motion in the future. TD Bank did not move to challenge the Authorization Order, thereby accepting the validity of the Authorization Order and the capacity it provided to the Joint Liquidators.

The Fifth Circuit Ruled That the Fraud Was Not Discoverable Until August 27, 2009

46. Following the collapse of SIB in February 2009, Stanford, James Milton Davis ("Davis") and a small cabal of other insiders were criminally charged in connection with their involvement in the fraud committed on SIB.

47. On August 27, 2009, Davis entered a guilty plea in respect of his criminal charges stemming from SIB's collapse (the "Davis Plea"). The Davis Plea contained a detailed description of the fraud committed by Robert Allen Stanford ("Stanford"), Davis and the small cabal of other insiders of SIB. The information contained in the Davis Plea was not previously available.

48. Subsequently, the U.S. Receiver commenced a fraudulent transfer claim pursuant to the *Texas Uniform Fraudulent Transfers Act*, Tex. Bus. & Com. Code §24.001 et seq. ("TUFTA") against various U.S. national political committees in an action styled as *Janvey v. Democratic Senatorial Campaign Committee, Inc.* In response, the political committees moved to dismiss

the claim on grounds that, among other things, it was barred pursuant to the applicable one-year TUFTA limitation period. However, the political committees' motion was finally dismissed by the U.S. Court of Appeal for the Fifth Circuit in a decision rendered on March 18, 2013. In dismissing the motion, the Fifth Circuit held:

> 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...and requested that [FTI] 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 corporation that had been diverted and dissipated in the operation of the scheme.
>
> [...]
>
> 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 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. The Receiver filed this suit on February 19, 2010, less than one year after Davis's guilty plea. There is no evidence in the record to indicate that the Receiver or Van Tassel had developed or could reasonably have developed knowledge or probative evidence of the true nature and duration of the Ponzi scheme prior to Davis's guilty plea on August 27, 2009. [underlining added]

49. Thus, having considered comprehensive evidence before it concerning the daunting circumstances faced by the U.S. Receiver in administering SIB's estate, the Fifth Circuit held that the fraud committed on SIB was not discoverable until August 27, 2009, which is five days after the Limitations Date. Contrary to its allegations in the within action, TD Bank has previously

adopted and relied on the Fifth Circuit's decision regarding the date of discovery on multiple occasions.

50. Separately, a class action, *Rotstain et al. v. The Toronto-Dominion Bank et al.*, was commenced in Texas on behalf of SIB creditors against, among others, TD Bank (the "Texas Class Action"). An organization composed of SIB creditors known as the "Official Stanford Investors Committee" ("OSIC") subsequently intervened in the Texas Class Action. However, TD Bank brought a motion seeking the dismissal of OSIC's claims, including on the basis that OSIC's TUFTA fraudulent transfer claims and two of its tort claims were limitations barred.

51. In particular, since the time the within action was commenced, TD Bank has taken the following positions in respect of OSIC's TUFTA claims:

(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."

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

53. 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 have a two year limitation period from when they were discoverable, TD Bank took the following position: "Statute expired on August 27, 2011 (2 years from James Davis Guilty plea)".

54. 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 upon the Davis Plea on August 27, 2009. Like the claims TD Bank has addressed in the Texas Class Action, the facts giving rise to the Joint Liquidators' claim include, as a starting point, the fact that a fraud was committed on SIB. As the Davis Plea was entered into after the Limitations Date, TD Bank has taken a position requiring the conclusion that the Joint Liquidators' claim was not discoverable before the Limitations Date. At a minimum, the issues relevant to the discoverability of the Joint Liquidators' claim are not as simple as TD Bank pleads in the within action.

55. As a result, TD Bank cannot now rely on its limitations defence in response to the Joint Liquidators' claim. The Joint Liquidators plead and rely on the doctrine of approbation and reprobation.

A Reasonable Person with the Abilities and In the Circumstances of the Former Officeholders Would Not Have Discovered the Joint Liquidators' Claim Before the Limitations Date

56. In the alternative, a reasonable person with the abilities and in the circumstances of the Former Officeholders would not have discovered the facts giving rise to the Joint Liquidators' claim before the Limitations Date. Accordingly, pursuant to the *Limitations Act, 2002*, on which the Joint Liquidators plead and rely, the Joint Liquidators' claim against TD Bank is not limitations barred.

Knowledge of Certain Facts was Required for Discovery

57. Contrary to the allegations contained in paragraphs 7 to 11 of TD Bank's statement of defence, knowledge that there was a fraud in respect of SIB's affairs and that TD Bank was one of SIB's correspondent banks does not amount to discovery of the Joint Liquidators' claim. Further, discovery of a fraud was a foundational fact and numerous other facts were subsequently required to amount to discovery. The Joint Liquidators admit that there were proceedings commenced and a press release issued as set out in sub-paragraphs 10(a) to 10(g) of TD Bank's statement of defence. However, the Joint Liquidators deny that those proceedings and press release demonstrate when a reasonable person with the abilities and in the circumstances of the Former Officeholders ought to have discovered the Joint Liquidators' claim against TD Bank. Knowing that TD Bank provided correspondent banking services to SIB or that Stanford and the Other Insiders had looted SIB does not constitute knowledge of actionable wrongdoing on the part of TD Bank.

58. For discovery of a claim against TD Bank to occur, a reasonable person with the abilities and in the circumstances of the Former Officeholders first ought to have known of the facts detailed below.

a) SIB suffered an injury, loss or damage

59. In this case, the injury, loss or damage was the financial loss suffered by SIB. The determination that SIB had suffered a financial loss required an extensive forensic review of SIB's financial affairs including a determination of all of SIB's existing assets and outstanding liabilities as at the date of its collapse. This was a time and resource intensive project made more complicated by the fact that SIB was a multi-billion dollar entity that had been in operation for more than 20 years. It invested money with numerous third parties around the world and owed liabilities to over 20,000 individuals and entities.

b) SIB's loss was the result of fraud

60. It was necessary to determine that SIB's financial loss was the result of the SIB Looting undertaken by Stanford and the Other Insiders that was assisted and made possible by TD Bank. Had it been determined that SIB's loss was caused by some non-fraudulent occurrence (for instance, poor investment decisions), the potential wrongdoers would presumably have been completely distinct from those who in fact caused or knowingly assisted in the SIB Looting and breaches of fiduciary duty by Stanford and the Other Insiders. The determination that SIB's loss was the result of the SIB Looting undertaken by Stanford and the Other Insiders and assisted by TD Bank was a necessarily complex task given that the fraud was deliberately undertaken in a clandestine manner to avoid detection and obscure the true nature of SIB's affairs. As detailed above, TD Bank has taken the position that the fraud became discoverable on August 27, 2009.

c) SIB was the victim of the fraud, not the perpetrator

61. It was a necessary consideration whether SIB was the victim of the SIB Looting or the perpetrator. This determination was critical to assessing whether there were third party claims, including against TD Bank.

d) TD Bank provided services that were relevant to the undertaking of the fraud

62. It was necessary to determine that TD Bank provided services to SIB and that those services were relevant to the undertaking of the fraud. In particular, it was necessary to determine that TD Bank provided correspondent banking services to SIB and that such services facilitated the undertaking of the fraud. On the other hand, if TD Bank had provided different services to SIB that did not facilitate the undertaking of the fraud, no viable claim would exist against TD Bank.

e) TD Bank's acts or omissions contributed to the loss

63. It was not enough to simply know that the services provided by TD Bank to SIB were relevant to the undertaking of the fraud. It was also necessary to determine that, TD Bank's improper acts or omissions contributed to the loss suffered by SIB. In particular, as detailed in the Joint Liquidators' statement of claim, it was necessary to determine that TD Bank should have known there was no legitimate business purpose for TD Bank's services, that TD Bank had an exclusive window into SIB's affairs and/or that there was a multitude of open source information in respect of, among others, SIB and Stanford, all of which required TD Bank to terminate SIB's access to TD Bank's facilities, report the fraudulent or improper conduct to the appropriate authorities and freeze SIB's accounts. However, TD Bank at all times continued unabated in its provision of banking services to SIB, with the result that the fraud on SIB was

allowed to continue and cause SIB's loss. Determining that TD Bank failed to act as was required in the circumstances necessitated a review and analysis of the information available to TD Bank and TD Bank's conduct, which was complicated by the lack of access to TD Bank's internal records.

f) A proceeding against TD Bank was an appropriate way to remedy SIB's loss

64. Having determined all of the foregoing facts, it remained to be determined whether a proceeding against TD Bank was an appropriate way to remedy SIB's loss. Given the mandate of the Former Officeholders (and the Joint Liquidators) to act in the best interests of SIB and its creditors, and the multitude of potential avenues available to recover funds given the size of SIB and the extent of its dealings, determining that a proceeding against TD Bank was an appropriate way to remedy SIB's loss required extensive analysis going beyond the facts strictly relevant to the Joint Liquidators' claim against TD Bank but also issues faced by SIB's estate on the whole.

The Abilities of the Former Officeholders and the Circumstances in Which They Found Themselves

65. Between the date of the Former Officeholders' appointment as receiver-managers and the Limitations Date, a reasonable person with the abilities and in the circumstances of the Former Officeholders would not have discovered the facts giving rise to the Joint Liquidators' claim against TD Bank. The abilities of the Former Officeholders and the circumstances in which they found themselves are outlined below.

a) The Former Officeholders completely lacked the funding required to investigate or pursue third party claims

66. Prior to the Limitations Date, the Former Officeholders lacked access to the funds necessary to undertake the receivership and liquidation of SIB.

67. Upon their appointment, the only funds initially available to the Former Officeholders for the administration of SIB's receivership and liquidation totaled less than USD $1.1 million, a miniscule amount in light of SIB's multi-billion dollar operations.

68. The funds available to the Former Officeholders were further limited by the expenses being incurred by SIB upon their appointment as receiver-managers. At the time of their appointment, SIB was spending approximately USD $400,000 a month on the ongoing expenses of employee salaries, securities, amenities, IT and maintenance alone.

69. As a result, notwithstanding that the Former Officeholders took all available steps to reduce the use of funds by SIB's estate (including not being paid for their services), the funds available to the Former Officeholders were severely limited and ultimately ran out in July 2009.

70. Only after diligent and contested efforts were the Former Officeholders able to successfully obtain an order from the U.K. Court of Appeal releasing the funds required to, at a minimum, cover the operational cost necessary to "keep the lights on" for the SIB estate over the ensuing six month period. That order was obtained on August 18, 2009, just four days before the Limitations Date, and the funds were not received for some time thereafter.

71. No reasonable person with the abilities and in the circumstances of the Former Officeholders would have used the scarce funds available to investigate third party claims, particularly without the legal capacity to subsequently commence such claims and, in any event, without the funds required to pursue such claims.

b) The Former Officeholders were faced with the complex circumstances resulting from the arrangement of SIB's affairs and its subsequent collapse

72. Even if the Former Officeholders had the funding required to investigate and pursue third party claims (which they did not), the circumstances resulting from SIB's collapse were extraordinarily complex and limited the Former Officeholders' ability to readily discover the facts giving rise to the Joint Liquidators' claim against TD Bank.

73. TD Bank's previous position in related litigation 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 in December 2011:

> ... 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 clearly acknowledges the chaos resulting from that collapse and the lengthy and expensive work required to discover third party claims (such as the within action) that resulted. This position is contrary to TD Bank's position as pleaded in the within action.

75. Consistent with TD Bank's position in the related litigation, the circumstances resulting from SIB's collapse included, among other things, the following:

(a) Over the course of more than 20 years, SIB was the victim of a multi-billion dollar fraud committed by a small cabal of insiders using a complex web of approximately 130 corporations affiliated with SIB and other entities chartered and operated in more than 50 locations spanning fifteen U.S. states and thirteen countries, including Antigua;

(b) As a result of the magnitude of the operations of SIB and its affiliates, there were hundreds of millions records relevant to the Former Officeholders' mandate as receiver-managers and liquidators, if not more;

(c) The records relevant to the Former Officeholders' mandate as receiver-managers and liquidators were disorganized and not centrally kept. Most notably, many such records were not located in Antigua and at all times prior to the Limitations Date were neither under the control of nor accessible by the Former Officeholders. Further, SIB's true financial picture was deliberately kept separate and apart from SIB's normal and readily available records and many relevant records were held by third party financial institutions (including TD Bank);

(d) The banking records available to the Former Officeholders consisted of records from all of the banks that held correspondent accounts for SIB and from banks that provided other services to SIB. Such banks (including TD Bank) provided daily banking records to SIB, which therefore totaled tens of thousands of pages and detailed tens of millions of transactions. Like SIB's other records, its banking records were disorganized and not centrally kept;

(e) In many instances, third party financial institutions that held SIB's assets upon its collapse refused to promptly cooperate and provide the information or records requested by the Former Officeholders, if they did so at all. In turn, the Former Officeholders could not readily ascertain the assets and liabilities of SIB in connection with those financial institutions. For instance, when the Former Officeholders requested that TD Bank provide account details and balances of SIB accounts, TD Bank's lawyers initially refused to provide such information;

(f) Certain records relevant to the Former Officeholders' mandate as receiver-managers and liquidators were unavailable to them prior to the Limitations Date because those records were held exclusively by the U.S. Department of Justice in connection with the criminal proceedings arising from SIB's collapse;

(g) Notwithstanding the Former Officeholders' efforts to negotiate and co-operate with the U.S. Receiver, due to legal complications, no agreement was reached between the Former Officeholders and the U.S. Receiver concerning the sharing of information between the two estates prior to the Limitations Date. Accordingly, any information exclusively held by the U.S. Receiver relevant to the Joint

Liquidators' claim against TD Bank was not directly accessible by the Former Officeholders;

(h) The Former Officeholders often could not rely on information about SIB's affairs held by third parties. For instance, unbeknownst to the Former Officeholders, the information concerning the value of the assets of SIB held by both the Antiguan Financial Services Regulatory Commission and SIB's external auditor, C.A.S. Hewlett & Co., had been fraudulently manipulated and used to conceal the fraud committed on SIB;

(i) The assets and liabilities of SIB were diverse and complex. For instance, among many other things:

(i) At the time of its collapse in February 2009, SIB had approximately 25,000 clients located in approximately 113 different countries with SIB certificates of deposit valued at approximately USD $8 billion,

(ii) As detailed at paragraph 62 of the Joint Liquidators' statement of claim, SIB offered six different types of products to customers. There were distinct terms and conditions for each type of product, all of which impacted the extent of the liabilities owed by SIB to individual customers,

(iii) As detailed at paragraph 63 of the Joint Liquidators' statement of claim, SIB' also offered investment banking services including public equity dealings, private placements, mergers and acquisitions, and debt financing,

all of which were undertaken for an array of clients around the world and which gave rise to distinct assets and liabilities of SIB,

(iv) SIB had investment assets with hundreds of financial institutions around the world totaling millions of dollars including equities, bonds, private equity investments and cash,

(v) SIB held extensive and diverse real property assets in Antigua that gave rise to unique financial and legal issues, and

(vi) SIB had extensive other assets ranging from smaller items such as office furniture and vehicles to debts owing to SIB worth millions of dollars;

(j) Upon arriving at SIB's offices in Antigua on February 20, 2009, the Former Officeholders found approximately 100 SIB customers in the lobby. Those customers had travelled to SIB's offices from around the world to demand repayment of their investments. Those customers were extremely agitated and demanding, so much so that SIB personnel were required to seek the assistance of the Antiguan police;

(k) Following the appointment of the Former Officeholders as receiver-managers, SIB's customers from around the world continued to travel to SIB's offices to demand their repayments and speak with the Former Officeholders or SIB personnel;

(l) Within the initial months following the appointment of the Former Officeholders as receiver-managers of SIB, the Former Officeholders received more than 15,000

emails from SIB customers demanding information on the status of SIB and their investments. Large numbers of such emails from SIB customers continued to be received by the Former Officeholders throughout the period they acted as receiver-managers and liquidators of SIB;

(m) Within the initial months following the appointment of the Former Officeholders as receiver-managers of SIB, the Former Officeholders also received thousands of telephone calls from SIB customers demanding information on the status of SIB and their investments. Large numbers of such telephone calls continued to be received by the Former Officeholders throughout the period they acted as receiver-managers and liquidators of SIB;

(n) Upon their appointment as receiver-managers, the Former Officeholders became responsible for the approximately 90 employees of SIB's offices in Antigua. Those employees were generally of limited assistance to the Former Officeholders due to their dismay over SIB's unexpected collapse and, more importantly, because information truly relevant to the Former Officeholders' efforts as receiver-managers and liquidators had been deliberately kept from them. This restricted the Former Officeholders' ability to investigate and uncover the true nature of SIB's affairs;

(o) To the extent that SIB's assets were held in foreign jurisdictions or the Former Officeholders were required to act in foreign jurisdictions in order to complete their mandate as receiver-managers or liquidators, the Former Officeholders were required to obtain recognition from the courts of such jurisdictions prior to

obtaining those assets or otherwise complete their mandate. Obtaining such recognition was a complex process that required the Former Officeholders to identify, retain and extensively coordinate with local counsel in foreign jurisdictions;

(p) Due to legal complications, virtually all steps taken in foreign jurisdictions by the Former Officeholders prior to the Limitations Date were vehemently opposed by the U.S. Receiver, the SEC and the Asset Forfeiture and Money Laundering Section of the U.S. Department of Justice; and

(q) At all times that the Former Officeholders acted as receiver-managers or liquidators of SIB, they also acted as receiver-managers of STC. The receivership of STC gave rise to an extensive number of unique issues that required attention and actions distinct from those taken in respect of SIB.

c) The Former Officeholders' personal abilities and circumstances limited their ability to readily discover a claim against TD Bank

76. Even if the Former Officeholders had the funding required to investigate and pursue third party claims (which they did not), their personal abilities and circumstances limited their ability to readily discover the facts giving rise to the Joint Liquidators' claim against TD Bank. Among other things, at the time of their initial appointment, those abilities and circumstances included the following:

(a) The Former Officeholders were citizens of the United Kingdom and were not citizens of Antigua;

(b) The Former Officeholders were educated and trained in the United Kingdom in accordance with the practices and laws of the United Kingdom and not in accordance with the practices and laws of Antigua;

(c) The Former Officeholders were based in the United Kingdom and the vast majority of their professional experience was obtained in the United Kingdom;

(d) The Former Officeholders had very limited experience working in Antigua, having undertaken only one previous project in that jurisdiction;

(e) The Former Officeholders had limited knowledge of the relevant laws, personnel and customs of undertaking a receivership or liquidation in Antigua;

(f) Although the Former Officeholders had experience undertaking receiverships and liquidations, they had never undertaken a project the size and scale of the receivership and liquidation of SIB, which (unbeknownst to the Former Officeholders at that time) had operated for more than 20 years and was the victim of the second largest financial fraud in history;

(g) The Former Officeholders had no knowledge of SIB's business or affairs and no knowledge of the personnel, information or records that they had been placed in charge of by virtue of their appointment as receiver-managers;

(h) The Former Officeholders had no immediate knowledge that SIB had suffered an injury, loss or damage and, in particular, did not know that SIB had suffered a financial loss and was in fact insolvent. Instead, they knew only that SIB's accounts had been frozen by the U.S. Receivership Order;

(i) The Former Officeholders had no knowledge or way to immediately determine that a fraud had occurred in connection with SIB and, importantly, had no knowledge or way to immediately determine that SIB was the victim of a fraud;

(j) Like with respect to SIB, the Former Officeholders similarly had no knowledge whatsoever in respect of STC, an entity for which they also served as receiver-managers;

(k) The Former Officeholders had no or very limited knowledge of TD Bank and, in particular, did not immediately know of the location of any TD Bank offices relevant to SIB or the types of services TD Bank provided;

(l) The Former Officeholders had no knowledge that TD Bank had provided correspondent banking services to SIB and similarly had no knowledge of any other banking services that had been provided to SIB;

(m) The Former Officeholders specifically had no knowledge or way to immediately determine that any services provided by TD Bank to SIB were relevant to the undertaking of a fraud; and

(n) The Former Officeholders had no knowledge of any wrongful acts or omissions of TD Bank in connection with its provision of correspondent banking services to SIB.

d) The Former Officeholders acted with reasonable diligence in the circumstances

77. The actions taken by the Former Officeholders prior to the Limitations Date were reasonable and consistent with their mandate and capacity first as receiver-managers and then as liquidators. The Former Officeholders at all relevant times acted with reasonable diligence, particularly in light of the funding restraints detailed above. For instance, notwithstanding their circumstances, among extensive other actions, prior to the Limitations Date, the Former Officeholders:

(a) Located and reviewed many of the available records that were relevant to their mandate as receiver-managers and liquidators, including those records held both at SIB in Antigua and, to the extent possible, with third parties around the world;

(b) Interviewed and worked with SIB employees and others in order to understand SIB's operations and, in turn, undertake the receivership and liquidation;

(c) Investigated and confirmed the sums owed to SIB's customers and other creditors;

(d) To the extent possible, located and reviewed the investment assets held by SIB with financial institutions around the world, including by undertaking extensive correspondence with such financial institutions;

(e) To the extent possible, located and revised the diverse non-investment assets of SIB held by SIB around the world, including by undertaking any necessary correspondence and steps to engage personnel knowledgeable of or responsible for such assets;

(f) To the extent possible in light of the very limited funds available, retained and utilized professionals around the world to take steps on behalf of SIB and the Former Officeholders;

(g) Took steps to determine the funds available to the Former Officeholders to undertake the receivership and liquidation and, upon realizing that there was insufficient funds, took steps to locate further sources of funds and access those funds;

(h) Ensured the preservation of SIB's operating infrastructure and computer systems, including by securing and imaging SIB's extensive computer systems and records;

(i) Ensured regular and responsive communications with SIB creditors, including by responding to extensive creditor inquiries, issuing regular press releases in both English and Spanish, and maintaining a website including information relevant to the receivership and liquidation;

(j) Extensively corresponded and negotiated with the U.S. Receiver with a view to co-operating and coordinating the administration of the two estates of SIB;

(k) Implemented and maintained a SIB-specific online claims management system;

(l) Sought recognition of their appointment as receiver-managers and liquidators in jurisdictions around the world where it was determined that SIB had assets, including in Canada, the U.S., the United Kingdom and Switzerland; and

(m) Took steps further to their mandate as receiver-managers of STC, most of which were distinct from the steps required in respect of SIB.

78. In taking such steps, the Former Officeholders acted properly and consistent with their mandate as receiver-managers and liquidators. They rationally prioritized their many competing priorities and responsibilities and did so in light of the restraints caused by a lack of funding and lack of information. The Former Officeholders acted consistent with their role as court-appointed officers acting on behalf of SIB's creditors and acted in the most cost-effective manner possible.

79. In the circumstances, even if the Former Officeholders had spent all of their time and efforts on investigating and pursuing third party claims in dereliction of their other higher priorities, they still would not have discovered the facts giving rise to the Joint Liquidators' claim against TD Bank prior to the Limitations Date. For similar reasons, even with the benefit of funding and certain records not available to the Former Officeholders, the U.S. Receiver also did not discover and could not have discovered with reasonable diligence those facts until after the Limitations Date. At all relevant times, the Former Officeholders and the U.S. Receiver acted as would a reasonable person in the circumstances.

Conclusion

80. In light of the foregoing, TD Bank's defence must fail.

Date: June 14, 2016

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Lawyers for the plaintiffs

MARCUS A. WIDE, et al.
Plaintiffs

v.

THE TORONTO-DOMINION BANK
Defendant
Court File No. CV-12-9780-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

FRESH AS AMENDED REPLY TO
STATEMENT OF DEFENCE

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Lawyers for the plaintiffs

TAB U

This is **Exhibit "U"** referred to in the
affidavit of Marcus A. Wide
sworn before me, this 22nd day of September, 2016.

A Commissioner for taking affidavits

Nathan Shaheen

From: Hall, Geoff R. <GHALL@MCCARTHY.CA>
Sent: 14 June 2016 5:59 PM
To: 'Conway, Madam Justice Barbara (SCJ)'
Cc: Lincoln Caylor; Maureen Ward; Nathan Shaheen; Sirivar, Junior; Ivanov, Vladimira M
Subject: TD/Wide - report on status of discovery plan
Attachments: DOCS-#15634224-v1-File_Direction_Order_of_Conway_J__-_May_13__2016.pdf

FilingDate: 14/06/2016 11:47:00 PM

Your Honour:

In a direction you made at a chambers appointment on May 13, 2016 (attached), you asked the parties to report back to you by June 15, 2016 on the status of the discovery plan. I write to provide that update. This email has of course been reviewed and approved by the Joint Liquidators' counsel.

We confirm that the Honourable Colin Campbell is willing and able to act as a mediator to resolve disputes over the discovery plan. The parties have agreed that we would not use Mr. Campbell until we have reached an impasse, which is not yet the case.

The parties are working on a draft Discovery Agreement and to this end had a very productive face-to-face meeting on June 1, 2016. Both sides left the meeting with "homework" to follow up on, which is under way. As a result, the discovery plan is not yet agreed, but we are much closer than we were at the time of the May 13, 2016 chambers appointment.

In the circumstances, the parties suggest that we make a further report to you when we reach an impasse and proceed to retain Mr. Campbell, or by July 15, 2016 (whichever is earlier).

Thank you for your assistance in this matter.

mccarthy tétrault

Geoff R. Hall
Partner | Associé
Litigation | Litige

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Suite 5300, TD Bank Tower, Box 48, 66 Wellington Street West, Toronto, ON M5K 1E6

Court File Number: CV-12-9780-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Wide
Plaintiff(s)

AND

TD
Defendant(s)

Case Management ☐ Yes ☐ No by Judge: _____

Counsel	Telephone No:	Facsimile No:

☐ Order ☐ Direction for Registrar (No formal order need be taken out)
☐ Above action transferred to the Commercial List at Toronto (No formal order need be taken out)

☐ Adjourned to: _____
☐ Time Table approved (as follows):

① Counsel are working on a discovery plan. The deadline for ~~[illegible]~~ completing same is extended from May 6 to June 10th.
② If counsel can not resolve the plan, they propose attending before The Honorable Colin Campbell to mediate any of the issues. I fully endorse this approach.
③ Counsel to report back to me (via email) by June 15th whether they have resolved the

May 13/16
Date

Conway J.
Judge's Signature

☐ Additional Pages 1 of 2

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

discovery plan or are proceeding to mediation.

(4) Counsel have prepared fresh as amended pleadings. They may be filed in that form, as agreed by counsel, & as approved by me.

Conway J.

Judges Initials: _____

TAB V

This is **Exhibit "V"** referred to in the
affidavit of Marcus A. Wide
sworn before me, this 22nd day of September, 2016.

A Commissioner for taking affidavits

Court File Number: CV - 12 - 9780 - 00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Wide
Plaintiff(s)

AND

TD
Defendant(s)

Case Management ☐ Yes ☐ No by Judge: _____

Counsel	Telephone No:	Facsimile No:

☐ Order ☐ Direction for Registrar **(No formal order need be taken out)**
☐ Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**

☐ Adjourned to: _____
☐ Time Table approved (as follows):

Counsel have agreed, and I so order, that in the event that the stay sought by TD is not granted, documentary productions by both parties shall be completed within 6 months of the release of my decision on the stay motion.

Sept 6/16
Date

Conway J.
Judge's Signature

☐ Additional Pages _____

TAB W

This is **Exhibit "W"** referred to in the
affidavit of Marcus A. Wide
sworn before me, this 22nd day of September, 2016.

A Commissioner for taking affidavits

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

DISCOVERY AGREEMENT
(Dated as of September 15, 2016)

Preamble

A. The Parties (as defined below) have conferred regarding matters relating to the preservation, production and use of documents, including electronically stored information, and oral discovery in this action, being CV-12-9780-00CL (the "**Action**").

B. This Discovery Agreement (the "**Agreement**") sets out the Parties' formal agreement with respect to certain discovery issues.

C. This Agreement is intended to serve as the Parties' discovery plan for the purpose of compliance with Rule 29.1 of the *Rules of Civil Procedure* (the "***Rules***").

1. Parties

1.1 The Parties to this Agreement are:

1.1.1 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 (the "**Joint Liquidators**"); and

1.1.2 The Toronto-Dominion Bank ("**TD Bank**").

2. Purposes of the Agreement

2.1 The purposes of this Agreement are:

2.1.1 to prepare a joint plan for the preservation, production and use of documents, including electronically stored information, and for oral discovery, in this Action in order to: (a) ensure an effective discovery process, and (b) minimize the time and expense required for the Parties to comply with their discovery obligations;

2.1.2 to ensure that the steps taken in connection with documentary and oral discovery in the Action are proportionate, taking into account the nature and scope of the litigation, the relevance of the available documents, the importance of the documents to the adjudication of the case, and the costs, burden and delay that may be imposed on the Parties to deal with electronically stored information; and

2.1.3 to identify any areas of disagreement between the Parties regarding: (a) the proper scope of documentary discovery in the Action, or (b) the manner in which documents are to be preserved, produced and used in the Action.

3. Discovery Rights Otherwise Not Affected

3.1 This Agreement is made in lieu of the Parties seeking a formal order from the Court with respect to the matters agreed upon. Any Party may make a motion to the Court to compel another Party to take the steps contemplated by the Agreement, and the Parties agree that the Court may take the existence of the Agreement into account in determining whether to grant the order sought. The respondent on such a motion may seek to justify its non-compliance with the Agreement on the basis of, among other things, any information that was unknown or unavailable to the Party at the time the Agreement was entered into.

3.2 Breach of this Agreement does not, in and of itself, give rise to a right to damages or any other monetary relief, or to injunctive relief, although the Parties agree that the Court may take any breach of this Agreement into account in exercising its discretion with respect to costs or other sanctions, or on an application for injunctive relief.

3.3 The Parties recognize that, as additional information becomes available throughout the Action, it may become apparent that (a) it is impracticable or impossible for a Party to comply with the terms of Agreement, or to do so in a time-efficient or cost-efficient manner, or (b) further steps,

beyond those set out in this Agreement, are required in order for a Party to obtain access to relevant documents in the Action. Each Party agrees to notify the other Parties promptly when it knows that it will not comply with any term of the Agreement or when it concludes that another Party should take further steps beyond those set out in this Agreement. The Parties agree to negotiate in good faith with respect to any amendments to the Agreement requested by a Party on this basis, and to seek the assistance of the Honourable Colin L. Campbell in appropriate cases in order to resolve disputes between the Parties.

4. **Paper and Other Non-Electronically Stored Information**

4.1 The Parties agree that copies of all producible paper documents will be exchanged between the Parties upon request in electronic form in accordance with Section 12 below or, upon request, exchanged between the Parties in paper format. The reasonable cost of making the paper copies is to be borne by the Party requesting the paper copy.

5. **Exchange of Court Documents Between Parties**

5.1 A "Court document" is any document that a Party is required to serve on another Party in connection with the Action, whether pursuant to the *Rules*, an order of the Court, a practice direction, or otherwise.

5.2 The Parties agree to serve and accept service of Court documents electronically, except where it is impracticable to do so, whether due to the size of the Court document or otherwise.

5.3 Where a Court document has been served in paper form, the Party who served the Court document agrees to provide to the other Parties upon request an identical copy in searchable electronic form unless it is impracticable to do so.

5.4 The Parties agree to serve Court documents in the following format:

Document	Format
Schedules A, B and C of the affidavit of documents, and any other Court documents consisting of an index or table (i.e., the tables set out in the Schedule, not the productions	Delimited ASCII text file. The Parties agree upon the following form of delimitation: CSV

themselves)	
All other Court documents	PDF file

6. **Preservation of Electronically Stored Information**

6.1 Without prejudice to the Parties' discovery rights, and without limiting the obligation of each Party to take reasonable steps to preserve electronically stored information known to be relevant, the Parties have been advised by legal counsel of their preservation obligations and no further preservation steps are required at this time.

6.2 Nothing in this Agreement affects the right of any Party to apply to the Court for a preservation order.

7. **Scope of Potentially Relevant Documents**

7.1 The Parties agree that relevance is defined by the pleadings in the Action. Based on the information presently available, the period of time relevant to both parties to the Action is agreed to be from 1991 until February 17, 2009 (the "**First Relevant Period**"). In addition, the period of time relevant to the discoverability of the Joint Liquidators' claim against TD Bank is from February 17, 2009 until August 22, 2011 (the "**Second Relevant Period**", together with the First Relevant Period, the "**Relevant Periods**"). As detailed further below, the Parties agree that certain documents generated after the Relevant Periods are also relevant to the Action because they relate to the Parties' after-the-fact investigations and reviews of events that took place within the Relevant Periods.

7.2 There are no geographical limitations on the relevant records. There are relevant documents in other jurisdictions besides Canada, including, at a minimum, Antigua and the United States. TD Bank had operations in the United States during the First Relevant Period and TD Bank may therefore hold relevant records in the United States or other jurisdictions.

7.3 The Parties acknowledge that the full scope and nature of documents held by TD Bank that are relevant to the Action is not known by the Joint Liquidators, and vice versa. The Parties therefore agree that nothing in this Agreement limits or eliminates any obligation on either Party to produce any document known to be relevant to the other Party, regardless of whether such document is of a nature expressly addressed by this Agreement.

7.4 The Parties have conferred regarding the sources of potentially relevant documents. Based on the information presently available, and without prejudice to the Parties' discovery rights, including the right of the Parties to take the position that there are further sources of potentially relevant documents, the Parties have agreed that the relevant documents and sources of further potentially relevant documents are as described in Sections 8 and 9 below.

8. **Identification of the Joint Liquidators' Relevant Documents**

8.1 The Joint Liquidators have power, possession and control of documents from the following sources:

8.1.1 The Recommind Database;

8.1.2 The Ringtail Database;

8.1.3 The Houston, Texas warehouse controlled by the U.S. Receiver; and

8.1.4 The USB key provided by the U.S. Receiver to the Joint Liquidators.

8.2 In order to identify the relevant documents contained in the sources listed at Section 8.1, the Joint Liquidators have taken or will take the following steps:

8.2.1 The Joint Liquidators will run the search terms listed at Schedule "A" to the Agreement into the Recommind Database and Ringtail Database;

8.2.2 The Joint Liquidators will provide TD Bank with a list of any search terms which return a number of hits which they deem to be disproportionate. The Parties will meet and confer in order to agree to a method for narrowing the hits to be reviewed. In the event that the Parties are unable to agree on such a method, or dispute the proportionality of the number of hits returned by any search term, they will seek the assistance of the Honourable Colin L. Campbell in order to resolve the dispute;

8.2.3 The Joint Liquidators will then review the search results in order to identify all relevant documents and, to the extent reasonably possible, remove duplicate documents;

8.2.4 The Joint Liquidators have run the search terms listed at Schedule "B" to the Agreement into the electronic spreadsheet indexing the records in the Houston, Texas warehouse. The Joint Liquidators manually reviewed the search results in order to identify sections of the spreadsheet potentially relevant to the Action. The Joint Liquidators then

undertook a line-by-line review of the potentially relevant sections of the spreadsheet, which resulted in the Joint Liquidators identifying 211 boxes or cabinets that appeared most likely to correspond with relevant physical records. The contents of the 211 boxes or cabinets were then reviewed at a high level and all potentially relevant documents were copied. The Joint Liquidators will undertake a detailed review of the copied documents to determine which of those records is in fact relevant;

8.2.5 The Joint Liquidators will review the records contained on the USB key provided by the U.S. Receiver to the Joint Liquidators; and

8.2.6 The Joint Liquidators will confer with the U.S. Receiver to determine whether the U.S. Receiver has any further records potentially relevant to the Action. If the U.S. Receiver does have such records, the Joint Liquidators will take reasonable steps to obtain and review those records to identify any relevant documents.

8.3 In addition to the foregoing, and without limiting the fact that relevance is defined by the pleadings or Section 7.3 of the Agreement, the Parties agree that any documents of the following nature that are in the power, possession or control of the Joint Liquidators are relevant to the Action:

8.3.1 All documents relevant to the discoverability of the Joint Liquidators' claim, including, but not limited to, documents reflecting relevant knowledge of and investigation into the relationship between TD Bank and relevant entities listed above, and any documents produced pursuant to meetings with any witnesses or affected parties in connection with the matters at issue in this claim;

8.3.2 All documents relevant to the Joint Liquidators' investigation into any potential third party claims, including the claim against TD Bank;

8.3.3 All documents related to damages;

8.3.4 All documents related to liability for damages;

8.3.5 All documents relevant to TD Bank's claim that the Stanford International Bank ("SIB") or its agents were contributorily negligent; and

8.3.6 All electronic documents in the power, possession or control of the U.S. Receiver relevant to the any of the categories listed above.

8.4 The Joint Liquidators agree to review their physical and electronic records in order to identify all documents of the nature described at Section 8.3.

9. **Identification of TD Bank's Relevant Documents**

9.1 TD Bank has power, possession and control of documents from the following sources:

9.1.1 All paper documents and printed electronic documents collected within the Financial Institutions Group at TD Bank, as set out in the letter attached as Schedule "C" to this Discovery Agreement;

9.1.2 All paper documents and printed electronic documents collected within the Private Investment Counsel Group at TD Bank, as set out in Schedule "C" to this Discovery Agreement;

9.1.3 All relevant documents available to TD Bank as of February 17, 2009 that were in the control of the custodians listed at Schedule "D" to this Discovery Agreement;

9.1.4 All documents in the email files of:

9.1.4.1 Martin Doyle (Vice President, Anti-Money Laundering Compliance, TD Securities);

9.1.4.2 Perry Mercer (Vice President and Senior Portfolio Manager, TD Waterhouse Private Investment Counsel);

9.1.4.3 Wolfgang Mersch (Managing Director, TD Securities);

9.1.4.4 Tarik Muzaffar (Vice President and Director of Global Transactions, TD Securities);

9.1.4.5 Geoff Rothwell (Vice President of Financial Institutions, TD Securities); and

9.1.4.6 Bill Sebenski (Business Head - Financial Institutions, TD Securities).

9.1.5 The contents of the hard drives of Wolfgang Mersch, Tarik Muzaffar, Geoff Rothwell and Bill Sebenski.

9.2 In order to identify the relevant and producible documents contained in the sources listed at Section 9.1, the TD Bank has taken or will take the following steps:

9.2.1 TD Bank will review all paper documents and printed electronic documents collected within the Financial Institutions and Private Investment Counsel Groups at TD Bank in order to identify all relevant documents and, to the extent reasonably possible, remove duplicate documents;

9.2.2 TD Bank agrees that all relevant documents available to TD Bank as of February 17, 2009 that were in the control of the custodians listed at Schedule "D" to the Agreement will be produced, subject to any claims of privilege;

9.2.3 TD Bank will run the search terms listed at Schedule "A" to the Agreement into the email files of the TD Bank personnel listed at Section 9.1.4. TD Bank will then review the search results in order to identify all relevant documents;

9.2.4 TD Bank will extract the records contained on the hard drives of the TD Bank personnel listed at Section 9.1.5 into a searchable electronic database and then run the search terms listed at Schedule "E" to the Agreement into the database. TD Bank will then review the search results in order to identify all relevant documents;

9.2.5 TD Bank will provide the Joint Liquidators with a list of any search terms which return a number of hits which it deems to be disproportionate. The Parties will meet and confer in order to agree to a method for narrowing the hits to be reviewed. In the event that the Parties are unable to agree on such a method, or dispute the proportionality of the number of hits returned by any search term, they will seek the assistance of the Honourable Colin L. Campbell in order to resolve the dispute; and

9.2.6 TD Bank will then review the search results in order to identify all relevant documents and, to the extent reasonably possible, remove duplicate documents.

9.3 In addition to the foregoing, and without limiting the fact that relevance is defined by the pleadings or Section 7.3 of the Agreement, TD Bank agrees to make reasonable efforts to identify documents of the following nature:

9.3.1 All agreements between TD Bank and the following entities:

9.3.1.1 SIB;

9.3.1.2 Robert Allen Stanford ("**Stanford**");

9.3.1.3 Antiguan Sun;

9.3.1.4 Bank of Antigua;

9.3.1.5 Caribbean Star Airlines;

9.3.1.6 Caribbean Sun Airlines;

9.3.1.7 Guardian International Bank Limited ("**Guardian**");

9.3.1.8 Stanford Financial Group ("**SFG**"); and

9.3.1.9 Stanford Group Company ("**SGC**") (collectively the "**Stanford Entities**").

9.3.2 TD Bank's provision of banking services to the Stanford Entities;

9.3.3 TD Bank's Correspondent Banking, Private Investment Counsel, Private Asset Management, and Treasury Departments' (collectively, the "**Relevant TD Bank Operations**") knowledge of the following categories of regulation relevant to the Stanford Entities that existed in Antigua and the United States during the First Relevant Period, and in Montserrat from 1985 until 1990, including steps taken to acquire such knowledge:

9.3.3.1 Montserrat statutes, rules and regulations that governed the provision of offshore banking services, including in respect of money laundering and criminal banking activity;

9.3.3.2 U.S. federal and Florida, Texas and California state-level statutes, rules and regulations pertaining to anti-money laundering ("**AML**") and criminal banking activity that governed the representative banking offices established by Guardian in Miami, Florida, Houston, Texas, and California, and the services provided by those offices;

9.3.3.3 Antiguan statutes, rules and regulations that governed the provision of offshore banking services (SIB) and onshore banking services (Bank of Antigua), with respect to AML and criminal banking activity; and

9.3.3.4 U.S. federal and Florida state-level statutes, rules and regulations with respect to AML and criminal banking activity that governed SFG, SGC and the foreign trust representative office of Stanford Trust Company, Ltd. located in Miami, Florida.

9.3.4 The Relevant TD Bank Operations' knowledge of publicly-available information with respect to the following matters, as they relate to the Stanford Entities, including steps taken to acquire such knowledge:

9.3.4.1 Stanford's personal bankruptcy;

9.3.4.2 Regulatory oversight or evaluation of Montserrat's banking statutes, rules and regulations in respect of AML and criminal banking activity from 1985 to 1990;

9.3.4.3 The reasons for which Guardian changed its domicile to Antigua;

9.3.4.4 Regulatory oversight or evaluation of Antigua's banking statutes, rules and regulations in respect of AML and criminal banking activity, including relating to Stanford's involvement with Antigua's regulatory regime;

9.3.4.5 The rates of return purportedly being generated by SIB certificates of deposit, and how those rates of return compared to those being generated by certificates of deposit being issued by legitimate major financial institutions comparable to SIB;

9.3.4.6 Any declarations that any of the Stanford Entities were high-risk from an AML perspective, including any declarations that any Stanford Entities were politically exposed persons;

9.3.4.7 The refusal of any other financial institutions to provide banking services to the Stanford Entities and the reason for such refusal;

9.3.4.8 The steps taken by, or knowledge of, the entities that are referred to in the Fresh as Amended Statement of Claim at paragraphs 214-242 with respect to the Stanford Entities, specifically:

a) Société Générale Private Banking (Suisse) S.A.;

b) the U.S. Securities and Exchange Commission ("**SEC**")

c) Pershing LLC;

d) Ferrier Lullin & Cie, now Julius Bar Group Ltd.;

e) JP Morgan Chase;

f) Snyder Kearney LLC;

g) First Advantage Investigative Services;

h) Fidelity Investments;

i) Chase Manhattan Bank;

j) First Interstate Bank;

k) Citizens & Southern Bank;

l) Bank of America;

m) the National Association of Securities Dealers ("**NASD**"); and

n) U.S. Customs.

9.3.4.9 Any investigations into SIB or SIB certificates of deposit by U.S. or Antiguan regulators; and

9.3.4.10 The public pronouncements or reports in respect of the Stanford Entities alleged at paragraphs 173-209 of the Fresh as Amended Statement of Claim, specifically:

a) Stanford's personal bankruptcy before the U.S. Bankruptcy Court (for the Western District of Texas, Waco Division), under Case No. 6-84-00263-T;

b) that Guardian operated in Montserrat from 1985 to 1990;

c) that, by 1998, Stanford has been accused of violating banking laws in Texas by running unlicensed "feeder" sales offices in Houston for Guardian;

d) the U.S. Office of the Comptroller of the Currency's advisories concerning alleged violations of banking laws by Guardian in 1988-1989;

e) that, by 1989, U.S. and British investigations of the banking system in Montserrat were ongoing;

f) the Financial Secretary of Montserrat's revocation of Guardian's banking licenses on November 28, 1990 and the reasons for such revocation;

g) that Guardian and SIB were being audited by C.A.S. Hewlett & Co. Ltd. after relocating to Antigua;

h) a 1991 investigation by the U.S. Federal Bureau of Investigation, U.S. Customs, and Texas law enforcement authorities into the Stanford Entities' possible involvement in drug money laundering;

i) that, in 1994, then-Prime Minister of Antigua Lester Bird allowed Stanford to organize and arrange a financing for a public hospital project in Antigua and that Stanford eventually loaned over $40 million USD through Bank of Antigua for such financing;

j) that, in 1996, Stanford's involvement with the aforementioned Antiguan hospital project prompted a U.S. congressional investigation into corruption in Antigua;

k) SIB's disclosure of rates of return of 15.71% in 1995 and 1996;

l) an April 29, 1997 U.S. tax court ruling that Stanford failed to file his 1990 tax return and owed more than $500,000 USD in taxes and penalties in relation to his ownership of Guardian in Montserrat;

m) a July 1998 warrant obtained by U.S. authorities to freeze funds controlled by suspected money launderers, $3.2 million USD of which were allegedly found in an account held at SIB;

n) SIB's November 1998 filing of a Regulation D exemption with the SEC, and subsequent filings of amended Regulation D exemptions in November 2001, March 2004, November 2004, and November 2007;

o) SFG's expenditures on government lobbying activities from 1999-2008, including by its employees and its political action committee;

p) cases filed by employees of the Stanford Entities with the American Financial Industry Regulatory Authority ("FINRA"), or its predecessor, claiming they had been wrongfully dismissed or alleging fraudulent business practices in violation of U.S. securities laws from 2001 to 2008;

q) Stanford and SFG employees' donation to a the legal defence fund of Robert Torricelli, then a U.S. Senator from New Jersey, in 2002;

r) Stanford's November 2003 payment of $37,000 USD to each of Antiguan Tourism Minister Molwyn Joseph and Antiguan Planning Minister Gaston Browne;

s) World-Check's 2004 addition of Stanford to its database of "high-risk" individuals and list of politically exposed persons;

t) a 2005 civil complaint filed against SIB and SGC in the U.S. District Court for the Southern District of Florida by two investors claiming that they were victims of a "Ponzi" scheme which targetted South Florida residents of Venezuelan origin;

u) a 2006 private whistle-blower lawsuit filed against Stanford and SGC in the Miami-Dade County Circuit Court in Florida by a former employee of a Stanford Entity claiming that that SGC was operating a "Ponzi" scheme;

v) NASD's June 2007 censure and $20,000 USD fine issued to SGC for compliance supervision failures and failure to maintain its minimum required capital;

w) World-Check's 2007 addition of SGC to its database of financial institutions that pose a "heightened risk" and concurrent report;

x) SIB's 2007 Annual Report;

y) FINRA's January 2008 censure and $10,000 USD fine issued to SGC for distributing misleading information and being in a conflict of interest;

z) SIB's 2008 disclosure that it had incurred a loss of 1.3% that year;

aa) The U.S. Federal Reserve Board's September 2008 subpoena on the Miami office of the Stanford Trust Company Ltd. requesting documents related to the relationships amongst various Stanford Entities;

bb) FINRA's September 2008 censure and $10,000 USD fine issued to SGC for compliance supervision failures, as reflected in a FINRA report from that same month;

cc) Pershing LLC's 2008 declaration that it could not verify whether or not Stanford was involved in fraud;

dd) a January 2008 wrongful dismissal claim filed against SGC by Mark Tidwell and Charles Rawl;

ee) media reports in 2008 indicating that the SEC was investigating SIB's CD sales and that it had issued subpoenas to Mark Tidwell and Charles Rawl;

ff) January 2009 media reports describing SIB as a "fraud" and noting that the interest rates on CDs were a "red flag";

gg) FINRA's January 2009 censure and $30,000 USD fine issued to SGC for inadequate disclosures; and

hh) a February 11, 2009 *Bloomberg Businessweek* report indicating that the SEC, the Florida Office of Financial Regulation, and FINRA were all investigating SFG.

9.3.5 TD Bank's provision of banking services to the Antiguan-based financial institutions named at paragraphs 69 to 72 of the Joint Liquidators' Amended Fresh as Amended Statement of Claim, namely:

9.3.5.1 American International Bank Limited;

9.3.5.2 Antigua Overseas Bank; and

9.3.5.3 Antigua Barbuda Investment Bank.

9.3.6 The Relevant TD Bank Operations' internal practices, procedures, records, reports, correspondence, disclosure or other documents pertaining to its compliance (or lack thereof) with the following statutes, regulations, standards or practices applicable to Canadian or American financial institutions during the First Relevant Period:

9.3.6.1 The Office of the Superintendent of Financial Institutions' guidelines for "Deterring and Detecting Money Laundering" (as amended), as pleaded at paragraph 246 of the Fresh as Amended Statement of Claim;

9.3.6.2 The standards or guidelines promulgated by the Financial Transaction and Reports Analysis Centre of Canada, as pleaded at paragraph 248 of the Fresh as Amended Statement of Claim;

9.3.6.3 The *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 and its Regulation, as pleaded at paragraphs 248 and 302-312 of the Fresh as Amended Statement of Claim;

9.3.6.4 The standards promulgated by the Basel Committee on Banking Supervision, as pleaded at paragraph 249 of the Fresh as Amended Statement of Claim;

9.3.6.5 The standards promulgated by the Financial Action Task Force, as pleaded at paragraph 251 of the Fresh as Amended Statement of Claim;

9.3.6.6 The standards promulgated by the Wolfsberg Group, as pleaded at paragraph 252 of the Fresh as Amended Statement of Claim;

9.3.6.7 The following U.S. statutes and regulations: the *USA Patriot Act*, the *International Banking Act*, the *Money Laundering Act*, the *Foreign Assets Control Regulations* and the *Bank Secrecy Act*, all as pleaded at paragraphs 9-12 of the Fresh as Amended Reply to Defence; and

9.3.6.8 The relevant standards and rules promulgated by the following U.S. regulatory bodies: the Securities and Exchange Commission, the U.S. Federal Reserve, the Office of the Comptroller of the Currency, the Financial Crimes Enforcement Network, the U.S. Office of Foreign Assets Control, and the Financial Industry Regulatory Authority, all as pleaded at paragraphs 9-12 of the Fresh as Amended Reply to Defence.

9.3.7 Any records, reports, correspondence or other documents relating to TD Bank's Correspondent Banking group's involvement with or review of the U.S. Senate's Minority Staff of the Permanent Subcommittee on Investigations' report entitled "Report on Correspondent Banking: A Gateway for Money Laundering" dated February 5, 2001.

9.4 TD Bank agrees to provide the Joint Liquidators with reasonable details regarding its efforts to identify documents of the nature described at Section 9.3, and to review and produce any such documents subject to relevance, any claims of privilege, and the principle of proportionality.

10. **Further Relevant Documents and Process Reports**

10.1 With respect to the action *Dynasty Furniture Manufacturing Ltd v The Toronto-Dominion Bank* (Court File No. CV-098373-00CL) (the "**Dynasty Action**"), the Parties agree as follows:

10.1.1 The documents to be produced by the plaintiffs in the Dynasty Action include all of the documents that will be produced by the plaintiffs in the Action. The plaintiffs' productions will therefore constitute productions of both the plaintiffs in the Action and the Dynasty Action;

10.1.2 The documents to be produced by TD Bank are the same in the Action and the Dynasty Action, and that productions by TD Bank in the Action will therefore constitute TD Bank's productions in the Dynasty Action; and

10.1.3 The plaintiffs in the Dynasty Action will have a small number of additional documents to produce, primarily in respect of damages. Any such documents will be produced to TD Bank in a supplementary affidavit of documents.

10.2 The Parties agree that as further information becomes available, either Party may take the position that there are further relevant custodians, sources of relevant documents or search terms that must be used in order to ensure that proper preservation, collection and production of relevant documents occurs. For greater certainty, nothing in the Agreement limits the Parties' rights to take such a position in the future or the potential success of such a position.

10.3 The Parties agree that they will continue to be bound by their ongoing discovery obligations after the date on which the Agreement is concluded (the "**Signing Date**"). If either Party becomes aware after the Signing Date that it has possession, power or control of a document that is relevant to the Action and not privileged, it shall produce such document to the other Party. If either Party creates a document after the Signing Date that is relevant to the Action and is not privileged, it shall produce such document to the other Party.

10.4 The Parties agree that to the extent the process undertaken by a Party to identify relevant documents is not described in the Agreement, that Party will provide a description of the process undertaken to identify those documents.

11. Privilege, Privacy and Confidentiality Issues

11.1 The Parties agree that, in the event any paper documents with respect to which a Party wishes to assert a claim of privilege are inadvertently disclosed, the other Party shall immediately notify the Party of the disclosure, and immediately return the paper documents and destroy all copies. In the event that the paper documents have been read, the information will not be used for any purpose without an Order, and the other Party shall provide a list of the names of the people who viewed the documents. Once returned, the documents at issue shall be included in the Party's Schedule B of its Affidavit of Documents, and the other Party shall provide written confirmation of the above steps.

11.2 The Parties agree that, in the event any electronic documents with respect to which a Party wishes to assert a claim of privilege are inadvertently disclosed, the other Party shall immediately notify the Party of the disclosure, and immediately return any original CDs, DVDs or hard drives containing the documents, and delete the coded information, associated images and OCR associated with the documents. In the event that the electronic documents have been read, the information will not be used for any purpose without an Order, and the other Party shall provide a list of the names of the people who viewed the documents. Once returned, the documents at issue shall be included in the Party's Schedule B of its Affidavit of Documents, and the other Party shall provide written confirmation of the above steps.

12. Disclosure and Production

12.1 The Parties agree to exchange all relevant, non-privileged documents in electronic form.

12.2 Unless otherwise specified in this Agreement, and without prejudice to the Parties' discovery rights, the Parties are not, at this time, requesting production of electronic metadata (except insofar as the Parties specify the production of extractable metadata fields to populate certain fields in the data files), back up tapes on which electronically stored information are stored, or deleted or residual electronically stored information.

12.3 TD Bank has filed a motion for a temporary stay of the action, currently returnable on October 6, 2016 (the "**Stay Motion**"). Further to the endorsement of the Honourable Justice Barbara Conway dated September 6, 2016, in the event that the Stay Motion is dismissed, the Parties will exchange documentary productions within six (6) months of the Stay Motion decision.

12.4 The Parties agree that in the event that the Stay Motion is granted and the decision on the Stay Motion does not otherwise address the issue, they will seek direction from the Honourable Justice Barbara Conway as to when the exchange of documentary productions will occur, including in respect of the Dynasty Action.

12.5 The Parties have conferred regarding the possibility of preparing Schedules A, B, and C of their Affidavits of Documents using a common format, and have agreed on the following:

12.5.1 Each document in Schedules A, B, and C of the affidavit of documents will be identified using the following parameters:

Item	Description	Format (where applicable)
Document numbering format:	Unique document ID number - Alpha/numeric	AAA00000000
Document numbering fields:	Begdoc # Parentid – reference parent Attchid – reference attachment(s)	
Fields/Coded Data for Emails:	Date Sent To From Subject CC	
Fields/Coded Data for attachments and loose electronic documents (non-emails):	Date Created/Date Last Modified File Type File Name	
Fields/Coded Data for Paper Documents:	Date Doc Type Doctitle Author Recipient	YYYY/MM/DD
Doclink and Media Fields:		

Redactions:	Type of privilege claimed (where applicable)	

12.5.2 Attachments will be identified as such and listed individually;

12.5.3 The Parties will provide a detailed list of Schedule B productions, save and except that documents subject to solicitor and client privilege need not be detailed.

12.6 The Parties have conferred regarding the format of the productions and load files and have agreed on the following parameters:

12.6.1 Productions Format

12.6.1.1 Native Files except for redacted documents and documents of paper origin.

a) No image placeholder for native documents is required for TD; image placeholders required for Bennett Jones.

12.6.1.2 Images for documents of paper origin and redacted documents.

a) Image files shall be produced in single page black and white tiffs (300 dpi), or Searchable PDFs where a party requests it.

b) Document level OCR text files

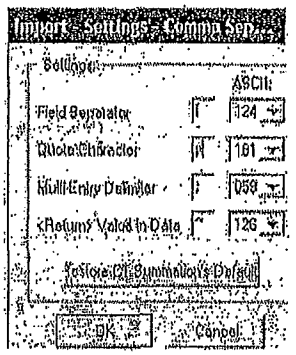
12.6.2 Load files Format

12.6.2.1 **LFP or DII** load file for tiff images (Parent and Child tokens and native file path should be included).

12.6.2.2 **LST** file for OCR text files

12.6.2.3 CSV or TXT for data with complete list of documents

12.6.2.4 CSV or TXT files are set to the following import/export settings:



12.7 The Parties reserve the right to inspect producible documents (paper and electronic) in their original form.

12.8 Where a Party asks to receive a paper copy of a document that has been produced in electronic form, the requesting Party agrees to pay the reasonable costs of the paper copy.

12.9 The Parties have conferred regarding the utility of identifying an e-discovery liaison person for each Party, to coordinate with the other Parties with respect to technical issues and inquiries arising out of the exchange of producible electronically stored information in electronic form, and have identified the following persons as e-discovery liaisons for the Parties:

12.9.1 For the Plaintiffs, Jacquie White, Litigation Support, Bennett Jones LLP, 416-777-6039; and

12.9.2 For the Defendant, Suzan Mitchell-Scott, Litigation Support Case Manager, McCarthy Tétrault LLP, 416-601-7562.

13. Authenticity and Reliability

13.1 Subject to the terms of this Agreement and, in particular, Sections 13.4 and 13.5 below, the Parties admit that all producible electronically stored information exchanged between them are authentic for purposes of subrule 51.02(1) of the Rules of Civil Procedure.

13.2 Where producible electronically stored information that has been exchanged between the Parties does not include the necessary identifying information to establish the authenticity of the document, the Parties agree to provide the necessary identifying information, if available, in Schedule A to the relevant Party's affidavit of documents or, failing that, in writing upon request.

Subject to the terms of this Agreement, the Parties admit the authenticity of any such document based on the identifying information that is provided.

13.3 Subject to the terms of this Agreement, the Parties admit the integrity of all producible electronically stored information exchanged between the Parties, for purposes of complying with the best evidence provisions set out in Subsection 34.1(5.1) of the *Evidence Act* (Ontario) and Section 31.2 of the *Canada Evidence Act*.

13.4 The Parties have conferred regarding the need for the implementation of procedures to ensure the authenticity and integrity of producible electronically stored information during the discovery process. Without prejudice to each Party's right to object in good faith to a document's authenticity or integrity, the Parties have agreed to leave the procedures required in order to ensure the authenticity and integrity of each Party's producible electronically stored information in the discretion of the Parties.

13.5 Notwithstanding any other provision of this Agreement, any Party may object in writing to the authenticity of producible electronically stored information, or to the integrity of the electronically stored information, provided such objection is made in good faith and a reasonable time before trial of the Action. Where objection is made, the Parties may exercise their usual rights of discovery with respect to the facts relevant to the objection.

14. <u>Oral Discovery</u>

14.1 Without prejudice to the Parties' rights set out in Rule 31.03 of the Rules of Civil Procedure, the persons intended to be produced for oral examination for discovery in the Action are:

14.1.1 Marcus A. Wide, representative of the Joint Liquidators; and

14.1.2 Wolfgang Mersch, representative of The Toronto-Dominion Bank.

14.2 The Parties agree that in the event that the Stay Motion is dismissed, they will work towards completing examinations for discovery within twelve (12) months of the Stay Motion decision.

14.3 The Parties agree that in the event that the Stay Motion is granted and the decision on the Stay Motion does not otherwise address the issue, they will seek direction from the Honourable Justice Barbara Conway as to when the examinations for discovery will occur, including in respect of the Dynasty Action.

14.4 If the parties are unable to resolve any dispute with respect to questions taken under advisement or refused at examinations for discovery, or with respect to the delivery of undertakings given at examinations for discovery, they will seek the assistance of the Honourable Colin L. Campbell in order to resolve the dispute.

14.5 The Parties reserve their rights to engage the Honourable Justice Barbara Conway to address any scheduling matters, including those relating to any dispute arising from examinations for discovery.

15. **Other Agreements**

15.1 This Agreement may be amended on the consent of the Parties at any time, provided the amendment is recorded in writing, whether by separate agreement, exchange of correspondence (including e-mail correspondence), or written confirmation of the amendment.

15.2 While each Party will make best efforts to ensure the exchange of virus-free electronically stored information, it is the obligation of the Party receiving electronically stored information to test for computer viruses.

16. **Costs**

16.1 Subject to any Agreement to the contrary, the reasonable costs incurred in complying with this Agreement, including the reasonable costs of retaining or using necessary external or in-house technical consultants, may be claimed as "costs of and incidental to a proceeding or a step in a proceeding" for purposes of s. 131 of the *Courts of Justice Act*.

17. **Meeting Without Prejudice**

17.1 The Parties agree that, except as expressly recorded in this Agreement, all communications made in connection with this Agreement were exchanged on a without prejudice basis and may not be relied upon in this Action.

18. **Governing Law**

18.1 This Agreement is governed exclusively by, and is to be enforced, construed and interpreted exclusively in accordance with, the laws of Ontario and the laws of Canada applicable in Ontario, which will be deemed to be the proper law of this Agreement.

19. **Signatures**

19.1 This Agreement may be signed by the Parties or by the Parties' solicitors on their behalf, and may be signed in counterparts.

19.2 Signatures:

Sept. 15, 2016
Date

Nathan Shaheen
For and on behalf of
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

September 15, 2016
Date

Geoff R. Hall, McCarthy Tétrault LLP
Counsel for The Toronto-Dominion B
For and on behalf of
The Toronto-Dominion Bank

SCHEDULE A

1. All of the following search terms are to be run by both parties:

Fraud	
Audit	"audit"
Authorized signatory	"authorized signatory"
Business expense	"business expense"
Bookkeeping	"bookkeeping"
Bribe	"bribe"
Correspondent	"correspondent"
Disbursement	"disbursement"
Due diligence	"due diligence"
Electronic monitor	"electronic monitor"
Ethics	"ethics"
	"ethical"
Football	"football"
Fraud	"fraud"
Hush money	"hush"
Independent review	"independent review"
Insider	"insider"
Internal affairs	"internal affairs"
Internal control	"internal control"
Investigation	"investigation"
	"investigate"
Kickback	"kickback"
Know your client	"know your client"
	"know your customer"
	KYC

Legitimate	"legitimate"
Money laundering	"launder"
	"AML"
Oversight	"oversight"
	"oversee"
Personal account	"personal account"
Personal fund	"personal fund"
Policy	"policy"
Ponzi	"Ponzi"
Reconciliation	"reconciliation"
	"reconcile"
Red flag	"red flag"
Related party	"related party"
Reputational risk	"reputational risk"
Slush fund	"slush fund"
Suspicious	"suspicion"
	"suspicious"
Tier	"tier"
Transaction monitoring	"transaction monitoring"
Relevant Third Party Personnel and Entities	
American International Bank	"American International"
Antigua	"Antigua"
Antigua Barbuda Investment Bank	"Antigua Barbuda Investment"
Antigua Overseas Bank	"Antigua Overseas"
Bank of New York	"Bank of New York"
Buffle, Phillipe	"Buffle"
Burgess, David	David /4 Burgess

Cash, Thomas	Thomas /4 Cash
	Tom /4 Cash
	Thom /4 Cash
Citizens & Southern Bank	Citizens /4 Southern
Closs, Richard	Richard /4 Closs
Compagnie Bancaire Genève	"Compagnie Bancaire"
	"Geneve"
Cooper, William (Bill)	William /4 Cooper
	Bill /4 Cooper
Crick, Marian Althea	Marian /4 Crick
	Althea /4 Crick
Donelan, Richard	"Donelan"
Ferrier Lullin	"Ferrier Lullin"
Fidelity Investments	"Fidelity Investments"
First Advantage Investigative Services	"First Advantage"
First Interstate Bank	"First Interstate"
Greenburg Traurig	"Greenburg Traurig"
Guardian Bank	"Guardian Bank"
Hunton Williams	"Hunton Williams"
Infanger, W.	"Ingatiger"
	"Infanger"
Jacquemoud Stanislas (Jacquemoud & Stanislas)	Jacquemoud /4 Stanislas
JP Morgan Chase	"JPMC"
	"JP Morgan"
Julias Baer (Julius Bär Group Ltd.)	"Julias Bar"
	"Julius Bar"

King, Leroy	Leroy /4 King
Lilly, Peter	Peter /4 Lilly
Loumiet, Carlos E.	"Loumiet"
McKinley, John	John /4 McKinley
Montserrat	Montserrat
National Association of Securities Dealers (NASD)	"National Association of Securities Dealers"
	"NASD"
National Republic Bank	"National Republic"
Parry, Eugene.	Eugene /4 Parry
Pellet, L.	Pellet
Pershing	"Pershing"
Phillip, Donley	Donley /4 Phillip
Proximal	Proximal
Republic Bancshares of Texas Inc.	"Republic Bancshares"
Shain, Randy	Randy /4 Shain
Snyder Kearney	"Snyder Kearney"
Société Générale Private Banking (Suisse) S.A.	"Societe Generale"
	"Société Générale"
	"SG Private"
Stanilas, Guy	"Stanilas"
Suter, Patrice	Patrice /4 Suter
Trustmark	"Trustmark"
Winer, Jonathan	Jonathan /4 Winer
	Jon /4 Winer
	Jonathon /4 Winer
World Check	"World Check"

Wulff, Thomas	Thomas /4 Wulff
	Tom /4 Wulff
	Thom Wulff
Regulators and Applicable Standards	
Bank Secrecy Act	"Bank Secrecy"
Basel Committee on Banking Supervision	"Basel"
Central Intelligence Agency (CIA)	"Central Intelligence Agency"
Department of Treasury	"Department of Treasury"
Federal Bureau of Investigation (FBI)	"Federal Bureau"
	FBI
Financial Action Task Force (FATF)	"Financial Action Task Force"
	"FATF"
Financial Crimes Enforcement Network (FinCEN)	"Financial Crimes Enforcement"
	FinCEN
Financial Industry Regulatory Authority (FINRA)	"Financial Industry Regulatory"
	"FINRA"
Financial Transaction and Reports Analysis Centre of Canada (FINTRAC)	"Financial Transaction" /2 "Reports Analysis"
	FINTRAC
Foreign Assets Control Regulations	"Foreign Assets Control"
International Narcotics Control Strategy Report (INCSR)	"International Narcotics Control Strategy"
	"INCSR"
Office of the Comptroller of the Currency (OCC)	"Office of the Comptroller"
	"Comptroller of the Currency"
	"OCC"
Office of the Superintendent of	"Superintendent of Financial Institutions"

Financial Institutions (OSFI)	"OSFI"
Politically exposed	"Politically exposed"
Proceeds of crime	"Proceeds of crime"
Royal Canadian Mounted Police (RCMP)	"Royal Canadian Mounted"
	"RCMP"
Senate	"Senate"
Wolfsberg Group	"Wolfsberg"

2. The Plaintiffs are to run the following search terms, which pertain to entities affiliated with TD Bank and their personnel:

TD Bank Entities	
TD Asset Management Inc.	"TD Asset"
TD Private Investment Counsel	"TD Private"
TD Securities	"TD Securities"
	@tdsecurities
TD Waterhouse	"TD Waterhouse"
	@tdwaterhouse
Toronto-Dominion Bank	"TD Bank"
	"Toronto-Dominion"
	"Toronto Dominion"
	@tdbank
TD Bank Personnel	
Allen, Carol	Carol /4 Allen
Altomare, Rosemary	"Altomare"
Attard, Charles	"Attard"
Betrand, Claude	"Betrand"
Burelo, Miguel Angel	"Burelo "
Carbone, Gabriel	"Carbone"
Caro, Sharon	Sharon /4 Caro
Chang, Fui Fui	Fui /4 Chang
Chang, Vince	Vince /4 Chang
Crozier, Kathy	"Crozier"
Cullen, Stephen	"Cullen"
Denton, Matthew	Matthew /4 Denton
DiFonzo, Virginia	"DiFonzo"

Doyle, Martin	"Doyle"
Elias, Marisol	Marisol /4 Elias
Gorse, Frank	"Gorse"
Gazzard, William	"Gazzard"
Gould, Sharon	"Gould"
Holk, Patty	"Holk"
Hughes, Carmina	Carmina /4 Hughes
Kamin, Paul	"Kamin"
Leckie, John	"Leckie"
Leonetti, Lisa	"Leonetti"
Lo, Angela	Angela /4 Lo
Nicholl, Andrew	"Nicholl"
Nichols, Reene	"Nichols"
Mantzoutsos, Chris	"Mantzoutsos"
Mariuz, Gina	"Mariuz"
Martinez, Amanda	Amanda /4 Martinez
Martinez, Jose Luis	Jose /4 Martinez
	Luis /4 Martinez
	"Jose Luis Martinez"
Mercer, Perry	"Mercer"
Mersch, Wolfgang	"Mersch"
	"Wolfgang"
McMullen, Dave	Dave /4 McMullen
Mulett, Sybil	"Mulett"
Muzaffar, Tarik	"Muzaffar"
	"Muzzafar"
Nanji, Rosemin	Rosemin /4 Nanji
Parhar, Anju	"Parhar"
Parsons, Ruth	Ruth /4 Parsons
Patino, Elsa	Elsa /4 Patino
Pepperell, John	"Pepperell"
Rothwell, Geoff	"Rothwell"
Saunders, Scott	Scott /4 Saunders
Sebenski, William (Bill)	"Sebenski"
Wallenius, Ritva	"Wallenius"
Watson, Wendy	Wendy /4 Watson

3. TD Bank is to run the following search terms, which pertain to entities affiliated with the Stanford International Bank Ltd. and their personnel:

Stanford Entities	
Antiguan Sun	"Antiguan Sun"

Bank of Antigua	"Bank of Antigua"
Caribbean Star Airlines	"Caribbean Star"
Caribbean Sun Airlines	"Caribbean Sun"
Guardian Bank	"Guardian Bank"
Stanford Financial Group	"Stanford Financial"
	"SFG"
	"SFGGM"
Stanford Group Company	"Stanford Group"
	"SGC"
Stanford International Bank Limited	"Stanford International"
	"SIB"
	"SIBL"
	"Stanford"
	@stanford
	@stanfordeagle
	"SCM"
Stanford Personnel	
Adams, John B.	John /4 Adams
Aitken, Christopher Charles	"Aitken"
Alicia, Sybil	"Sybil"
Alvarado, Mauricio	"Alvarado"
Amadio, Henry	"Amadio"
Aria, Oralia	"Aria"
Bailey, Trevor	Trevor / 4 Bailey
Barber, Stephen Richard	Stephen /4 Barber
	Richard /4 Barber
Barnes, Julius	Julius /4 Barnes
Barnette, Skip	"Barnette"
Bogar, Danny	"Bogar"
Blackman, Courtney	"Blackman"
Comeaux, Jay	"Comeaux"
Conzelman, James	"Conzelman"
D'Amato, Jason Allen	"D'Amato"
D'Aniello, Anthony	"D'Aniello"
Davis, James	James /4 Davis
	Jim /4 Davis
Davis, Rhonda	Rhonda /4 Davis
Davis, Zack	Zack /4 Davis
	Zach /4 Davis
Finkelstein, Ben	Ben /4 Finkelstein
Fram, Frederick Gordon	"Fram"
Francois, Frankie	"Francois"

Gonzalez, Joaquin	Joaquin /4 Gonzalez
Gonsalves, Natasha	Natasha /4 Gonsalves
Green, Jason Taylor	Jason /4 Green
	Taylor /4 Green
Groves, Denise	"Groves"
Hamm, Suzanne	Suzanne /4 Hamm
Hamric, Rebecca	"Hamric"
Hector, Terry-Ann	Terry-Ann /4 Hector
Isgur, Marvin	"Isgur"
Johnson, Ken	Ken /4 Johnson
Koch, Kyle Michael	Kyle /4 Koch
	Michael /4 Koch
Pendergest Holt, Laura	"Pendergest"
	"Pendergest-Holt"
	Laura /4 Holt
Penny, Zach	Zach /4 Penny
Hodge, Julie	Julie /4 Hodge
Jacobs, Beverly	Beverly /4 Jacobs
Jensen, Alice	Alice /4 Jensen
Krieger, Hansjorg	"Krieger"
Khouly, Maya	"Khouly"
Kipper, Eugene	"Kipper"
Lapointe, Alain	"Lapointe"
Maharaj, Amar	"Maharaj"
Maldonado, Patricia	"Maldonado"
	"Patricia"
	"PM"
Mercer-Severin, Sascha	Sascha /4 Mercer
	Sascha /4 Severin
Olivier, Priscilla	"Olivier"
Osbourne, Omari	Omari /4 Osbourne
Pacheco, Miguel	"Pacheco"
Palmliden, Frederic	"Palmliden"
Patlan, Tarrie	"Patlan"
Persaud, Blianoo	"Persaud"
Poppel, Ralph Edward	"Poppel"
Ramirez, Nelson	Nelson /4 Ramirez
Rawl, Charles	"Rawl"
Rincon, AJ	AJ /4 Rincon
	A.J. /4 Rincon
Rodriguez, Lula	"Lula"
Rodriguez, Pedro	Pedro /4 Rodriguez
Rodriguez-Tolentino, Juan	"Tolentino"

	Rodriguez-Tolentino
	"IRT"
Roman, Jennifer	Jenn /4 Roman
Schaufele, Lou	"Schaufele"
Sheppard, Heather	Heather /4 Sheppard
Shi, Jen	Jen /4 Shi
Smith, Eddie	Eddie /4 Smith
Stanford, Robert Allen	Allen /4 Stanford
	Robert /4 Stanford
	"RAS"
	"Sir Allen"
Stanton, Latrice	Latrice /4 Stanton
Stein, Ronald (Rocky) Mark	Ron /4 Stein
	Rocky /4 Stein
	Mark /4 Stein
Stinson, Lena	"Stinson"
Stoelker, Andrea	"Stoelker"
Suarez, Yolanda	"Suarez"
Thacker, Stephen Lloyd	"Thacker"
Tidwell, Mark	"Tidwell"
Tonarelli, Oreste	"Tonarelli"
Trullenque, Alvaro	"Trullenque"
Tywater, Danielle	"Tywater"
Vingerhoedt, Frans	"Vingerhoedt"
Weeden, Ken	Ken /4 Weeden
Weiser, Charles (Chuck) Maurice	Charles /4 Weiser
	Chuck /4 Weiser
	Maurice /4 Weiser
Whites, Robby	Rob /4 Whites
Willard, Neal	Neal /4 Willard
Winograd, Mark	"Winograd"
Young, Bernard Elmer	Bernard /4 Young
	Elmer /4 Young
Stanford Account Numbers	
0302513	"0302513"
7301178	"7301178"
7301399	"7301399"
2156432	"2156432"
2156529	"2156529"
2161573	"2161573"
2161670	"2161670"

2224235	"2224235"
2260513	"2260513"
2300380	"2300380"
2306297	"2306297"
NP6940	"NP6940"
NP6941	"NP6941"
NP7275	"NP7275"

SCHEDULE B

1. Alain LaPointe
2. Amar Maharaj
3. American International Bank
4. Ameritrade
5. AML
6. Andre Gauthier
7. Andrea Stoelker
8. Andrew Nicholl
9. Antigua
10. Antigua Barbuda Investment Bank
11. Antigua Overseas Bank
12. Anti-money laundering
13. Art Simon
14. Bank
15. Bank of America
16. Bank of Antigua
17. Bank of Houston
18. Bank of New York
19. Banknorth
20. Basel
21. Bear Sterns
22. Bill Sebenski
23. Blaise Friedli
24. Caribbean Star
25. Carmina Hughes
26. Charles Attard
27. Charles Rawl
28. Chase Manhattan Bank
29. Cherry Hill
30. Chris Mantzoutsos
31. Citizens & Southern Bank / Citizens and Southern Bank
32. Comerica
33. Commerce Bank
34. Correspondent Bank
35. Coutts & Co
36. Danley Phillip
37. Denise Groves

38. Devinhouse
39. Donley Phillip
40. Due Diligence
41. Eddie Smith
42. Elsa Patino
43. Elsie Lecusay
44. Emerging Markets
45. Errol Cort
46. Eugene Kipper
47. Eugene Parry
48. Ferrier Lullin
49. Financial Action Task Force / FATF
50. Financial Crimes Enforcement Network / FinCen
51. Financial Industry Regulatory Authority / FINRA
52. Financial Institutions Group
53. Financial Transactions Reports Analysis Centre of Canada / FINTRAC
54. First Interstate Bank
55. Francois Lessard
56. Franz Vingerhoedt
57. Frederic Palmliden
58. Geoff Rothwell
59. Gilbert Lopez
60. Gilbert's Resort
61. Gina Mariuz
62. Global Operations Technology
63. Global Trade
64. Global Transactions
65. Guardian Bank / Guardian International Bank
66. Guardian Bank and Trust
67. Guy Stanislas
68. Heather Sheppard
69. Heenan Blaikie
70. Henry Amadio
71. Hewlitt
72. HSBC Bank PLC
73. Hunton Williams and Greenburg Traurig
74. Infanger
75. International Financial Sector Authority

76. International Narcotics Control Strategy Report
77. Investment Management Agreement
78. J.T. Radford
79. Jacquemoud & Stanislas
80. James Davis
81. James Zachariah Davis / Zach Davis / Zack Davis
82. Jim Outlaw
83. John Greaves
84. John Matthewson
85. John McKinley
86. John Pepperell
87. Juan Rodriguez Tolentino
88. Juan Tolentino
89. Julius Bar / Julius Bär
90. Kenny J. Byron
91. Know Your Client
92. Kroll
93. Laura Pendergest-Holt
94. Leroy King
95. Lourniet
96. Maiden Isle
97. Marian Althea Crick
98. Mark Kuhrt
99. Mark Tidwell
100. Martin Doyle
101. Mauricio Alvarado
102. McGill College
103. Michael Minkoff
104. Miguel Pacheco
105. money laundering
106. Money Laundering (Prevention) Act
107. Montreal
108. Montserrat
109. Mt. Laurel / Mount Laurel
110. National Association of Securities Dealers
111. National Republic Bank
112. Netting and Set Off Agreement
113. New Jersey

114. Nigel Weir
115. Office of the Superintendent of Financial Institutions / OSFI
116. Omari Osbourne
117. Ontario
118. Patrice Suter
119. Patricia Maldonado
120. Pellett
121. Permanent Subcommittee on Investigations
122. Perry Mercer
123. Peter Lilly
124. Phillipe Buffle
125. Pier Francesco
126. Pierre Beaudoin
127. Politically Exposed Foreign Person / PEFP
128. Politically Exposed Person / PEP
129. Private Investment Council
130. Proceeds of Crime (Money Laundering) and Terrorist Financing Act / PCMLTFA
131. Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations PCMLTFR
132. Proskauer Rose and Chadbourne & Parke
133. Proximal
134. Quebec
135. RBS Coutts
136. Rene-Levesque
137. Robert Allen Stanford
138. Rosemary Altomare
139. Royal Canadian Mounted Police / RCMP
140. Royal Trust
141. Scott Saunders
142. Securities and Exchange Commission /SEC
143. Senate Report
144. SG Private Bank
145. Sharon Gould
146. Société Générale / Societe Generale / SocGen
147. Stanford Suisse AG
148. Steve Cullen / Steven Cullen / Stephen Cullen
149. Tarik Muzaffar
150. Tarrie J. Patlan

151. TD
152. TD Asset Management
153. TD Bank
154. TD Canada Trust
155. TD Securities
156. TD Waterhouse
157. Terms and Conditions / Terms & Conditions
158. Terry Didus
159. Thomas Wolfe
160. Toronto Dominion
161. Toronto, Ontario
162. Toronto-Dominion
163. Trade Finance
164. Trustmark National Bank
165. Vince Chang
166. William Cooper / Bill Cooper
167. William Gazzard
168. Wolfgang Mersch
169. Wolfsberg
170. World-Check
171. Yolanda Suarez

SCHEDULE C

Documents were collected primarily from the two groups which had direct dealings with Stanford-related entities on behalf of TD Bank:

1. the Financial Institutions group within TD Securities, which is responsible for correspondent banking and therefore had the bulk of relevant Stanford-related documents in TD Bank's possession; and

2. the Private Investment Counsel group ("**PIC**").

Documents were also collected from certain other units within TD Bank and third parties which had relevant records.

These documents, which will be described further below, have all been uploaded to a CaseLogistix electronic database maintained by McCarthy Tétrault (the "**CLX Database**"). This database contains approximately 16,800 records.

Documents held by the Financial Institutions Group

Within the Financial Institutions group, all documents pertaining to Stanford-related entities were collected as follows:

a) all Stanford-related e-mails on the computers of personnel who had involvement with Stanford-related entities were printed off and copied;

b) all paper files in the possession of such personnel were copied;

c) all central paper files located on the floor on which the Financial Institutions group is located were copied; and

d) all paper documents which had been sent for off-site storage were copied.

Overall, these records include KYC information, credit information, call reports, account opening information, annual reports, and correspondence with Stanford-related entities.

The personnel from whom these documents were collected were Wolfgang Mersch, Geoff Rothwell, Bill Sebenski, Tarik Muzaffar, Andrew Nicholl, Vince Chang, Wendy Watson, Fui Fui Chang, Patty Holk, Reene Nichols, Ritva Wallenius, and Virginia DiFonzo. Some of the documents were central records and were not associated with any individual TD Bank personnel.

Documents held by PIC

Within PIC, copies were made of internal notes, correspondence, e-mails which had been printed out and saved in correspondence, client statements for Stanford International Bank ("**SIB**") from 1999 to 2009, client statements from the Bank of Antigua from 2002 to 2009, and all account opening documentation and investment management agreements signed with SIB, Bank of Antigua and the Bank of Panama.

The personnel from whom these documents were collected were Perry Mercer, Douglas Ball, Gabriel Cabrone, Brian Clark, and Ben Eggers. Some of the documents were central records and were not associated with any individual TD Bank personnel.

Documents held by other units or parties

All documents pertaining to Stanford-related entities were also collected from TD Bank's Global Operations Technology group, which provides support to the Financial Institutions group. These records include documents related to account opening, account statements, and drafts. As with the Financial Institutions group, any records sent for off-site storage were copied.

Payment data related to Stanford was also collected from the Technology department. These documents consisted of spreadsheets showing payment information for Stanford-related entities.

Documents were also collected from Symcor, a financial processing services provider for TD Bank. These documents consisted of cash letters (cheques) related to Stanford-related entities.

Finally, documents were gathered from TD Bank's Trade Finance department in Montreal, which had in its possession letters of credit pertaining to Stanford-related entities, and from the Money Market desk, which had documents related to short-term deposits made by Stanford-related entities.

SCHEDULE D

Carbone, Gabriel

Chang, Vince

Nicholl, Andrew

Mantzoutsos, Chris

Mercer, Perry

Mersch, Wolfgang

Muzaffar, Tarik

Rothwell, Geoff

Sebenski, William (Bill)

Watson, Wendy

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

DISCOVERY AGREEMENT

McCarthy Tétrault LLP
PO Box 48, Suite 5300
Toronto-Dominion Bank Tower
Toronto ON M5K 1E6

Geoff R. Hall LSUC#: 34701O
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Tel: 416 601-7750

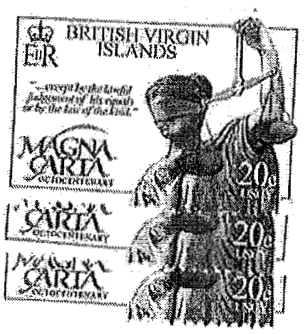
Vladimira M. Ivanov LSUC#: 68119J
Tel: 416 601-8024
Fax: 416 868-0673

Lawyers for the Defendant

TAB X

This is **Exhibit "X"** referred to in the
affidavit of Marcus A. Wide
sworn before me, this 22nd day of September, 2016.

A Commissioner for taking affidavits



AMENDED THIS 23rd Sep 2014 PURSUANT TO
MODIFIÉE CE CONFORMÉMENT À
☐ RULE/LA RÈGLE 26.02 ( )
☐ THE ORDER OF Penny J
L'ORDONNANCE DE
DATED/FAIT LE 26th Aug 2009
REGISTRAR GREFFIER LOCAL
COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

Court File No. CV-09-8373-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

DYNASTY FURNITURE MANUFACTURING LTD., SHAFIQ HIRANI, HANIF ASARIA, DINMOHAMED SUNDERJI and 2645-1252 QUÉBEC INC.

Plaintiffs

- and -

THE TORONTO-DOMINION BANK

Defendant

FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT:

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

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the plaintiffs' lawyer or, where the plaintiffs do not have a lawyer, serve it on the plaintiffs, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

DATE: ~~September ____, 2014~~ 26th Aug 2009

Issued by: M. Sagario
Local Registrar

Address of Court Office:
393 University Avenue, 10th Floor
Toronto, Ontario M5G 1T6

TO: McCARTHY TÉTRAULT LLP

Suite 5300, TD Bank Tower
Toronto Dominion Centre
66 Wellington Street West
Toronto, ON M5K 1E6

Geoff R. Hall (LSUC #34701O)
Junior Sirivar (LSUC #47939H)

Tel: 416.601.7750
Fax: 416.868.0673

Lawyers for the Defendant,
Toronto-Dominion Bank

CLAIM

1. The plaintiffs claim from the defendant, The Toronto-Dominion Bank ("TD Bank"):

(a) damages in the amount of $17,553,751, plus further amounts to be particularized prior to trial;

(b) an accounting and disgorgement of profits in amounts to be determined prior to trial;

(c) prejudgment and post-judgment interest on the foregoing amounts pursuant to the Courts of Justice Act;

(d) costs of this action on a substantial indemnity basis plus H.S.T.; and

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

I. OVERVIEW

2. The plaintiffs seek to recover damages arising from the defendant's negligence, knowing assistance, recklessness and failure to act as a reasonable bank in response to a multi-billion dollar fraud perpetrated against its customer, Stanford International Bank Limited ("SIB"), an Antiguan bank now in liquidation with which the plaintiffs made investments.

3. SIB, an international banking company based in Antigua, offered opportunities to customers around the world to purchase certificates of deposit ("CDs").

4. The plaintiffs were led to believe that sums deposited with SIB would be and were invested using a low-risk investment strategy concentrating on maximum liquidity in a well-balanced, widely diversified global portfolio that would provide generous returns. On that basis, they purchased SIB CDs.

5. Instead of investing funds received by SIB customers as represented, Robert Allen Stanford ("Stanford") and a small cabal of other insiders (the "Other Insiders") orchestrated a scheme to loot SIB of several billion dollars of its assets (the "SIB Looting"). The Other Insiders consisted of, most notably, James Milton Davis ("Davis"), SIB's Chief Financial Officer.

6. To perform the SIB Looting, Stanford and the Other Insiders misappropriated and misapplied the vast majority of SIB's assets. They placed SIB's assets into speculative, largely illiquid investments, diverted them to other companies owned by Stanford, made approximately US$2 billion in concealed and unsecured SIB shareholder loans to Stanford and used them to fund their own lavish lifestyles. As a result, Stanford and the Other Insiders committed breaches of fiduciary duties and breaches of trust. On June 12, 2012, Stanford was sentenced to 110 years in prison for orchestrating the SIB Looting. The Other Insiders have also been convicted in connection with the SIB Looting.

7. Beginning in the early 1990s, TD Bank acted as correspondent bank for SIB. In particular, TD Bank opened and maintained multiple correspondent bank accounts for SIB through which flowed the vast majority of all investor funds for the purchase of SIB CDs and payments from SIB to investors and others in multiple jurisdictions around the world. For instance, in the January 1, 2008 to February 2009 period which preceded the date when regulators discovered and terminated the SIB Looting, approximately US$2,539,762,421.22 was credited to SIB's TD Bank account number 360012161670. As a result, SIB was a significant source of revenue for TD Bank. In fact, as the SIB Looting grew, so too did TD Bank's revenue, so much so that SIB became TD Bank's largest correspondent banking customer in the world. In addition, TD Bank provided trade financing and treasury services to SIB.

8. TD Bank also acted as correspondent bank for Bank of Antigua Limited ("BOA"), a Stanford-owned onshore bank based in Antigua, and provided other banking services to Caribbean Star Airlines Ltd. and Caribbean Sun Airlines Inc., both entities owned by Stanford (together, "Caribbean Star Airlines"). Further, TD Asset Management Inc. and TD Waterhouse Private Investment Counsel Inc., both of which were wholly-owned subsidiaries of TD Bank (together, "TD Waterhouse"), managed discretionary investment portfolios for both SIB and BOA.

9. TD Bank opened SIB's correspondent bank accounts without conducting any "know your client" ("KYC") or anti-money laundering ("AML") due diligence. It did so notwithstanding that correspondent banking is the highest risk service provided by banks. In addition, there was clearly no legitimate business purpose for SIB to require correspondent banking services in Canada. For among other reasons, this was because SIB initially did not have any Canadian customers and all of the funds wired to SIB's accounts at TD Bank were in U.S. dollars. Accordingly, TD Bank never should have accepted SIB as a client in the first place.

10. In legitimate circumstances, SIB would have sought and received correspondent banking services from a U.S. bank. However, due to the clear risk occasioned by SIB, U.S. banks had refused to provide correspondent banking services to SIB, a fact that TD Bank was required to be aware of. In fact, throughout the period that TD Bank provided correspondent banking services to SIB, U.S. banks generally refused to provide correspondent banking services to any offshore or Antiguan-based banks or required such banks to be part of a reputable banking group, a quality SIB clearly did not have.

11. TD Bank negligently opened SIB's correspondent bank accounts and compounded its negligence by operating those accounts for nearly 20 years. It was also required under the laws of

Canada and mandatory banking industry standards to perform due diligence reviews of SIB's affairs, SIB's use of TD Bank's correspondent banking services, Stanford and the Other Insiders, and other relevant information. These obligations gave rise to the requirement that TD Bank ask for and obtain information from SIB, Stanford and the Other Insiders that would have enhanced TD Bank's exclusive window into SIB's affairs. In the circumstances, such inquiries and the resulting information should have indicated to TD Bank that it was required to terminate SIB's access to TD Bank's facilities, report the conduct of Stanford and the Other Insiders to the appropriate authorities and freeze SIB's accounts.

12. For instance, if TD Bank undertook even the basic required due diligence reviews, it would have determined that, during the period of time that TD Bank provided banking services to SIB, Antigua's banking regulations and AML practices were subject to extensive, sustained and public condemnation, all of which related to Antigua's known facilitation of fraud and money laundering. It also would have discovered that Stanford himself undertook various well-publicized manipulations of Antigua's regulatory regime.

13. TD Bank had direct experience with the risks occasioned by providing correspondent banking services to an Antiguan-based offshore bank. For instance, in 1996, it closed the correspondent bank accounts of another Antiguan-based offshore bank, American International Bank Limited ("AIB"). It did so after a senior TD Bank executive responsible for TD Bank's relationship with AIB determined that the amounts moving through the AIB account at TD Bank were too large for a legitimate bank in Antigua.

14. Notwithstanding that the volume of funds moving through SIB's correspondent accounts was significantly larger than that moving through AIB's account, TD Bank maintained its

relationship with SIB. In fact, by at least 2008, SIB had become TD Bank's single largest correspondent banking customer, not just in the Caribbean, but worldwide. Notably, as virtually all investments with SIB flowed through TD Bank, the exponential growth of SIB's balance sheet created a significant source of revenue for TD Bank.

15. TD Bank was also required to diligently conduct ongoing monitoring of publicly-available information pertaining to SIB and SIB's business operations. During the almost twenty years that TD Bank provided correspondent banking services to SIB, such publicly-available information repeatedly disclosed clear warning signs with respect to SIB and Stanford. For example, in 1984, just prior to entering the offshore banking industry, Stanford was declared a bankrupt by a Texas court with personal debts in excess of US$13 million. This fact alone should have precluded TD Bank from providing banking services to SIB, as banking industry standards clearly provide that a previously-bankrupt individual should be ineligible to run a bank. Among other issues, World-Check, a reputable organization that gathers information globally on heightened risk individuals and entities, officially deemed Stanford a politically exposed person (a "PEP") in 2004 and designated one of Stanford's companies a financial institution that posed a high risk in 2007.

16. As a result of publicly-available information, even without the benefit of the window into SIB's affairs such as the one enjoyed by TD Bank, other banks and regulators discovered seriously adverse information regarding SIB and Stanford. This information revealed that business should not have been conducted with SIB and/or that the SIB Looting was taking place.

17. For instance, in September 2000, a U.K. consulting firm issued a due diligence report in respect of BOA to the predecessor of Société Générale Private Banking (Suisse) S.A. ("SocGen"), which provided SIB with banking services in Switzerland. That report, which was completed in

the course of only a few hours and at a cost of only £500, commented on both SIB and Stanford. In particular, it identified various "red flags" in respect of Stanford and SIB and concluded that "SIB has had a somewhat dubious reputation for many years", that "it is an accepted fact that Stanford International Bank has been used by Mexican drug cartels to launder considerable volumes of criminally obtained funds" and that SocGen should be concerned about entering into business relationships with SIB or Stanford as "it would be very difficult for [SocGen] to defend itself or its reputation should any problems arise in the future."

18. Even earlier, in 1997, after just six days of field research, the U.S. Securities and Exchange Commission (the "SEC") was even more definitive: red flags about Stanford's operations indicated a likely "Ponzi" scheme. The SEC's failure to act on such conclusions has now been the subject of a comprehensive report that in no way disavowed the conclusion that publicly accessible information revealed Stanford's fraud more than ten years prior to SIB's collapse.

19. Similarly, when international clearing house Pershing LLC ("Pershing") sought to verify SIB's assets in connection with its provision of services to another Stanford-owned entity, it was refused access to any documentation regarding SIB's balance sheet and the supporting paperwork that reflected SIB's assets. Due to the lack of transparency into SIB's portfolio, Pershing withdrew its services and by December 2008 announced publicly that it could not verify that Stanford was not involved in fraud of some nature. Several others also came to the same conclusion, including various U.S. banks, an international clearing house, a private due diligence firm, a prominent U.S. law firm and the National Association of Securities Dealers.

20. TD Bank not only had access to the publicly-available information relied on by other entities that identified the SIB Looting and/or refused to provide services to SIB, but also had

extensive additional information as a result of its unique vantage point as SIB's correspondent bank, as well as its other business relationships with SIB, BOA and Caribbean Star Airlines. For instance, in addition to the fact that there was no legitimate business purpose for SIB to have accounts in Toronto, TD Bank knew that the rates of return purported to be generated by SIB were completely at odds with the rates of return actually generated for SIB by TD Waterhouse.

21. TD Bank not only ignored the information available to it, but did so in the face of a 2001 U.S. Senate report in respect of correspondent banking that specifically named TD Bank. That report indicated that TD Bank had provided correspondent banking services to AIB and confirmed that, as a result, TD Bank had directly acted as a major conduit for improper access to the U.S. financial system. At the very time of the U.S. Senate report and for several years afterward, TD Bank continued unabated in its provision of banking services to SIB and access to the U.S. financial system.

22. In the face of its knowledge about SIB's affairs and the publicly-available information in respect of SIB and Stanford, by at least 2000, the TD Bank executive responsible for the SIB correspondent banking relationship admitted internally that TD Bank did not understand SIB's business and concluded that he was uncomfortable with TD Bank's relationship with SIB and that due diligence under strict KYC and AML standards was required as "something did not seem right". In addition, by at least July 2008, different executives at TD Bank were "nervous" about TD Bank's relationship with SIB. However, TD Bank continued unabated in its provision of banking services to SIB until being ordered by a court to cease doing so nearly a month after SIB's collapse.

23. All of the plaintiffs' investments in SIB CDs were made in or after January 2007, with certain of those investments being made as late as January 2009, just a month before SIB's collapse. Thus, by the time of the plaintiffs' first investments in SIB CDs, the vast majority of the relevant publicly-available information in respect of Antigua, SIB and Stanford had arisen and was readily available to TD Bank. Accordingly, had TD Bank acted as it was required to do, prior to the time at which the plaintiffs made their investments in SIB CDs, it would have terminated SIB's access to TD Bank's facilities, reported the conduct of Stanford and the Other Insiders to the appropriate authorities and frozen SIB's accounts.

24. TD Bank, as a member of the international banking community, should have acted long before regulatory agencies intervened and effectively ended the SIB Looting in early 2009. In opening and maintaining its relationship with SIB, TD Bank was negligent. By its acts and omissions described herein, TD Bank failed to act as a reasonable bank would have acted when confronted with the same suspicious circumstances. At all times, it had sufficient information such that it knew or ought to have known of, or was recklessly or willfully blind to, the SIB Looting. Despite this knowledge, TD Bank continued to provide correspondent banking services to SIB (as well as the other aforementioned services) until after SIB's collapse. In addition, TD Bank also assisted Stanford and the Other Insiders in breaches of fiduciary duties and breaches of trust.

25. TD Bank was required to take reasonable measures to avoid causing loss to SIB and, in turn, the plaintiffs. By failing to do so, TD Bank caused significant injuries and losses to the plaintiffs.

II. THE PARTIES

A. The Plaintiffs

26. Dynasty Furniture Manufacturing Ltd. ("**Dynasty**") is a corporation incorporated pursuant to the laws of Alberta. In or about June 2008, Dynasty invested approximately CAN$1 million in SIB CDs.

27. Shafiq Hirani ("**Hirani**") is an individual residing in the Province of Alberta. Between about September 2007 and January 2009, Hirani invested approximately CAN$8 million in SIB CDs (net of withdrawals).

28. Dr. Hanif Asaria ("**Asaria**") is an individual residing in the Province of Alberta. Between about September 2007 and January 2009, Asaria invested approximately CAN$1 million in SIB CDs.

29. Dinmohamed Sunderji ("**Sunderji**") is an individual residing in the Province of Alberta. In or about January 2009, Sunderji invested approximately CAN$2.3 million in SIB CDs.

30. 2645-1252 Québec Inc. ("**1252 Québec**") is a corporation incorporated pursuant to the laws of the Province of Québec. Between about January 2007 and March 2008, 1252 Québec invested approximately CAN $5 million in SIB CDs.

31. In deciding to invest their funds in SIB CDs, each of the plaintiffs relied on misrepresentations that Stanford and the Other Insiders caused to be made. These representations included, among other things, that the CDs they were buying were safe investments backed by SIB, which was said to be a reputable, long-standing, multi-billion dollar banking institution.

32. All of the plaintiffs' investments in SIB CDs were transacted through SIB's correspondent bank accounts at TD Bank. TD Bank received the funds for those investments into those correspondent bank accounts and subsequently sent those funds to a destination directed by SIB, Stanford or the Other Insiders.

B. Robert Allen Stanford and SIB

33. Stanford was born in the United States on March 24, 1950. He is a citizen of the U.S. and Antigua.

34. Stanford wholly owned Stanford International Bank Holdings Ltd., an Antiguan corporation which itself directly and wholly owned SIB. There were no other equity owners of SIB. Stanford was the Chairman of the Board of SIB.

35. SIB was at relevant times the largest private international or "offshore" bank in Antigua. By the time of its collapse in 2009, SIB employed approximately 100 individuals at its headquarters in Antigua and thousands of others were employed at other Stanford-owned entities around the world.

36. Stanford was on SIB's Board of Directors, as were his father, James A. Stanford, Davis, Sir Courtney N. Blackman, O.Y. Goswick, Kenneth C. Allen and Robert S. Winter. At relevant times, Stanford was Chairman of the Board of Directors and Sir Courtney N. Blackman, an independent director and former Governor to the Central Bank for Barbados, served as the Vice Chairman.

37. SIB's Board of Directors met regularly and was comprised of various sub-committees. For instance, Sir Courtney N. Blackman served as Chairman of the Audit Committee and presented

audit committee reports to SIB's Board of Directors on behalf of the other audit committee members.

38. SIB and its affiliates also had an advisory board that was comprised primarily of former politicians and international business persons, most of whom were independent from SIB. It has been reported that a TD Bank executive, Perry Mercer, served on this advisory board, as did Blaise Friedli of SocGen.

C. The Defendant

39. TD Bank is a Schedule I bank, duly constituted by letters patent under the authority of the *Bank Act*, R.S.C. 1991, c. 46, with a head office located in Toronto, in the Province of Ontario.

40. As detailed herein, TD Bank provided correspondent banking, lending, trade financing and treasury services to SIB, BOA, another Antiguan bank owned by Stanford, and at least one other Stanford-owned entity.

41. TD Bank provided correspondent banking services to SIB in connection with all of the purchases of SIB CDs by the plaintiffs.

III. HISTORY OF SIB'S OPERATIONS AND AFFAIRS

42. TD Bank was required to know the history of SIB, SIB's products and services, the factors giving rise to SIB's collapse and information in respect of Stanford personally. Such history and information is detailed below. It is full of "red flags".

A. Stanford Purchases BOA and Establishes SIB

43. In 1985, with no previous involvement in the banking industry, Stanford incorporated Guardian International Bank Limited ("Guardian") in the British Overseas Territory of Montserrat. At that time, Stanford and his father owned all of the share capital of Guardian.

44. In order to support sales of Guardian CDs, Stanford established representative offices for Guardian in Miami, Florida and Houston, Texas under the name "Guardian International Investment Services".

45. From 1985 until 1990, Stanford operated Guardian in Montserrat with his former college roommate, Davis. They operated Guardian as an "offshore" bank and, as such, it catered almost exclusively to customers outside of Montserrat.

46. Guardian primarily targeted Latin American customers and offered CDs with interest rates of double the then-current standard rate of return. Using this strategy, by the end of 1989, Guardian claimed US$55.5 million in accounts, a number which grew to over US$100 million by the following year.

47. Notwithstanding its apparent success, Guardian came under the scrutiny of bank regulators. By 1989, the Texas Department of Banking had warned Stanford about operating a foreign bank representative office in Texas "without authority under either state or federal law."

48. Thereafter, following investigations by bank regulators in Texas, Florida and California, the U.S. Office of the Comptroller of Currency issued a Banking Circular regarding Stanford's unauthorized banking activities in the U.S. The Texas Department of Banking went further, ordering Guardian to immediately cease its Texas operations or "the Texas Attorney General will

be requested to promptly file charges against the bank, its board of directors and its management for apparent willful and continuing violations of the Texas Banking Code."

49. Around the same time, the banking system in Montserrat at large came under investigation by the Federal Bureau of Investigation and the U.K.'s Scotland Yard. Consequently, Guardian itself came under scrutiny for possible drug money laundering.

50. As a result of reports from those law enforcement agencies, the government of Montserrat determined that Stanford no longer met bank ownership requirements on the island and informed Stanford that Guardian's banking license was going to be revoked. Among other reasons provided, Montserrat informed Stanford this decision was due to the fact that (i) Guardian was operating in a manner "detrimental to its depositors", (ii) Guardian failed to supply adequate details as to its liquidity, and (iii) Stanford was formerly a bankrupt.

51. In response, and before Montserrat could formally revoke Guardian's license, on December 7, 1990, Stanford caused Guardian to migrate its domicile to Antigua and re-incorporate under Antigua's *IBC Act*. Following Guardian's arrival in Antigua, it shared headquarters with BOA.

52. On December 8, 1990, the day after Stanford reincorporated Guardian in Antigua, Stanford completed his acquisition of all of the share capital of BOA in exchange for Eastern Caribbean ("EC") $469,700.80 through his holding company, Guardian Bank Group Holdings Limited (as it was then called). The sellers of BOA's share capital were a group of Antiguan citizens and the Government of Antigua.

53. BOA was originally incorporated on February 10, 1981. As a domestic Antiguan bank, BOA offered banking services primarily to citizens of Antigua, in EC dollars, the local currency.

54. On December 20, 1994, Guardian changed its name to SIB.

55. As an offshore international banking company, and pursuant to s. 240 of the *IBC Act*, SIB was prohibited from knowingly accepting deposits in the legal tender of Antigua or of other countries of the CARICOM region. As the legal tender in Antigua is the EC dollar, SIB was effectively barred from doing business with residents of Antigua. Instead, its deposits derived from customers located in foreign jurisdictions.

56. Since SIB was an offshore Antiguan bank which had no way to receive wire transfers or other payments on its own, it needed to gain access to an onshore bank's facilities as a means for SIB customers to transfer funds to SIB. This was accomplished by way of SIB's procurement of correspondent bank accounts.

57. The term "correspondent account" is defined broadly for banking organizations and includes any account or formal relationship established by a financial institution to receive deposits from, make payments to or other disbursements on behalf of a foreign financial institution, or to handle other financial transactions related to the foreign financial institution. By analogy, SIB needed to "rent" the services of one or more onshore banks in order for it to operate and access the U.S. financial system. Absent such correspondent arrangements, it would have been paralysed operationally.

58. By relying on correspondent banks such as TD Bank, SIB eventually operated in approximately 113 countries and by late 2008 reported that it held approximately US$8.5 billion in assets under management. SIB's 2007 Annual Report stated that SIB had in excess of 50,000 clients. When any customer of SIB wished to make a U.S. or Canadian dollar deposit with SIB by

electronic funds transfer, they were directed to remit their value electronically to SIB's correspondent accounts at TD Bank.

59. In addition to TD Bank, SIB was also provided the following banking services:

(a) correspondent banking services by HSBC Bank PLC ("HSBC") in the United Kingdom. HSBC received all EURO and British Pound Sterling wire transfer payments from SIB's depositors;

(b) Republic Banchsares of Texas, Inc., which was later acquired by Trustmark National Bank (together, "Trustmark"), received U.S. dollar cheque deposits as correspondent bank to SIB, but refused to accept any wire transfers on behalf of SIB. Such cheques were sent by SIB customers to SIB in Antigua, which in turn bundled and delivered them for deposit into SIB's accounts held at Trustmark in Houston; and

(c) SocGen provided what have been referred to as secret "slush fund" accounts for SIB. It has been alleged that bribes to SIB's auditor, to Leroy King of the Financial Services Regulatory Commission of Antigua (the "FSRC"), and to others were funded from accounts at SocGen.

B. SIB's Products and Services

60. SIB offered six different deposit products to customers: fixed CDs, flex CDs, index linked CDs, premium accounts, performance accounts and express accounts. SIB customers almost exclusively purchased CDs. SIB also offered other products to customers, but the availability of such products was tied to the need for customers to hold accounts with SIB, almost always in the

form of CDs. Such products included Visa, Mastercard and American Express credit card services, as well as loan facilities, letters of credit, letters of guarantee and private banking services. Thus, for example, SIB required customers to maintain a CD with SIB as security in order to acquire a credit card and SIB placed holds on customers' CDs in an amount twice that of their credit card limits.

61. In addition, SIB engaged in various investment banking services. Such services included multi-million dollar public equity dealings, private placements, mergers and acquisitions and debt financings, all of which were undertaken for an array of clients in various locations around the world. SIB assembled a team of professionals from various industry-leading financial firms to provide its investment banking services.

62. SIB primarily sold its CDs through SIB-affiliated companies. Most notably, these companies included:

(a) the Stanford Financial Group ("SFG"), which was based in Houston, Texas and reported to have more than US$50 billion "under advisement";

(b) the Stanford Group Company ("SGC"), which was an investment dealer and broker dealer based in Houston, Texas. It registered with the SEC in 1996;

(c) the Stanford Trust Company, Ltd. ("STC"), a trust company organized under the laws of Antigua that as of 1998 operated a foreign trust representative office in Miami, Florida and carried on business as "Stanford Fiduciary Investory Services";

(d) SIB itself through its Montreal, Quebec office; and

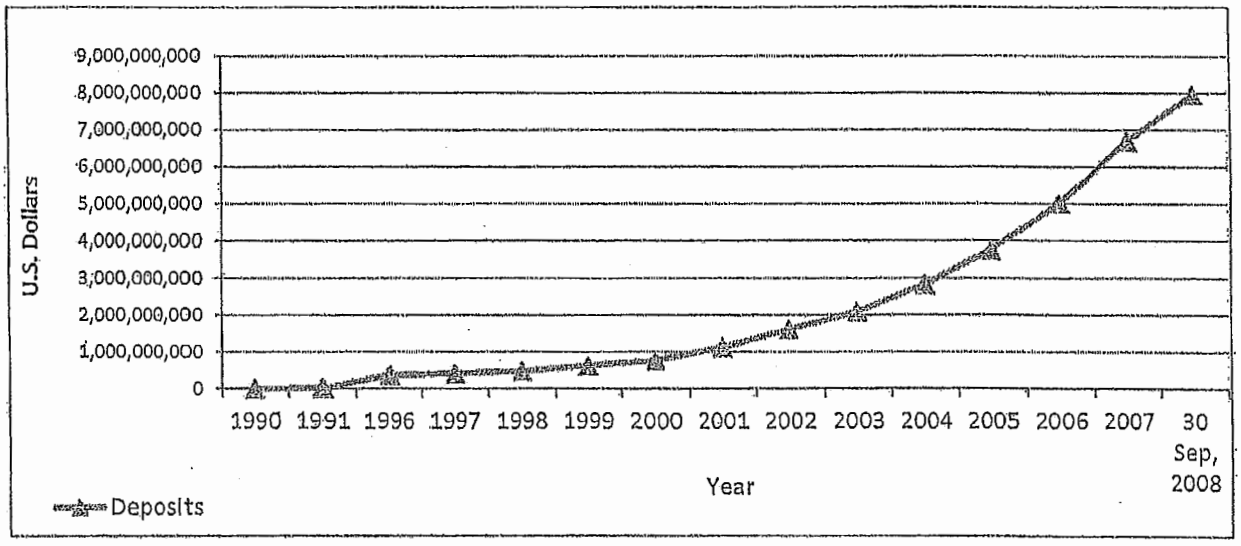
(e) Numerous affiliated company offices in Latin and Central America, as well as in Zürich, Switzerland.

63. SIB's annual reports consistently disclosed that SIB had a portfolio that produced returns of over 10 percent.

64. SIB's Annual Reports disclosed that SIB's auditors were C.A.S. Hewlett & Co. Ltd., a small accounting firm based in Antigua.

65. Financial advisors and SIB employees sold SIB CDs using information such as investment return figures and promotional materials that had been provided or were based on information prepared by Stanford and the Other Insiders. Thus, on the basis of the representations that Stanford and the Other Insiders caused to be made, SIB sold billions of dollars of CDs.

66. As illustrated by the graph below, between approximately 1990 and 2009, SIB grew its business exponentially from approximately US$14 million in CD investments while operating as Guardian in Montserrat to approximately US$8 billion in CD investments by 2009.



C. TD Bank Provided Services to Stanford-Owned Entities

1. TD Bank Improperly Opened the SIB Accounts

67. In approximately 1992, TD Bank acquired some of the Bank of New York's interests in Canada. These interests included the Bank of New York's then existing correspondent banking relationships with approximately 20 banks located throughout the Caribbean. Three of these banks were based in Antigua, namely (i) the Stanford-owned domestic Antiguan bank, BOA, (ii) the domestic Antiguan bank, Antigua Overseas Bank, the share capital of which was owned by William Cooper ("Cooper") and (iii) another Antiguan domestic bank, Antigua Barbuda Investment Bank ("ABIB"). TD Bank thus acquired its way into becoming the correspondent bank for BOA.

68. As domestic Antiguan banks, BOA, Antigua Overseas Bank and ABIB primarily used TD Bank's correspondent banking services to provide limited services to Antiguans who required services in Canada to conduct transfers or effect foreign currency exchanges involving minimal amounts of money. Because TD Bank was not the originator of these correspondent accounts (in that Bank of New York had established them), TD Bank never conducted any KYC or AML due diligence inquiries in respect of the counter-party banks in the Caribbean. TD Bank thus "grandfathered" the noted three Antiguan banks' correspondent banking relationships. The BOA, Antigua Overseas Bank and ABIB correspondent accounts showed relatively minor activity.

69. Following TD Bank's acquisition of some of the Canadian interests of the Bank of New York, Cooper asked TD Bank to establish a correspondent bank account for AIB, the Antiguan domiciled international banking company also owned by Cooper. The "grandfathering" of Antigua Overseas Bank by TD Bank's acquisition of some of the Bank of New York's Canadian interests thus allowed Cooper to present AIB as an affiliate of a pre-existing correspondent customer of TD

Bank. Since TD Bank was already doing business with a Cooper-owned bank, TD Bank agreed to allow AIB to establish its own correspondent account. No KYC or AML due diligence inquiries were completed by TD Bank in respect of AIB or Cooper. AIB and Cooper thus entered into TD Bank's Caribbean correspondent banking division through a "side door" and not the "front door".

70. If it adhered to the KYC and AML compliance standards of a reasonable bank, TD Bank would have insisted that AIB come through the "front door" and, in turn, TD Bank would have properly vetted AIB and Cooper and refused to accept AIB as a customer. TD Bank did not do so. The activities of AIB and Cooper subsequently gave rise to a number of successful criminal prosecutions in the late 1990s by U.S. law enforcement authorities for laundering the proceeds of certain advance fee and other frauds. Cooper remains a fugitive of U.S. Justice.

71. The same explanation for how AIB got to enjoy correspondent banking privileges at TD Bank applies to SIB.

72. Around the same time that TD Bank acquired its correspondent relationship with BOA, SIB (the successor of Guardian, which just previously had its license revoked in Montserrat) attempted to use various U.S.-based banks for its correspondent banking purposes. This made sense, as the vast majority of purchases of SIB CDs were made with U.S. dollars. However, after conducting due diligence, each of these banks ultimately declined to provide correspondent banking accounts to SIB or quickly closed such accounts due to concerns over money laundering or other impropriety. As a result of its inability to acquire correspondent banking services from a U.S.-based bank, SIB applied for such services from TD Bank in Canada.

73. TD Bank did not conduct KYC or AML due diligence inquiries when SIB applied for correspondent bank accounts. Instead, because TD Bank already had a correspondent banking

relationship with the Stanford-owned BOA, TD Bank allowed SIB to "piggyback" onto BOA's antecedent relationship for KYC and AML compliance purposes. In other words, like with AIB, TD Bank allowed SIB to access its services through the "side door" and not the "front door".

74. Consistent with this sloppy approach (and according to TD Bank itself), TD Bank has no record of account opening applications being completed by SIB or there being any written contracts in respect of SIB's correspondent bank accounts. In fact, it appears the only written contracts that at any time purported to govern the TD Bank's provision of correspondent banking services to SIB were TD Bank's standard form unilateral contracts in respect of correspondent banking that did not address SIB in any specific manner. Such unilateral contracts arose for the first time only in 1998 but did not contain any substantive legal terms until less than two years prior to SIB's collapse.

75. If TD Bank adhered to the KYC and AML compliance standards of a reasonable bank, it would have insisted that SIB come through the "front door" and would have also properly vetted SIB and Stanford and refused to accept SIB as a customer. TD Bank did not do so.

76. The reasons that TD Bank was required to refuse to accept SIB as a customer are extensive and are detailed further below. Most simple and straightforward, however, was that Stanford was formally declared bankrupt in 1984 with personal debts in excess of US$13 million. It is widely accepted in the banking community that an individual who has been personally bankrupted is not a fit and proper person to own or manage a bank.

77. Stanford's personal bankruptcy was a matter of public record. Therefore, a basic public records database search would have revealed Stanford's lack of fitness to own or manage SIB. In fact, this was one of the very reasons that led Montserrat to revoke Guardian's banking license.

Similarly, when Guardian sought a license from the Eastern Caribbean Central Bank (the "ECCB") to own a trust company, the ECCB determined that Guardian was not permitted to hold such a license due to Stanford's bankruptcy.

78. Another significant factor indicating that TD Bank should never have provided services to SIB was that there was clearly no legitimate purpose for SIB to hold correspondent bank accounts in Toronto. Among other reasons, this was because, at the time the TD Bank-SIB relationship commenced, SIB had no Canadian customers and thus transacted no business in Canadian dollars. Instead, at that time and throughout the period that TD Bank provided banking services to SIB, the vast majority of investor funds transacted were in U.S. dollars.

79. Wire transfers were critical to the operation of SIB and, in turn, the SIB Looting. Without them, SIB would have had no means to quickly or efficiently complete any transaction, a clearly necessary feature of modern commerce. Without access to wire transfers, SIB, as an offshore Antiguan bank, would have been dependent on delivery of physical cash or cheques to complete any transaction, a commercially untenable situation particularly since SIB's customers were located around the world.

80. Normal practice is that U.S. dollar correspondent bank accounts are provided by U.S. banks. Although, as a Canadian bank based in Toronto, TD Bank was permitted to undertake U.S. dollar transactions, it was not permitted to clear U.S. dollar wire transfers in Canada. This was significant because the vast majority (if not all) U.S. dollar deposits into SIB's correspondent bank accounts were received by wire transfer. Instead, TD Bank was required to rely on U.S. banks to serve as intermediaries to clear U.S. dollar wire transfers.

81. Accordingly, TD Bank at all relevant times required and relied upon the clearing services of a U.S. bank to complete most basic transactions for SIB. For instance, for at least part of the period that TD Bank provided correspondent banking services to SIB, U.S. wire transfers were routed through and cleared by Bank of America in New York City. This is rather ironic given that Bank of America had previously refused to continue providing correspondent banking services to SIB. Such arrangements were maintained by SIB and TD Bank notwithstanding that reliance on U.S. intermediary banks resulted in fees being incurred by SIB and/or SIB customers that would not have been incurred had SIB simply relied on a U.S. bank for its U.S. dollar correspondent banking services. Using such arrangements, TD Bank provided access to the U.S. financial system that otherwise was unavailable to SIB.

2. The Provision of Banking Services by TD Bank

82. From the time the SIB TD Bank accounts were opened, TD Bank and TD Waterhouse together opened and maintained approximately 11 separate accounts for SIB and other Stanford-owned entities. Among other things, those accounts facilitated all of SIB's U.S. dollar wire transfers. When SIB eventually obtained Canadian customers (including the plaintiffs), TD Bank also provided such services for Canadian dollar transfers. However, in total, SIB only had 159 Canadian customers who together invested less than CAD$50 million with SIB. In contrast, SIB at large had in excess of 21,000 customers that invested approximately US$10 billion, primarily in U.S. dollars.

83. The provision of correspondent banking services is both a competitive and lucrative business for banks. Banks seek out valuable correspondent banking relationships because they can generate substantial "fee from free balances" revenue overnight for the bank that is the provider of

the relevant services. Transaction fee revenue is also a source of income from correspondent banking relationships.

84. During the 1990s and early 2000s, TD Bank's largest correspondent bank customers were generally properly capitalised and regulated banks from the United States. In 1999, the total revenue generated by TD Bank from the provision of correspondent banking services to banks in the Caribbean did not exceed CAD$1 million. At that time, SIB's reported assets were also limited. For instance, at the end of 1999, SIB reported having US$676,236,000 in assets and US$623,560,000 in liabilities to depositors.

85. However, the exponential growth of SIB's balance sheet from approximately 2002 until late 2008 (during which time approximately US$9 billion of SIB CDs were sold to depositors) altered the profile of SIB from that of a relatively minor source of business into that of a major correspondent bank customer and a significant source of revenue for TD Bank.

86. For instance, between December 31, 2005 and December 31, 2007, TD Bank reported annual increases of corporate banking revenue of 8% (for 2006) and 17% (for 2007), which reflected annual corporate banking revenue rising from CAD$266 million in 2005 to CAD$287 million and CAD$337 million in 2006 and 2007, respectively. In both years, these increases in corporate banking revenue were reported by TD Bank as being "largely due to higher net interest income from correspondent banking deposits and higher lending volumes." At the same time, between December 31, 2005 and December 31, 2007, SIB's reported assets grew from US$4.1 billion to US$7.1 billion. By the last year of SIB's operations – between January 2008 and February 2009 – approximately US$2,539,762,421.22 was credited to SIB's TD Bank account number 360012161670.

87. As a result, by 2008, SIB had become TD Bank's single largest correspondent banking customer not just in the Caribbean, but worldwide. This was the case notwithstanding that TD Bank had hundreds if not thousands of correspondent banking relationships, including with major U.S. banks and other globally-recognized banks from around the world. Until the growth of SIB, such banks constituted TD Bank's largest correspondent banking customers.

88. Notably, in 1996, TD Bank closed AIB's correspondent account. This decision was based on, among other things, the fact that the amounts moving through the AIB account at TD Bank were too large to be associated with a legitimate bank in Antigua. TD Bank determined that an offshore bank in Antigua that generated a large sum of money was a "red flag".

89. At that same time, the amounts running through SIB's correspondent bank accounts at TD Bank were comparable to the amounts running through AIB's account and soon after escalated dramatically. This escalation occurred during the period that the risk of doing business with Antiguan financial institutions also greatly increased in notoriety, which is detailed below. However, unlike with AIB, TD Bank continued to provide correspondent banking services to SIB.

90. In addition, TD Bank provided banking services including credit to the Stanford-owned Caribbean Star Airlines. SIB secured the credit provided to these entities through a U.S. dollar account held by SIB at TD Bank.

91. Further, TD Waterhouse managed discretionary investment portfolios for both SIB and BOA throughout the period that TD Bank provided correspondent banking services to SIB. The investment strategy employed by TD Waterhouse was the same for both the SIB and BOA portfolios.

92. TD Bank also provided trade financing and treasury services to SIB. In addition, in connection with loans, advances and other obligations that SIB had with TD Bank, SIB pledged to TD Bank its security holdings with TD Waterhouse.

93. During the years that SIB and BOA maintained investment portfolios with TD Waterhouse, those portfolios were managed by John Pepperell, who was the Vice Chairman of TD Waterhouse, and Perry Mercer.

94. From 2002 until SIB's collapse in 2009, James Zachariah Davis ("Zack Davis"), who is the son of Davis, was a research analyst at SFG. Zack Davis' job as a research analyst at SFG entailed monitoring and providing instructions with respect to the SIB and BOA portfolios that were managed by TD Waterhouse. He dealt directly with Perry Mercer (who according to Zack Davis was a long-time friend of Davis) and others at TD Bank and TD Waterhouse.

D. Stanford and the Other Insiders Looted SIB

95. As CEO, director and Chairman of the Board of Directors of SIB, Stanford owed fiduciary duties to SIB. Such fiduciary duties were also owed by the Other Insiders, including Davis.

96. Section 95 of the *IBC Act* provides that Stanford and the Other Insiders had a duty to "act honestly and in good faith with a view to the best interests of the corporation" and to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."

97. In addition, Stanford and the Other Insiders owed common law fiduciary duties to SIB. Such duties paralleled those owed by Canadian corporate executives and included, among other things, the duty to:

(a) act with loyalty, good faith, and honesty;

(b) avoid conflicts of interest and duty;

(c) use all of their energy, ability, and imagination in the best interests of SIB;

(d) develop business opportunities for the sole benefit of SIB; and

(e) not conceal any information from SIB.

98. However, in breach of their fiduciary duties, Stanford and the Other Insiders converted customer funds used to purchase CDs from SIB for improper purposes, including for their own use, and implemented and orchestrated the SIB Looting to defraud SIB and its customers, including the plaintiffs.

99. In particular, the investment strategy and rates of return promised to the plaintiffs by Stanford and the Other Insiders were not as claimed. Under the direction and at the instigation of Stanford and the Other Insiders, several billion dollars of funds provided to SIB (including the funds invested by the plaintiffs) were diverted for the personal benefit of Stanford and the Other Insiders. As a result, the plaintiffs were victims of acts of larceny and breaches of fiduciary duties and trust by Stanford and the Other Insiders.

100. Stanford and the Other Insiders separated the funds received by SIB from its customers into three tiers. Tier I contained cash or cash equivalents, while Tier II consisted of various portfolios of investments that were managed at arm's length by third party financial institutions, including TD Waterhouse, together with a small amount of cash or cash equivalents.

101. By maintaining Tiers I and II and allowing SIB employees and executives to undertake discrete tasks with respect to them, Stanford and the Other Insiders were able to deceive honest SIB employees and others. This deception allowed Stanford and the Other Insiders to use Tier III to effect the SIB Looting.

102. Tier III was the most financially-significant tier at SIB, consisting of the vast majority of SIB's funds. It was managed by Stanford and the Other Insiders and they kept its true contents secret.

103. SIB employees, executives and directors either did not know of the existence of Tier III or, if they did know, had no knowledge whatsoever of its contents and were under the impression it was being legitimately managed. In fact, information relevant to the true contents of Tier III was not even kept on SIB's computer systems and Stanford and the Other Insiders used forged documents to deceive SIB employees, executives and directors as to the true nature of SIB's underlying assets. The real information in respect of Tier III was stored on an external drive that Stanford and the Other Insiders commonly called "the football" and kept with them at all times.

104. Once Stanford and the Other Insiders had directed SIB's funds into Tier III, instead of investing them as represented to SIB customers, employees, officers, executives and others (the "SIB Stakeholders"), they misappropriated and misapplied the funds by placing them into speculative, largely illiquid investments (namely real estate and private equity), diverting them to other companies owned by Stanford, using them to fund their own lavish lifestyles, and making large concealed and unsecured SIB shareholder loans to Stanford, none of which were repaid. Accordingly, Stanford and the Other Insiders acted to the detriment of SIB and the SIB Stakeholders, including the plaintiffs, for their own financial gain.

105. In addition, Tier III funds were used to hide the SIB Looting. In particular, Stanford and the Other Insiders diverted Tier III funds generated by SIB from the sale of CDs to pay purported interest on and redemptions of the CDs as required, thereby deceiving SIB customers, employees, executives and others, and allowing the continuation of the SIB Looting. Concealing the fraud in this manner resulted in the SIB Looting taking on the characteristics of a "Ponzi" scheme.

106. During his orchestration of the SIB Looting, Stanford in particular led a lavish lifestyle financed exclusively with SIB's funds that he had converted to his own use. Among other things, he enjoyed the use of a US$10 million Florida mansion and a fleet of private jets (valued at approximately US$100 million). He also took extravagant and expensive vacations costing up to US$100,000 and would often rent US$100,000/week yachts.

107. In order to conceal the SIB Looting from the SIB Stakeholders, Stanford and the Other Insiders routinely caused false entries to be made in SIB's accounts. Specifically, Stanford and the Other Insiders caused, among other things:

(a) false entries to be made into SIB's ledgers for the purpose of reporting false or unjustifiably inflated revenues and/or false or unjustifiably inflated investment portfolio balances and asset values, and:

(i) such false entries to be submitted to SIB's regulator in Antigua, the FSRC, and/or

(ii) such false entries to be represented to potential investors in SIB's CDs in order to encourage investments in CDs;

(b) copies of SIB bank statements to be forged; and

(c) false and/or unjustifiably inflated increases in assets to be recorded in SIB's annual reports and promotional materials.

108. As a result of Stanford and the Other Insiders' directions, SIB's annual reports falsely claimed increases in the value of SIB's assets from approximately US$760 million in 2000 to US$8.5 billion in December 2008. In reality, SIB only had approximately US$500 million in identifiable or traceable assets at the time of SIB's collapse only two months later in February 2009.

IV. THE COLLAPSE OF SIB

109. By the Fall of 2008, owners of SIB CDs began demanding redemptions of those CDs in increasing numbers. At the same time, SIB was increasingly experiencing difficulties generating new sales of SIB CDs. This scenario was prompted by the financial crisis in 2008.

110. As a result, by October 2008, SIB was left with no choice but to liquidate its accounts held at TD Bank and TD Waterhouse, among others, in order to pay interest and redemption rates owed to customers. TD Bank facilitated this liquidation primarily at the instruction of the Chief Investment Officer of SFG, Laura Pendergest-Holt ("Pendergest-Holt") and Zack Davis. The liquidation included both SIB and BOA assets. TD Bank did not take any steps to investigate why the liquidations were occurring or alter the services it provided to SIB or BOA except to monitor the situation from the perspective of its own credit risk.

111. By at least January 2009, the SEC began subjecting SIB to intense scrutiny. It demanded that SIB provide an itemized list of all assets in SIB's portfolios and all of SIB's financial and accounting documents. The SEC also informed various SIB executives and officers that it sought their testimony.

112. Soon thereafter, in early February 2009, Davis called a meeting with all of SIB's top executives in Miami, Florida. At that meeting, at which Stanford was not present, Davis informed the executives of the SIB Looting. The executives had no idea about the SIB Looting or the contents of Tier III prior to the meeting. According to Davis, upon hearing of the SIB Looting, the SIB executives' reaction was one of "shock".

113. On February 16, 2009, the SEC filed civil charges against SIB and its related entities, and against Stanford, Davis and Pendergest-Holt. In doing so, the SEC alleged "massive ongoing fraud" involving SIB CDs. That same day, the SEC obtained an injunction preventing SIB and its related entities from carrying on business and the appointment of an equity receiver from the U.S. District Court in Dallas, Texas.

114. Similarly, on February 19, 2009, the FSRC appointed receiver-managers of SIB. This appointment was continued by the High Court of Justice of Antigua on February 26, 2009, which thereafter determined that SIB should be liquidated and dissolved under the supervision of the Antiguan court pursuant to the *IBC Act*. The Former Liquidators were thereby appointed.

115. Despite the unique window into SIB provided by the extensive banking services it provided and the duty that TD Bank had to understand the true nature of SIB's affairs, until the SEC issued a freezing order on March 12, 2009, TD Bank took absolutely no steps whatsoever to limit SIB's banking activities, to report SIB's numerous irregularities to any regulatory authority or to take any other action that would have prevented the losses suffered by SIB and its customers in connection with the SIB Looting.

116. By Order of the Ontario Superior Court of Justice (Commercial List) dated April 24, 2009 (and subsequently extended) in Court File No. CV-09-8154-00CL (*Attorney General of Ontario v.*

The Contents of Various Accounts Held with TD Bank and TD Waterhouse in rem), TD Bank was ordered to pay into court all of the monies it held on behalf of SIB.

117. On June 18, 2009, a federal grand jury returned a 21-count indictment against, among others, Stanford and Pendergest-Holt. The grand jury indictment charged Stanford and Pendergest-Holt with various offences including conspiracy to commit mail, wire and securities fraud, wire fraud, mail fraud, conspiracy to commit money laundering and conspiracy to obstruct an SEC investigation.

118. On March 6, 2012, Stanford was convicted of 13 of the 14 counts remaining against him, including those in relation to his fraud and conspiracy. On June 14, 2012, he was sentenced by U.S. District Judge David Hittner who commented that Stanford had orchestrated "one of the most egregious frauds ever presented to a trial jury in federal court." Stanford was sentenced to 110 years in prison and ordered to forfeit US$5.9 billion.

119. On June 21, 2012, Pendergest-Holt pled guilty to obstructing the SEC's investigation into the misconduct of Stanford and the Other Insiders. However, the other counts against Pendergest-Holt were withdrawn after the SEC's investigation revealed that she did not know of Tier III or the fraud on SIB until Davis disclosed them at the February 2009 meeting in Miami, Florida referred to at paragraph 113. This was the case notwithstanding Pendergest-Holt's role as the Chief Investment Officer of SGF and her close personal relationships with Stanford and Davis. On September 13, 2012, Pendergest-Holt was sentenced to three years in prison and three years of supervised release.

120. On August 27, 2009, Davis entered into a plea arrangement whereby, in exchange for his co-operation, he was convicted of conspiracy to commit mail, wire and securities fraud, and

conspiracy to obstruct an SEC investigation. Davis was sentenced to five years of prison, three years of supervised release and had a judgment of US$1 billion ordered against him.

121. SIB has at no point been indicted or charged with any offense in connection with the SIB Looting. Similarly, other than Stanford, members of SIB's Board of Directors have at no point been indicted or charged with any offence in connection with the SIB Looting, nor have any other senior executives of SIB such as its Presidents. SIB and the SIB Stakeholders, including the plaintiffs, were deceived by Stanford and the Other Insiders.

V. FURTHER RED FLAGS

A. Banking Services Should Not Have Been Provided to an Offshore Antiguan Bank

122. During the period that TD Bank provided correspondent banking services to SIB, international regulators and government authorities publicly identified that Antigua needed to improve its banking regulations to prevent money laundering and criminal activity.

123. At least as early as 1996, the U.S. State Department's International Narcotics Control Strategy Report ("INCSR") highlighted weaknesses in Antigua's banking system related to money laundering. The report noted inadequate regulation and a surge in questionable banking operations in Antigua. These findings were reiterated in the INCSRs of the subsequent years. The 2003 Report indicated that money laundering in Antigua was related to fraud schemes and that money laundering occurs more often in the offshore sector than in the domestic finance sector.

124. Although the Antiguan government subsequently passed the *Money Laundering (Prevention) Act* of 1996, the U.S. criticism of Antiguan banking laws persisted.

125. Consequently, the Antiguan government formed the Antiguan Offshore Financial Sector Planning Committee to advise the government and recommend additional changes to its banking laws. Despite being likely the most prominent individual in the very industry the Committee was designed to evaluate, and the owner of the largest offshore bank in Antigua, SIB, Stanford was appointed Chairman of the Committee in 1997. Stanford was appointed by then Antiguan Prime Minister Bird, whose election campaign Stanford had been a major contributor to.

126. As Chairman of the Committee, Stanford created a "task force" that was charged with considering improvements to Antigua's banking laws. Stanford paid the expenses of establishing the task force out of his own pocket, creating a clear conflict of interest. In addition, members of the task force were based in the U.S. and were historically connected with and had received funds from Stanford.

127. Ultimately, the task force recommended removing various offenses from Antigua's banking laws, including "false accounting" and "fraud", all activities that Stanford himself was actively involved in through his operation of the SIB Looting. As a result of the recommendations of the task force, in November 1998, the government of Antigua amended the *Money Laundering (Prevention) Act*. The changes substantially weakened the Act's ability to address money laundering.

128. In addition, the government changed the supervision of its offshore financial sector by vesting authority over that sector in a new International Financial Sector Authority (the "IFSA"). Incredibly, Stanford was appointed Chair of the IFSA and one of Stanford's U.S. lawyers also served on the IFSA along with Stanford's Antiguan lawyer, Errol Cort, who was also the Attorney

General of Antigua at that time. In essence, Stanford had been appointed to run the regulator that was tasked with overseeing the very industry that Stanford did business in.

129. The aforementioned process of banking reforms was intensely and publicly criticized, with Stanford's involvement in the process playing a central role in the criticisms. Notably, it also prompted the U.S. Treasury Department, through its Financial Crimes Enforcement Network ("FinCEN"), to issue an extraordinary advisory in April 1999 (the "FinCEN Advisory"), as appears from the FinCEN Advisory No. 11 dated April 1999. The FinCEN Advisory stated, among other things, that:

(a) "In November 1998, the government of Antigua and Barbuda amended its Money Laundering (Prevention) Act in a manner that significantly weakened that Act";

(b) "The [new International Financial Sector Authority's] Board of Directors includes representatives of the very institutions the Authority is supposed to regulate, thus raising serious concerns that those representatives are in fact in control of the Authority, so that the Authority is neither independent nor otherwise able to conduct an effective regulatory program in accordance with international standards";

(c) "The amendment of the Money Laundering (Prevention) Act, combined with changes in Antigua and Barbuda's treatment of its offshore financial services sector, are likely to erode supervision, stiffen bank secrecy, and decrease the possibility for effective international law enforcement and judicial cooperation";

(d) the combination of these actions "raise questions about the purposes of transactions routed into or out of Antigua and Barbuda or involving entities organized or domiciled, or non-resident persons maintaining accounts in Antigua and Barbuda"; and

(e) "Enhanced scrutiny is especially important for transactions involving Antigua and Barbuda offshore banks, transactions involving both Antigua and Barbuda offshore banks and the nine commercial banks licensed to do business in Antigua and Barbuda, and transactions in which one or more of such nine commercial banks act for one or more Antigua and Barbuda offshore institutions."

130. The FinCEN Advisory was significant. It constituted only the second time in history the U.S. Treasury Department had released an advisory targeting a specific country. The United Kingdom also issued a similar advisory in April 1999.

131. Further, it was apparent that the FinCEN Advisory was specifically referring to Stanford when it warned that the Antiguan International Financial Sector Authority's Board of Directors included "representatives of the very institutions the Authority is supposed to regulate" and that the "Authority is neither independent nor otherwise able to conduct an effective regulatory program in accordance with international standards."

132. In May 1999, U.S.-based attorney Carlos E. Loumiet, who was one of Stanford's lawyers and an architect of Antigua's AML laws, publicly responded to the FinCEN Advisory. While ultimately refuting the FinCEN Advisory, Loumiet conceded that there was "considerable, indisputable merit" to the U.S. concerns about the "inherent potential conflicts of interest" with

respect to having private banking representatives such as Stanford on Antigua's International Financial Sector Authority.

133. Around the same time, Jonathan Winer, then the head of the U.S. State Department's Bureau for International Narcotics and Law Enforcement Affairs publicly stated that Antigua was "one of the most attractive financial centres in the Caribbean for money launderers.".

134. In or around 2000, James Johnson, the U.S. Treasury Department's Undersecretary of Enforcement, complained in a letter to then Antiguan Prime Minister Bird, that Antigua had compromised its laws against money laundering and created a conflict of interest by allowing Stanford and other banking officials to sit on the regulatory board. He noted in the letter that the Financial Sector Authorities' seizure of bank documents from a civil servant "raises substantial questions as to Antigua and Barbuda's commitment to provide effective supervision of its offshore sector."

135. In 2000, the Organization for Economic Cooperation and Development published a report containing a list of countries whose regulations were deemed designed to help people avoid paying taxes in their home countries and Antigua was on that list.

136. In 2001, the U.S. Senate's Minority Staff of the Permanent Subcommittee on Investigations' issued a report entitled "Report on Correspondent Banking: A Gateway for Money Laundering" dated February 5, 2001 ("U.S. Senate Report"). The U.S. Senate Report specifically named TD Bank as having provided correspondent banking services to AIB, an Antiguan financial institution that had been found to be engaged in fraud.

137. The U.S. Senate Report identified that AIB had fallen into liquidation after it laundered millions of dollars and collapsed from insider abuse, insufficient capital and the sudden withdrawal of deposits. TD Bank's involvement in this fraudulent scheme appeared as a case study in the U.S. Senate Report which identified that correspondent accounts are particularly vulnerable to money laundering and provide corrupt foreign banks access to the U.S. financial system and the freedom to move money around the world. With respect to TD Bank's relationship with the Antiguan AIB, it concluded, among other things, that:

(a) TD Bank was used to receive wire transfers from fraud victims and/or to disburse the illicit funds to accounts controlled by the criminals; and

(b) TD Bank in Canada was a major conduit for AIB funds in to the U.S. banking system and that between June 1996 and January 1997, US$20.9 million was wired to the AIB correspondent account from the account at TD Bank in Canada.

138. It was apparent from the U.S. Senate Report that TD Bank representatives were interviewed and asked to produce documents regarding TD Bank's relationship with AIB. These requests occurred while Stanford orchestrated the SIB Looting and while TD Bank provided correspondent banking services to SIB. Despite this, TD Bank apparently failed to adequately review, investigate or monitor its other Antiguan based correspondent bank accounts, including those of SIB and BOA. In addition, at the same time, TD Waterhouse continued to manage investment portfolios for SIB and BOA.

139. In 2003, and continuing at least until 2007, the U.S. State Department's INCSRs listed Antigua as a "jurisdiction of major concern" on its list of Major Money Laundering Countries.

140. In or around February 2007, Antiguan Prime Minister Baldwin Spencer accused Stanford of "political interference" after Stanford stated he would be touring the 17 constituencies in Antigua outlining his proposals for future development. Stanford also met with a committee of the Antiguan Cabinet and leaders of the opposition party to outline his investment program.

141. Further, at relevant times, the FSRC employed only three individuals to examine the affairs of all Antiguan banks. This was the case despite the fact that Antigua's Gross Domestic Product amounted to only a fraction of the assets claimed to be deposited at SIB alone during the same period.

142. TD Bank was aware of the extensive and public condemnation of Antigua's banking regulations and AML practices, as well as Stanford's well-publicized involvement with and manipulation of Antigua's regulatory regime.

143. The FinCEN Advisory was particularly relevant to TD Bank's relationships with SIB and BOA. This was because, at the time of the FinCEN Advisory, TD Bank had only two correspondent banking relationships with Antigua-based banks: SIB and BOA. The FinCEN Advisory therefore served as an express warning to TD Bank that banking services should not have been provided to SIB or BOA.

144. On September 29, 1999, Davis wrote to John Pepperell of TD Waterhouse to address "reports in the media [of] questionable banking practices, which involve transactions with financial institutions located in offshore jurisdictions", a clear reference to the FinCEN Advisory and associated media reports. At the same time, Davis offered to have SIB's legal department "present [SIB's] comprehensive program to [TD Bank's] compliance department or others within your organization."

145. A TD Waterhouse employee responded to Davis' letter, noting simply that SIB's "cognizance of this problem and commitment to ensure your offshore bank officers know how to deal with this issue is assuring to us" and that it would "not be necessary" to have "[SIB's] legal department present your comprehensive program to our compliance department." Neither TD Bank nor TD Waterhouse took any steps to limit or review the banking services provided to SIB as a result of the FinCEN Advisory.

146. TD Bank was required to know the foregoing information in respect of Antigua and Stanford's influence there. Had TD Bank undertaken reasonable due diligence in respect of SIB and Stanford, it would have discovered such information. That information alone indicated that banking services should not have been provided to SIB. However, even if banking services continued to be provided, the information revealed by a reasonable amount of due diligence in respect of Antigua at the very least indicated that TD Bank was required to undertake enhanced due diligence with respect to SIB, its business, Stanford and SIB's TD Bank accounts. To the extent that TD Bank did not undertake such enhanced due diligence, TD Bank failed to act as a reasonable bank would have in the same suspicious circumstances.

147. TD Bank was aware of sufficient information such that it knew or ought to have known that, or was recklessly or willfully blind to the fact that, Stanford and SIB were high risk customers that should not have been provided with the privileges and access that a correspondent banking relationship with TD Bank provides.

B. TD Bank Had an Exclusive Window Into SIB's Affairs

148. TD Bank's unique position provided it with sufficient information amounting to knowledge of the SIB Looting. This unique positioning was a result of the fact that:

(a) TD Bank provided correspondent banking services to SIB;

(b) TD Bank provided correspondent banking services to BOA;

(c) TD Bank provided banking services to Caribbean Star Airlines;

(d) TD Bank provided trade financing and treasury services to SIB;

(e) TD Waterhouse managed an investment portfolio for SIB; and

(f) TD Waterhouse managed an investment portfolio for BOA.

149. Each of these relationships required TD Bank and TD Waterhouse to obtain substantial information from a Stanford-owned entity in order to commence and continue the relationship. TD Bank was in the unique position of being able and duty bound to ask questions and require satisfactory answers from SIB, Stanford and the Other Insiders. Each relationship also uniquely positioned TD Bank to understand the transactions that were being undertaken by those Stanford-owned entities, as well as the relationship between those entities.

150. TD Bank has admitted that it had access to SIB's financial statements. It has further admitted that it did not conduct in depth reviews of those statements. This is an example of TD Bank not availing itself of its exclusive window into SIB's affairs as it was required to do.

151. In addition to having complete access to and control of all of SIB's accounts held at TD Bank and TD Waterhouse, TD Bank personnel had the opportunity to and in fact did visit, among other places, SIB's headquarters in Antigua and SFG's headquarters in Houston, Texas. The stated purpose of such visits was to conduct due diligence, including meeting senior SIB personnel and examining first hand SIB's operations.

152. For instance, in 1999 or 2000, a meeting took place between Stephen Cullen ("Cullen"), Bill Sebenski ("Sebenski") and John Leckie ("Leckie"). At that time, Sebenski had recently taken over Cullen's role as TD Bank's Managing Director of Correspondent Banking for the Caribbean and Latin America and both Cullen and Sebenski reported directly to Leckie, TD Bank's General Manager of Trade Finance and Correspondent Banking. At the meeting, Leckie inquired whether TD Bank really understood SIB's business. This inquiry was made notwithstanding that SIB had become a significant correspondent banking client of TD Bank and Leckie was responsible for overseeing the TD Bank-SIB relationship. Since both Cullen and Sebenski answered that they in fact did not understand SIB's business, both were sent by Leckie to Houston, Texas to meet with SIB and SFG personnel.

153. After the due diligence trip to Houston, Texas, Cullen informed Sebenski that he was uncomfortable with TD Bank's continued correspondent banking relationship with SIB. Cullen further informed Sebenski that TD Bank needed to conduct a due diligence investigation of SIB and apply a strict KYC standard because "something did not seem right". However, TD Bank either did not conduct such an investigation or did so and nonetheless continued to provide correspondent banking services to SIB.

154. In fact, over the period that TD Bank provided correspondent banking services to SIB, TD Bank personnel took at least 15 trips to meet with SIB and/or SFG personnel in Antigua or Houston. TD Bank was able to and did set the agenda for such visits, including by indicating to SIB what information TD Bank would require during such visits. In addition, SIB personnel met with TD Bank personnel responsible for the SIB correspondent banking relationship in Toronto and at SIB's Montreal office on various occasions, as well as in other locations around the world including Miami, Memphis, New York, Vienna and London, England.

155. However, although TD Bank was required to take trips to meet with SIB personnel and thoroughly examine SIB's operations, the visits between TD Bank and SIB personnel consisted primarily of expensive meals, high-priced accommodations and social events such as participating in or attending at PGA golf Pro-Am tournaments and cricket tournaments hosted by Stanford. Further, to the extent that TD Bank did undertake due diligence during such visits, that due diligence was inadequate. For instance, TD Bank focused on questions concerning SIB's customers. Although TD Bank was required to ask such questions, it was also required to ask questions and demand satisfactory answers in respect of SIB's own operations and affairs, including in respect of Stanford personally, but failed to do so.

156. The Applicable Standards (which are discussed below at paragraphs 241 to 309) required TD Bank to aggregate all of the information acquired by TD Bank and TD Waterhouse in the course of providing the aforementioned services to Stanford-owned entities and to consider that information holistically when determining whether it was appropriate to provide correspondent banking services to SIB.

157. For example, in accordance with the Applicable Standards, TD Bank was required to "know" SIB and understand its business operations prior to agreeing to act as correspondent bank. As a result, at the time that TD Bank began providing correspondent banking services to SIB, TD Bank was required to know that SIB had neither Canadian customers nor business connections to Canada. TD Bank was also required to know that, while it had agreed to accept wire transfers in both Canadian and U.S. dollars, because SIB did not have Canadian customers, the wires processed by TD Bank would be exclusively in U.S. dollars. Similarly, TD Bank should have determined if other financial institutions had denied or ceased to provide correspondent banking services to SIB.

158. Moreover, TD Bank knew that by agreeing to provide SIB with correspondent banking services, it was agreeing to facilitate the transfer of funds into the U.S. and other jurisdictions in a manner which shielded the true nature of those transfers from the recipient banks in those jurisdictions and their regulatory authorities. This very same issue was confronted in the U.S. Senate Report regarding TD Bank's participation in the AIB fraud.

159. Thus, based on the information arising from the necessary due diligence required of TD Bank with respect to SIB, which was required to be conducted in addition to and in place of any due diligence previously undertaken with respect to BOA, TD Bank knew that there was no legitimate business or economic purpose for SIB to require correspondent banking services in Canada.

160. This was even more apparent due to the fact that SIB had an existing banking relationship with Trustmark in Houston, Texas (which a reasonable bank would have determined), making the business case for any correspondent banking services even more dubious. While Trustmark processed cheques for SIB, it declined to provide wire transfer services to SIB. As a practical matter, if SIB could not utilize wire transfers, it would have been virtually impossible for Stanford and the Other Insiders to perpetrate the SIB Looting because they would been forced to rely on mailing cheques in every instance where they caused SIB and its affiliates to conduct transactions. Stanford and the Other Insiders solved this issue by relying on TD Bank. They were able to do so notwithstanding that TD Bank was required by the Applicable Standards to decline to provide correspondent banking services to SIB.

161. In addition, having chosen to establish correspondent bank accounts for SIB, TD Bank was required, in accordance with the Applicable Standards, to undertake enhanced ongoing monitoring

of SIB and the appropriateness of its relationship with SIB. Among other reasons, this was particularly true in light of the fact that:

(a) SIB was located in Antigua, one of the highest risk jurisdictions in the world;

(b) TD Bank was providing correspondent banking services, the highest risk type of banking services ; and

(c) all funds transferred to and from SIB's TD Bank accounts were done by wire transfer, a method which itself constitutes a high risk.

162. However, TD Bank has admitted that it did not undertake enhanced monitoring of SIB's accounts until late 2008 and only did so then because of concerns over SIB's liquidity.

163. The ongoing monitoring of SIB that TD Bank was required to undertake should have continuously ensured that SIB was utilizing its correspondent bank accounts in a manner consistent with how TD Bank understood those accounts would be utilized when it agreed to open them, or in accordance with its updated understanding of what normal usage of SIB's accounts entailed.

164. As such, when TD Bank compared its understanding of how SIB's accounts operated to the actual use of those accounts, TD Bank should have realized either (i) that it did not have an understanding of the normal use of SIB's correspondent bank accounts, or (ii) that its understanding of how SIB should have been using its correspondent bank accounts indicated that there was no legitimate business or economic purpose for SIB to require correspondent bank accounts in Canada. Either way, TD Bank's review of SIB should have led to the conclusion that TD Bank should not continue to provide correspondent banking services to SIB.

165. Alternatively, to the extent that TD Bank failed to conduct the necessary ongoing monitoring of SIB's correspondent bank accounts, it acted in direct contravention of the Applicable Standards, acted recklessly and fell clearly below the standard of a reasonable bank.

166. As a result, every day that TD Bank provided services to SIB, it did so in reckless disregard of the fact that there was no legitimate business or economic purpose to SIB's banking relationship with TD Bank. This recklessness only got worse as the relationship continued and TD Bank obtained further information that amounted to actual knowledge of the SIB Looting.

167. In addition to the fact that there was no legitimate economic or business purpose to SIB's banking relationship with TD Bank, as a result of the aforementioned relationships, TD Bank was also uniquely positioned to have knowledge of SIB's general history (discussed at paragraphs 44 to 109) and also knowledge of the fact that:

(a) Prior to engaging TD Bank to provide correspondent banking services, Guardian or SIB used financial institutions in the U.S. for its correspondent banking purposes, including Chase Manhattan Bank ("Chase"), First Interstate Bank and Bank of America, all of which chose to end their relationships with Guardian or SIB. For instance, Bank of America's Compliance Department repeatedly insisted to Bank of America's management that providing services to SIB constituted an intolerable risk. After one year of providing such services, Bank of America's management came to agree with the warning of the Compliance Department and ended Bank of America's relationship with SIB;

(b) TD Bank previously provided correspondent banking services to AIB, another Antiguan financial institution. TD Bank was aware that its relationship with AIB

caused TD Bank to become a conduit for the transfer of significant volumes of fraudulent transfers. In fact, the very same TD Bank executive who administered AIB's TD Bank account also was responsible for the SIB and BOA correspondent bank accounts with TD Bank. As such, TD Bank was aware of the clear and present need to subject its other Antiguan correspondent bank customers, including SIB, to particular scrutiny;

(c) TD Bank contributed to the U.S. Senate investigation into correspondent banking. That investigation resulted in the U.S. Senate Report, which not only concluded that correspondent banking was a gateway for money laundering, but specifically noted the use of TD Bank's accounts to facilitate the fraud committed by AIB and Guardian Bank and Trust (Cayman) Ltd. Since TD Bank was aware of the U.S. Senate Report, TD Bank's awareness of the risks associated with providing correspondent banking was high, including with respect to providing such services to an Antiguan financial institution;

(d) SIB represented that Mercer, who was also a long-time friend of Davis, sat on an advisory board for SIB. If indeed Mercer sat on the advisory board, this relationship also provided TD Bank with access to information concerning the SIB Looting. If he did not, and SIB represented that he did, TD Bank ought to have been aware of this. Such a misrepresentation would have been a "red flag", to say the least, to TD Bank that required TD Bank to investigate and take action;

(e) The rates of return generated by TD Waterhouse were at odds with the rates of return that SIB purportedly generated; and

(f) SIB directed TD Bank to send funds held in its correspondent bank accounts to locations and to entities in a manner that clearly indicated such funds were not being used as represented to SIB's customers, a clear "red flag" within the exclusive knowledge of TD Bank.

168. TD Bank, by virtue of its banking relationship with SIB, was also uniquely positioned to demand further particulars about the publicly available information concerning SIB and Stanford, all of which TD Bank was required to be aware of. If TD Bank demanded such further particulars, those particulars were denied by Stanford and the Other Insiders or, if provided, revealed further cause for concern. Any such result should have led TD Bank to determine that banking services should not have been provided to SIB. Alternatively, Stanford and the Other Insiders provided TD Bank with further particulars that were inconsistent with the publicly available information. Such inconsistencies were themselves a "red flag" that should have been properly investigated, with the result being that TD Bank determined banking services should not be provided to SIB.

C. TD Bank Knew or Ought to Have Known of Relevant Open Source Information

169. Over the period of time that TD Bank provided correspondent banking services to SIB, it knew or ought to have known, or was recklessly or willfully blind to, information that was discoverable with even limited investigative efforts. In accordance with the Applicable Standards, TD Bank was required to diligently conduct ongoing monitoring of such publicly-available or "open source" information pertaining to SIB and its business operations. A summary of such information follows.

170. Stanford petitioned himself into personal bankruptcy on February 17, 1984 before the U.S. Bankruptcy Court (for the Western District of Texas, Waco Division) under Case No. 6-84-00263-T on the basis of personal debts of US$13,648,618.75.

171. From 1985 until 1990, Guardian operated in Montserrat, a jurisdiction which was historically known to have inadequate AML regulations.

172. By 1988, Stanford had been accused of violating banking laws in Texas by running unlicensed "feeder" sales offices in Houston for Guardian. The U.S. Office of the Comptroller of the Currency in 1988 and again in 1989 issued advisories concerning Stanford's similar violations of banking laws in Florida and California.

173. By 1989, the banking system in Montserrat came under investigation by U.S. and British authorities. Consequently, Guardian itself came under scrutiny for possible drug money laundering. When Guardian was forced to report to the Montserrat banking authorities, Stanford and Davis fabricated account statements and ledgers.

174. On November 28, 1990, the Financial Secretary of Montserrat notified Stanford that it was going to revoke Stanford's banking licenses because:

(a) Guardian's auditor, C.A.S. Hewlett & Co. Ltd., was not an approved auditor;

(b) Guardian was operating in a manner "detrimental to its depositors";

(c) Guardian failed to supply satisfactory details as to its liquidity;

(d) Stanford was formerly a bankrupt; and

(e) Guardian had failed to submit annual financial statements.

175. However, before the threatened revocation could be imposed, Stanford caused Guardian to change its domicile to Antigua.

176. Stanford moved Guardian from Montserrat to Antigua at the very time that Montserrat was scrutinizing its banks. At the same time, Antigua subjected its offshore banking industry to limited regulation and had the reputation of being the most corrupt island in the Caribbean.

177. There were extensive deficiencies in Antigua's offshore banking industry and Stanford played a major role in Antigua's actions with respect to its offshore banking industry.

178. Having moved to Antigua, Guardian/SIB reported that it was audited by C.A.S. Hewlett & Co. Ltd., which is a small firm based in Antigua that clearly did not possess sufficient competence to adequately audit a financial institution the size and scale of SIB. This was evidenced by the fact that it did not have a website and basic internet-based searches would not reveal any information on the firm. Further, on account of being based in Antigua, C.A.S. Hewlett & Co. Ltd was not subject to significant regulatory oversight. Notably, it was also the same audit firm that Montserrat had deemed to be an unapproved auditor of Guardian.

179. In 1991, the U.S. Federal Bureau of Investigation, U.S. Customs and Texas law enforcement authorities investigated Stanford's possible involvement in drug money laundering. This investigation resulted in U.S. Customs officials searching Stanford's private jet when he returned from the Caribbean.

180. In 1994, then Antiguan Prime Minister Lester Bird allowed Stanford to organize and arrange financing for a public hospital project in Antigua. Stanford purportedly funded an interim loan to the Antiguan Government to finance 100 percent of the project's architectural and

engineering costs. Eventually, Stanford lent the Antiguan Government over US$40 million through BOA, thereby heavily indebting the Antiguan Government – BOA and SIB's only regulator – to Stanford. Stanford's involvement in the hospital project prompted a 1996 U.S. congressional investigation into corruption in Antigua.

181. In both 1995 and 1996, SIB disclosed *identical* rates of return of exactly 15.71 percent, a result that was highly unusual and unlikely.

182. In addition, SIB's Annual Reports disclosed rates of return far higher than those offered by traditional banks, including TD Bank. From 1997 until 2006, SIB disclosed returns on its CDs that were, at their worst, 140 percent greater than the average return generated by U.S. banks' CDs. At their best, the returns disclosed by SIB on its CDs were 388 percent greater than the average return generated by U.S. banks' CDs.

183. The SIB promotional materials, which induced prospective customers to purchase CDs, advertised rates of return in excess of those offered by TD Bank or other major financial institutions. The promotional materials did not explain how those rates of return were earned or could be paid.

184. On April 29, 1997, a verdict was rendered against Stanford by a U.S. Tax Court in his case against the Internal Revenue Service. The Court ruled that Stanford failed to file a 1990 tax return and owed in excess of US$500,000 in taxes and penalties related to his ownership of Guardian in Montserrat.

185. In July 1998, U.S. authorities obtained a warrant to freeze funds controlled by suspected money launderers. The seizure warrant was executed by U.S. authorities and sought to freeze a

total of US$3.3 million. While the seizure warrant sought to freeze funds in U.S. financial institutions, including SGC, most of the funds – nearly US$3.2 million – were found to be in an SIB account.

186. In November 1998, Stanford caused SIB to file a Regulation D ("Reg. D") exemption with the SEC. The exemption allowed SFG, via SGC, to sell SIB CDs to U.S. "accredited investors" in the U.S. without registering them as securities. SIB's initial Reg. D filing listed SIB CD offerings totalling only US$50 million. SIB's filed an amended Reg. D in November 2001 to increase the Reg. D offering to US$150 million. SIB filed additional amendments in March and November of 2004, increasing the size of SIB's CD offerings to US$200 million and then US$1 billion, clearly evidencing the massive sales of SIB CDs taking place in the U.S. In November 2007, SIB filed yet another Reg. D amendment to increase the size of the offering to US$2 billion.

187. From 1999 to 2008, SFG spent approximately US$4.8 million on government lobbying activities — spending US$2.2 million of that in 2008 alone — and its employees and its political action committee gave US$2.4 million to federal Democratic and Republican candidates since 2000. At the same time, SFG lobbied against aspects of proposed U.S. legislation aimed at cracking down on offshore banks and money laundering.

188. Beginning in or around 2001 and continuing until at least 2008, various employees of Stanford-owned entities filed individual cases with the American Financial Industry Regulatory Authority ("FINRA"), or its predecessor, claiming that they had been wrongfully dismissed and alleging fraudulent business practices in violation of U.S. securities laws.

189. In or around 2002, media reports indicated that Stanford and employees of SFG donated US$90,350 to the legal defense fund of Robert Torricelli ("Torricelli"), then a U.S. Senator from

New Jersey. This represented the largest block of contributions to Torricelli's legal defense fund in the preceding reporting period. The legal defense fund existed to pay Torricelli's legal bills stemming from a criminal investigation into his involvement with Korean-American businessman David Chang. Torricelli notably sat on the Senate Subcommittee on Investigations and the Senate Finance Committee, both of which deal with money laundering issues. Torricelli was also a member of the Senate Finance Committee's Subcommittee on the Internal Revenue Service. At that time, the Internal Revenue Service was moving to obtain records of offshore bank credit cards that U.S. officials had said may be used to avoid taxes. Those same media reports noted the accusations that had been leveled against Stanford with respect to his influence in Antigua.

190. In or around November 2003, Stanford gave two Antiguan government officials – Antiguan Tourism Minister, Molwyn Joseph, and Antiguan Planning Minister, Gaston Browne – each US$37,000. At the time, both officials were part of a team negotiating with Stanford for a proposed exchange of two properties in St John's, Antigua. Civic groups publicly urged their removal, calling the payments "apparent inducements" and saying that the two had "serious conflicts of interest".

191. In or around 2004, World-Check, a reputable organization that gathers information globally on heightened risk individuals and entities, added Stanford to its database of high risk individuals and classified him as a PEP on account of, among other things, his association with then Antiguan Prime Minister Bird. By virtue of their positions or influence they may hold, PEPs present a high risk for potential involvement in bribery and corruption.

192. In or around 2005, a civil complaint against SIB and SGC was filed in the U.S. District Court for the Southern District of Florida by two investors. The investors claimed they were the

victims of a "Ponzi" scheme which targeted South Florida residents of Venezuelan origin and that SIB and SGC knowingly aided and abetted the other individual defendants in their perpetration of the scheme.

193. In or around 2006, a former employee of a Stanford-owned entity filed a private whistle-blower lawsuit against Stanford and SGC. The suit, filed in Miami-Dade County Circuit Court in Florida, charged that SGC was attracting clients by selling CDs with artificially high yields and was operating a "Ponzi" scheme. The plaintiff also alleged that he was fired for raising concerns that the firm's practices violated federal and state laws. In addition, it was alleged that Stanford was bribing Antiguan regulators to keep them from passing money laundering legislation. After the presiding judge gave the plaintiff permission to depose Stanford, SGC became interested in settling and did so in December 2007.

194. In or around June 2007, the National Association of Securities Dealers (the "NASD") censured SGC and fined it US$20,000 for failing to establish and maintain a supervisory system reasonably designed to achieve compliance with applicable securities laws, regulations and NASD rules, and failing to maintain its required minimum capital.

195. In or around June 2007, World-Check added SGC to its database as a financial institution that posed a heightened risk. The resulting World-Check report reported that SGC was connected to, among others, Stanford, Davis and Pendergest-Holt. At the time that World-Check added SGC to its database, World-Check indicated that one or more public sources had reported that SGC distributed sales literature that failed to present a fair and balanced treatment of investment risks and benefits, and contained misleading, unfair and unbalanced information. In addition, it appears on the face of the World-Check report that, prior to SIB being shut down in February 2009,

World-Check updated its database to note that FINRA had censured and fined SGC on various occasions, that SGC had failed to adopt necessary supervisory procedures with respect to public disclosure and that SGC was alleged to be involved in a US$8 billion pyramid scheme.

196. SIB's 2007 Annual Report claimed that SIB's investment portfolio consisted of 58.6 percent equity, 18.6 percent fixed income, 15.6 percent alternative investments (i.e. hedge funds) and 7.2 percent precious metals. The 2007 Annual Report thus described SIB's portfolio as a "well-diversified portfolio of highly marketable securities issued by stable governments, strong multi-national corporations and major international banks". Other than the fixed income, the typical performance of every component of this investment allocation was volatile and subject to significant risk. SIB's 2007 Annual Report was therefore internally inconsistent because the purported composition of SIB's portfolio was at odds with the consistently high rates of return that SIB claimed to generate.

197. In or around January 2008, FINRA censured SGC and fined it US$10,000 for distributing misleading, unfair and unbalanced information about the CDs, as well the fact that the relationship between SIB and SGC could create a conflict of interest.

198. In 2008, SIB also disclosed that it had incurred a loss of 1.3 percent amidst one of the worst financial crises in history. In that same year, the S&P 500 lost 39 percent and the Dow Jones STOXX Europe 500 Fund lost 41 percent of their respective values.

199. In September 2008, the U.S. Federal Reserve Board served a subpoena on the Miami office of STC. The subpoena requested documents relating to, among other things, the relationship between STC and Stanford Trust Company Ltd. (Antigua), as well as documents related to SIB CDs between STC and other SFG entities.

200. In or around September 2008, FINRA censured SGC and fined it US$10,000. Among other things, FINRA's findings stated that SGC's supervisory system did not provide for supervision reasonably designed to achieve compliance with applicable securities laws, as appears from the September 2008 FINRA report.

201. As detailed further below, in or around 2008, a major international clearing house, Pershing, announced that it could not verify Stanford was not involved in fraud of some nature.

202. In or around January 2008, two former top executives of SGC, Mark Tidwell ("Tidwell") and Charles Rawl ("Rawl") filed a wrongful dismissal claim against SGC. The claim alleged that SGC failed to file necessary forms with the U.S. Treasury disclosing its clients' offshore holdings and did not advise clients to file those forms. It also alleged that SGC purged files and destroyed documents as early as 2007 related to what Tidwell and Rawl claimed was an ongoing SEC investigation regarding practices relating to the sale of CDs. The suit also alleged that SGC gave clients false historical performance data for its securities.

203. In or around 2008, media reports indicated that the SEC was investigating SIB's CD sales and that it had issued subpoenas to two former SGC employees, Tidwell and Rawl, who, as previously noted, had sued SGC.

204. In or around January 2009, media reports described SIB as being a fraud. These reports noted that it was a "red flag" that the interest rates on CDs were as high as they were and that SIB's business model required depositors giving funds to the bank to invest in the market. They also noted that it was suspicious that SIB had consistently achieved above-average results in all of its investment categories.

205. In or around January 2009, FINRA censured SGC and fined it US$30,000 for failing to adequately disclose the research methods used to report certain securities valuations and that it was making a market in the company's securities.

206. On or around February 11, 2009, *Bloomberg Businessweek* reported that the SEC, the Florida Office of Financial Regulation and FINRA were all investigating SFG. The report stated that the probe's focus was on the high-yield CDs and the investment strategy behind them, as well as how SFG could afford to provide employees with large bonuses, luxury cars and expensive vacations, especially in light of the fact that selling CDs is usually a low-margin business. The report also noted that SIB was audited by a small accounting firm, the principal of which had died on January 1, 2009.

207. TD Bank was actually aware of certain of the publicly-available information in respect of SIB. For instance, in response to a July 2008 *Bloomberg* article entitled "SEC Investigating Stanford Group Offshore-Back CDs", TD Bank contacted personnel from SIB and/or SFG and indicated that its "main question and concern about the Bloomberg article is about the alleged SEC investigation into SIB's sale of CDs into the US. This is the central and more significant issue in the media reports." Soon thereafter, Davis advised another SIB employee that TD Bank "was beginning to get nervous because of all the rumors circulating about SFG."

208. Notwithstanding TD Bank's concerns and the extensive publicly-available information in respect of Antigua, SIB and Stanford, all of which TD Bank was required to be aware of and consider, TD Bank took absolutely no steps whatsoever to limit SIB's banking activities or report to any regulatory authority at all until receiving the freeze order dated March 12, 2009 from the SEC, nearly a month after SIB's collapse.

209. All of the plaintiffs' investments in SIB CDs were made in or after January 2007, with certain of those investments being made as late as January 2009, just a month before SIB's collapse. Thus, by the time of the plaintiffs' first investments in SIB CDs, the vast majority of the relevant publicly-available information in respect of Antigua, SIB and Stanford had arisen and was readily available to TD Bank. Accordingly, had TD Bank acted as it was required to do, prior to the time at which the plaintiffs made their investments in SIB CDs, it would have terminated SIB's access to TD Bank's facilities, reported the conduct of Stanford and the Other Insiders to the appropriate authorities and frozen SIB's accounts.

D. Similarly Situated Entities Knew of the SIB Looting or Refused to Provide Services

210. As a result of the extensive publicly-available information, even without the benefit of the window into SIB's affairs such as the one enjoyed by TD Bank, the SIB Looting was widely known in the law enforcement, AML and banking communities from at least 1997. TD Bank is part of these communities.

211. Notably, and as described below, other entities and regulators that were part of these communities concluded that business should not have been conducted with SIB or, in some cases, that the SIB Looting was taking place.

SocGen

212. For instance, on July 5, 2000, a report in respect of BOA was provided by a U.K. consulting firm, "Proximal Consulting", to a Swiss-based bank, Compagnie Bancaire Genève, which was subsequently acquired by SocGen in 2003 (the "**Proximal Report**"). The Proximal Report is a due diligence report that was completed in only a few hours and at a cost of only £500.

It summarizes a compliance review of the affairs of BOA. In doing so, it also commented on both Stanford and SIB. For instance, paragraphs 4.3 – 4.4 of the Proximal Report state:

> In a controversial move in 1997, Lester Bird asked Stanford to undertake the task of tightening anti money laundering regulation in Antigua as a response to international pressure. Stanford created a board with himself as President to implement the changes and over 18 months, new laws to control money laundering were implemented. Five offshore "banks" were closed and 20 more were reviewed; "know your customer" laws were strengthened. However, the US authorities viewed Stanford's financing and participation of the board and his ownership of banks on the island as a conflict of interests. Moreover, the new law is reviewed as having substantial loopholes and making it more difficult to obtain bank records. This led to the issue of the FinCEN advisory notice that is attached to this report.
>
> The attached FinCEN advisory appears to have been conceived by the US State Department's Bureau of International Narcotics and Law Enforcement Affairs who are particularly concerned with the role and influence of R. Allen Stanford. One senior official from another US Government agency has been quoted on Stanford as saying, "Try as we might, we have never been able to come up with anything on him."

213. At paragraph 4.5, the Proximal Report states that "in relation to SIB, court documents we have seen show that":

> Juan Zepeda Mendes, an influential member of the Carlillo Fuentes organization [Mexico's largest drug cartel at the time], opened an account in his name at SIB on 6 June 1997 with a transfer of $104,000 from Bear Stearns that we [sic] followed by subsequent transfers from Bear Stearns of $400,000 (19 June 1997) and $200,000 (2 July 1997).
>
> Jorge Bastida, another influential member of the Carlillo Fuentes organization, deposited $1,191,332 in his account at SIB that consisted of five cheques all dated 18 April 1997 with consecutive numbers all drawn on an account of a Mexican Casa de Cambio.

214. Paragraph 4.6 of the Proximal Report addresses Stanford's involvement in and departure from banking in Montserrat. It states:

> It is alleged that RAS previously owned a bank in Montserrat but he relinquished the licence in 1989/90. Further claims are that his voluntary relinquishment was due to the fact that the British Police were just about to engineer the formal

revoking of the licence. Based on this information, there is a widely held view that SIB has had a somewhat dubious reputation for many years, but this has never been the subject of official action.

215. Paragraphs 5.1 and 5.2 of the Proximal Report discuss Antigua. They state:

> Antigua has obtained a reputation as being a jurisdiction that has done very little about money laundering and has thus been the target of (in particular) South American and Russian criminals who have used the financial infrastructure of the island to successfully launder funds. This was highlighted by the collapse of the European Union Bank.
>
> Following the issue of the US Government Advisory Notice (which is attached to this report in full) many financial institutions based in Antigua have found it difficult to establish or continue correspondent banking relationships particularly with US based or owned banks. Unconfirmed reports suggest that one large US bank has closed all of its correspondent relationships with banks in Antigua.

216. In light of the foregoing, the Proximal Report concludes:

> The Bank of Antigua itself as a prospective partner and/or client of [SocGen] poses no problem in itself, as the bank is a domestic one operating solely in Antigua with no direct links to money laundering or other criminal activity. However, if the Bank of Antigua is being used as a channel to introduce clients from Stanford International Bank (or other customers not resident in Antigua) to [SocGen] we have concerns as to the consequences of this. Firstly it is an accepted fact that Stanford International Bank has been used by Mexican drug cartels to launder considerable volumes of criminally obtained funds. Secondly, because of the very high level of attention given to Antigua as a money laundering centre, it would be very difficult for [SocGen] to defend itself or its reputation should any problems occur in the future.

217. Notwithstanding its actual knowledge of the fact of "widely accepted" criminal money laundering activity at SIB and in Antigua generally, SocGen continued to provide banking services to SIB and Stanford until the collapse of SIB in February 2009. However, it has been alleged by Davis that Blaise Friedli, the principal officer at SocGen, was a friend of Stanford. He also alleged that both Friedli and other unnamed officials at SocGen received bribes from Stanford to ensure that SIB and SFG would continue to receive SocGen's services.

The SEC

218. The SEC office in Forth Worth, Texas reviewed the operations of SGC and its sale of SIB CDs in 1997. At that time, after only six days of field work in examination of Stanford and his companies, the SEC came to the conclusion that Stanford was likely operating a "Ponzi" scheme. SEC examiners concluded that SIB's statements promoting SIB CDs appeared to be misrepresentations. Those examiners noted that the interest rates purportedly paid on SIB CDs, combined with the large referral payments being made to SGC and SFG, were simply too high to be achieved through the purported low-risk investments. Taking into account these and other facts, the SEC's Fort Worth branch chief concluded that the returns on SIB CDs were "absolutely ludicrous".

219. The SEC's office in Forth Worth conducted additional investigations into SGC and SIB in 1998, 2002 and 2004. Each examination resulted in the conclusion that the SIB CDs could not have been "legitimate" and that it was "highly unlikely" that the returns Stanford claimed to generate could have been achieved with the purported conservative investment approach. The only significant difference in the SEC's findings over the years was that the fraud grew exponentially from US$250 million to US$1.5 billion.

220. The SEC brought an end to the SIB Looting in February 2009, but its failure to do so earlier was the subject of a March 2010 report by the SEC's Office of the Inspector General. That report concluded that the SEC's failure to end the fraud on SIB and bring Stanford to justice did not result from a lack of evidence that the fraud on SIB was taking place. Rather, the report found that senior officials at the SEC's Fort Worth office felt that prosecuting large novel or complex cases was disfavoured in comparison to prosecuting numerous "quick-hit" cases.

221. In addition, the report found that the former head of the enforcement branch at the SEC's Fort Worth office, Spencer Barasch, who played a significant role in the multiple decisions to quash investigations of Stanford, sought to represent Stanford as legal counsel on three separate occasions after he left the SEC and, in fact, did represent Stanford briefly in 2006 before the SEC informed him he could not do so. As a result, he received the maximum allowable fine for a violation of U.S. conflict-of-interest rules and was barred from practicing before the SEC for one year due to his actions in connection with Stanford.

Pershing LLC

222. SGC entered into a "clearing agreement" with international clearing house Pershing in December 2005. Initially, Pershing processed wire transfers from client accounts it held for the purchase of SIB CDs. However, by approximately mid-2006, Pershing became concerned about the financial reliance of SGC on SIB because SGC was losing money and a significant portion of its revenue consisted of referral payments from SIB.

223. As a result, in the summer of 2006, Pershing began to ask for verification of SIB's assets and the returns generated by the SIB portfolio. When SGC responded with only generalities about SIB's investment policy, Pershing increased its due diligence efforts in respect of SIB. These efforts included, among other things, attempting to acquire a complete SIB CD prospectus and travelling to Antigua to meet with SIB personnel and SIB's regulator, the FSRC, to see documentation regarding SIB's balance sheet and the supporting paperwork that reflected the assets. However, in each instance, Pershing was met with stonewalling and excuses by SIB personnel, as well as by Leroy King, the senior-most official at the FSRC, who Stanford had bribed.

224. Ultimately, due to its continued concerns over its inability to gain transparency into SIB's portfolio, Pershing notified SGC that it would no longer process wire transfers from SIB. In connection with doing so, in December 2008, Pershing announced that it could not verify Stanford was not involved in fraud of some nature.

Ferrier Lullin & Cie

225. At least as of 2000, Swiss-bank Ferrier Lullin & Cie (now Julius Bar Group Ltd.) ("Ferrier Lullin") acted as the custodian for SIB's investments with Axia Investments in Switzerland.

226. Ferrier Lullin commissioned and received a due diligence report in respect of SIB dated May 10, 2002. Among other things, that report noted that:

(a) in the 1990s, "Antigua's offshore sector became more worrisome as individuals believe to have ties to Russian organized crime moved in";

(b) Stanford was appointed to spearhead the effort to reform Antigua's banking laws and later appointed to the board of authority to oversee Antigua's offshore banks. This was the case notwithstanding that Stanford owned the largest bank to be supervised;

(c) the U.S. State Department issued a report calling Antigua "one of the most attractive financial centers in the Caribbean for money launderers" and later stated that "[i]ndividuals suspected of involvement in money laundering and other illicit economic activities used their considerable influence to weaken Antigua's AML legislation", a clear reference to Stanford; and

(d) the U.S. had issued the FinCEN Advisory and that U.K. and French officials soon after voiced similar concerns.

227. In July 2003, an internal Ferrier Lullin memorandum confirmed concerns about Stanford and SIB. It noted that Ferrier Lullin employees from various departments had made inquiries about SIB and had asked, among other things, whether SIB was truly a bank and if SIB was a shell bank being used to avoid rules in the U.S.

JP Morgan Chase

228. Between 1994 and 2003, the Middle Market division of JP Morgan Chase opened 22 bank accounts for SFG. During the same period, the Private Banking division of JP Morgan Chase held bank accounts for Stanford in his personal capacity. However, as a result of monitoring Stanford's accounts, the Private Banking division of JP Morgan Chase found "significant unfitting activities occurring in the accounts of R. Allen Stanford" and therefore closed those accounts.

229. Upon being notified that the Private Banking division of JP Morgan Chase had ended its relationship with Stanford, the Middle Market division began reviewing and more closely monitoring SFG's accounts. As a result of doing so, the Middle Market divison determined that it was "unable to obtain a reasonable explanation of the customer's account activities" and subsequently filed a Suspicious Activties Report in respect of SFG transactions totaling more than $170 million between January 1, 2003 and August 29, 2003. The Suspicious Activities Report identified various transactions giving rise to concerns about violations of the U.S. *Bank Secrecy Act* and money laundering. Such transactions included those with entities in Antigua, entities related to SFG (including SIB) and with TD Bank.

Synder Kearney LLC

230. In 2008, SGC engaged Snyder Kearney LLC ("Snyder Kearney"), a prominent U.S. law firm, to perform due diligence in respect of two private fund offers that were sponsored by SGC and managed by another Stanford-owned entity, Stanford Capital Management. Synder Kearney initially accepted the engagement and thereafter requested verification of SIB's portfolio. However, SGC refused to provide the relevant information and Snyder Kearney promptly withdrew from the engagement.

First Advantage Investigative Services

231. Due diligence in respect of SIB CDs was also undertaken by or on behalf of certain prospective investors. For instance, Randy Shain ("Shain") of the New York-based First Advantage Investigative Services was retained to conduct due diligence in respect of SIB and SIB CDs on behalf of a client.

232. In completing such due diligence, Shain identified and reviewed certain of the "open source" information in respect of SIB and Stanford outlined above. Such information pertained to, among other things, various lawsuits filed against Stanford or his companies, all of which alleged money laundering and other impropriety, Antigua's AML deficiencies and Stanford's involvement therewith, and certain of Stanford's bribes and conflicts of interest.

Fidelity Investments

233. Fidelity Investments commenced providing services to SIB and SGC. However, following its attempt to conduct certain due diligence activities, it soon thereafter terminated the relationship.

Chase Manhattan Bank

234. In its earlier years, SIB (then known as Guardian) had a correspondent banking relationship with Chase. However, Chase ended its relationship with SIB over concerns about double endorsed cheques.

First Interstate Bank

235. First Interstate Bank began providing correspondent banking services to SIB (then known as Guardian) to SIB in the late 1980s. It ended its relationship with SIB in the early 1990s. It has been reported that First Interstate Bank provided money laundering services to alleged narcotics traffickers and was placed under investigation by U.S. Federal authorities. Stanford reportedly personally knew the directors of First Interstate Bank at the time, who were themselves suspected of being involved in the alleged money laundering activities.

Citizens & Southern Bank

236. In December 1990, when BOA was purchased by Stanford, Citizens & Southern Bank ("C&S") of Atlanta, Georgia was BOA's correspondent bank. Stanford attempted to "piggyback" SIB into a correspondent banking relationship with C&S based upon BOA's pre-existing relationship. C&S, however, promptly closed the SIB U.S. dollar account of BOA and informed Stanford that he could not indirectly use BOA's correspondent banking relationship for SIB. As a result, Stanford and some of the Other Insiders flew to C&S Headquarters in Atlanta to try to convince C&S to independently approve a correspondent banking relationship with SIB. C&S did not approve SIB for a correspondent banking relationship, so the entire group travelled to Thibodaux, Louisiana in an attempt to rectify problems that SIB was also then having with its correspondent banking relationship with First Interstate Bank.

Bank of America

237. Bank of America provided SIB with correspondent banking services over the course of approximately one year, which occurred in or around 1993 and 1994. During that period, Bank of America's Compliance Department repeatedly insisted to Bank of America's management that providing services to SIB constituted an intolerable risk as a result of AML concerns. After one year of providing such services, Bank of America's management came to agree with the warning of the Compliance Department and ended its relationship with SIB.

The NASD

238. The NASD concluded as early as 2006 that SGC violated NASD rules through "unwarranted and misleading" assertions that SIB's portfolio investments were "prudent" at a time when SGC admitted that it did not know what was in SIB's portfolio.

U.S. Customs

239. Even as far back as the early 1990s, U.S. Customs officials noted that SIB (then known as Guardian) had "constant cash flow" from foreign depositors but "no regulation of its activities" and U.S. Customs took an interest in the "possible smuggling activities of principals in the Stanford organization."

240. The aforementioned conclusions were reached by the above-listed entities, all of which did not have TD Bank's extensive access to SIB and its operations. TD Bank's approach differed from other entities that were similarly required to and did undertake due diligence on SIB. For instance, when Pershing was met with stonewalling and excuses by SIB personnel, Pershing stopped providing services to SIB. By comparison, TD Bank:

(a) did not ask questions or demand answers as it was required to do and that would have revealed the secret kept by Stanford and the Other Insiders in respect of Tier III and the SIB Looting, in which case it fell below the standard of care;

(b) asked the required questions but was denied answers and nonetheless continued to provide banking services to SIB, in which case it fell the standard of care; or

(c) asked the required questions and was provided the answers and thereby became expressly aware of the true nature of Tier III and the SIB Looting, but nonetheless continued to provide banking services to SIB, in which case it fell below the standard of care.

241. In all of the circumstances, TD Bank should not have provided banking services to SIB. Had it declined to provide such services, TD Bank would not have processed the plaintiffs' purchases of SIB CDs and Stanford and the Other Insiders would not have been able to perpetrate the SIB Looting.

VI. APPLICABLE BANKING STANDARDS AND LAWS

242. The standard practices and procedures undertaken by Canadian financial institutions that enter into correspondent banking relationships derive from a combination of standards developed by financial regulators and relevant financial industry organizations, as well as legislative and statutory duties. The banking standards and laws that were applicable to TD Bank during the period that it provided correspondent banking services to SIB are set out below.

A. Financial Regulators and International Organizations Set the Standards

1. The Applicable Standards

243. Financial regulators and international organizations focused on the global financial system have for decades developed, monitored and implemented standards aimed at detecting, deterring and preventing money laundering. In addition to establishing standards for financial institutions concerning client identification and account monitoring, these regulators and organizations have long warned that correspondent banking relationships with foreign financial institutions often facilitate money laundering and that, as a result, correspondent accounts merit particular care, as well as enhanced due diligence and monitoring. This is especially the case with respect to accounts involving the provision of services in jurisdictions known to have relaxed regulatory standards for banks, since failure to exercise such care may result in the correspondent bank holding and/or transmitting money linked to corruption, fraud or other illegal activity.

244. In Canada, federally regulated financial institutions ("**Financial Institutions**") such as TD Bank are regulated by the Office of the Superintendent of Financial Institutions ("**OSFI**"). Since 1990, OSFI has developed standards for Financial Institutions concerning AML compliance. These standards are contained in the following relevant documents:

(a) OSFI Best Practices: Deterring and Detecting Money Laundering, 1990 (the "**1990 OSFI Standards**");

(b) OSFI Guideline B-8, Deterring and Detecting Money Laundering, September 1996 (the "**1996 OSFI Standards**");

(c) OSFI Guideline B-8, Deterring and Detecting Money Laundering, April 2003 (the "**2003 OSFI Standards**");

(d) OSFI Guideline B-8, Deterring and Detecting Money Laundering, November 2004 (the "2004 OSFI Standards");

(e) OSFI Guideline B-8, Deterring and Detecting Money Laundering, November 2008 (the "2008 OSFI Standards")

(collectively, the "OSFI Standards").

245. TD Bank was consulted by OSFI when the OSFI Standards were drafted.

246. Since 2000, the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC") has been responsible for ensuring Financial Institutions' compliance with Canadian AML standards pursuant to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 (the "PCMLTFA"). However, OSFI has continued to include AML compliance in its examinations of Financial Institutions for its own purposes, and as part of its memorandum of understanding with FINTRAC to perform AML compliance on its behalf.

247. Financial Institutions are also subject to the standards developed by the Basel Committee on Banking Supervision, which are contained in the following relevant documents:

(a) Customer Due Diligence for Banks, October 2001 (the "2001 Basel Standards");

(b) (i) General Guide to Account Opening and Customer Identification, February 2003, and (ii) Initiatives by the Basel Committee on Banking Supervision et al to combat money laundering and the financing of terrorism, June 2003 (together, the "2003 Basel Standards"); and

(c) Consolidated KYC Risk Management, October 2004 (the "2004 Basel Standards")

(collectively, the "**Basel Standards**").

248. Canada endorsed the Basel Standards.

249. The Financial Action Task Force (the "**FATF**") is an intergovernmental body that develops, monitors and evaluates countries' AML standards. The FATF has established standards applicable to Financial Institutions, which are contained in the following relevant documents:

(a) FATF 40 recommendations, 1990 (the "**1990 FATF Standards**");

(b) FATF 40 recommendations, 1996 (the "**1996 FATF Standards**");

(c) FATF 40 recommendations, 2003 (the "**2003 FATF Standards**"); and

(d) FATF Guidance on the Risk-Based Approach to Combating Money Laundering and Terrorist Financing, 2007 (the "**2007 FATF Standards**")

(collectively, the "**FATF Standards**").

250. Similarly, Financial Institutions are required to meet the standards developed by the Wolfsberg Group ("**Wolfsberg**"). Wolfsberg is an international association of banks which aims to develop financial service industry standards for, among other things, AML policies pertaining to correspondent banking. Such standards were established in AML Principles for Correspondent Banking, 2002 (the "**2002 Wolfsberg Standards**" or the "**Wolfsberg Standards**").

251. During the time period that TD Bank provided correspondent banking services to SIB, the OSFI Standards, the Basel Standards, the FATF Standards and the Wolfsberg Standards (together, the "**Applicable Standards**") were binding on TD Bank and informed the standard of reasonable banking that it was obliged to meet. By providing banking services to SIB, TD Bank failed to meet the Applicable Standards.

252. Notably, throughout the period that TD Bank provided correspondent banking services to SIB, it completed and submitted questionnaires to Wolfsberg. In each instance, TD Bank's completed questionnaires indicated that it had in place and adhered to strong KYC and AML policies, all of which were in compliance with the Wolfsberg Standards. However, it is clear that TD Bank was in fact not in such compliance.

2. Timeline of the Standards' Implementation

253. The Applicable Standards informed the standard of reasonable banking that TD Bank was obliged to meet during the time that it provided correspondent banking services to SIB. The Applicable Standards evolved as each of the individual standards was revised. The result of each revision to one of the OSFI Standards, the Basel Standards, the FATF Standards or the Wolfsberg Standards was that the Applicable Standards were continuously updated, strengthened and made more onerous over the time period that TD Bank provided correspondent banking services to SIB.

The 1990 Applicable Standards

254. Beginning in 1990, approximately two years prior to TD Bank beginning to act as correspondent bank for SIB, TD Bank was required to implement and follow policies and procedures that were compliant with the 1990 FATF Standards. Among other things, the 1990 FATF Standards required Financial Institutions to:

(a) undertake due diligence on all clients;

(b) develop AML policies, procedures and controls;

(c) develop screening procedures for prospective employees and provide those employees with ongoing training with respect to AML compliance;

(d) pay special attention to business relationships and transactions with clients and other financial institutions that did not sufficiently apply the FATF Standards; and

(e) report all suspicious transactions to the appropriate authorities, with particular emphasis placed on funds Financial Institutions suspected were derived from criminal activity.

255. As a result of the 1990 FATF Standards, Financial Institutions were required to take care when entering into relationships with new clients, but also to review and monitor the accounts of existing clients.

256. The 1990 FATF Standards also required Financial Institutions to gather sufficient client identification information about respondent institutions and assess respondent institutions' AML controls when acting as a correspondent bank. This was true with respect to both new and existing correspondent bank clients.

The 1996 Applicable Standards

257. By 1996, in addition to complying with the previously implemented Applicable Standards, Financial Institutions were required to comply with the 1996 OSFI Standards and the 1996 FATF Standards.

258. The 1996 OSFI Standards explicitly recognized that Financial Institutions' most important weapon against money laundering was knowledge of their clients. In keeping with this recognition, among other things, the 1996 OSFI Standards required Financial Institutions to:

(a) take special care when opening accounts for foreign deposit-taking institutions;

(b) subject the activities of all clients, regardless of their risk profile, to some form of ongoing monitoring to detect transactions or attempted transactions that may be suspicious;

(c) establish an annual self-assessment program to assess the effectiveness of their AML programs and procedures, the purpose of which was to enable management to identify areas of risk or assess the need for additional controls;

(d) have, as part of their deterrence and detection procedures, a process to promptly identify and report suspicious transactions, particularly transactions relating to pass-through accounts, such as correspondent banking accounts, both internally to senior management and to the appropriate authorities; and

(e) undertake enhanced monitoring of pass-through accounts, such as correspondent banking accounts, using high risk indicators, such as, for example, the accumulation of balances inconsistent with known revenue or turnover and subsequent transfers to accounts held overseas.

259. In addition, among other things, the 1996 FATF Standards required Financial Institutions to:

(a) identify and verify through official or other reliable documents the identity of their clients;

(b) designate compliance officers at the senior management level to ensure compliance with their AML programs;

(c) implement enhanced due diligence procedures to be utilized in higher risk situations; and

(d) pay particular attention to complex or unusual transactions with no apparent economic purpose or visibly lawful purpose and examine the background of such transactions, with the findings being documented in writing and made available to supervisors, auditors and law enforcement agencies.

The 2001 Applicable Standards

260. By 2001, in addition to complying with the previously implemented Applicable Standards, Financial Institutions were required to comply with the 2001 Basel Standards.

261. Among other things, the 2001 Basel Standards required Financial Institutions to:

(a) obtain financial statements and descriptions of clients' principal lines of business with respect to large corporate accounts;

(b) understand the normal and reasonable account activity of all clients in order to reduce risk;

(c) perform enhanced due diligence if the Financial Institution had any reason to believe that an applicant was being refused banking facilities by another bank;

(d) conduct regular reviews of existing client identification records in order to ensure that those records remained up-to-date;

(e) conduct regular reviews of a client's account whenever a significant transaction took place, client documentation standards changed or the way the account operated changed;

(f) develop KYC risk management programs that included proper management oversight, systems and controls, segregation of duties, training and other related policies;

(g) determine whether they were engaged in business relationships with any PEPs and identify any individuals or entities associated with a PEP;

(h) ensure that senior managers knew the circumstances of high risk private banking clients and, with respect to those clients, were aware of relevant third party information; and

(i) ensure that internal audit teams were adequately staffed with individuals who were well-versed in risk management policies and controls.

262. The 2001 Basel Standards also required Financial Institutions to have in place clear client acceptance policies and procedures that described the types of customers that posed a higher risk and ensured enhanced due diligence took place with respect to such higher risk clients. Where high risk clients posed problems in the banking relationship that could not be resolved, Financial Institutions were required to close the account and return money to its source.

263. The 2001 Basel Standards also recognized that certain types of transactions should alert Financial Institutions to the possibility that a client is conducting unusual or suspicious activities. Such transactions were specifically recognized to include those that did not readily appear to make

economic or commercial sense, or those that involved large amounts of cash deposits that were inconsistent with the normal and expected transactions of a particular variety of client.

264. Notably, the 2001 Basel Standards noted that very high account turnover, inconsistent with the size of the balance, may indicate that funds were being moved through the account for an improper purpose.

265. In addition, the 2001 Basel Standards specifically addressed correspondent banking. In particular, the Basel Standards required that Financial Institutions conduct appropriate levels of client identification in order to fully understand the nature of a respondent bank's business and that Financial Institutions employ enhanced due diligence procedures with respect to any transactions carried out through correspondent banking accounts.

266. Finally, pursuant to the 2001 Basel Standards, Financial Institutions were required to pay particular attention when undertaking or continuing correspondent banking relationships with a respondent bank located in a jurisdiction with poor KYC standards.

The 2002 Applicable Standards

267. By 2002, in addition to complying with the previously implemented Applicable Standards, Financial Institutions were required to comply with the 2002 Wolfsberg Standards.

268. The 2002 Wolfsberg Standards required Financial Institutions to utilize a risk-based approach to decide whether to initiate a relationship with a correspondent banking client and the level of due diligence required to continue such relationships. When conducting due diligence with respect to a correspondent banking client, among other things, Financial Institutions were required to consider:

(a) the client's domicile and organization;

(b) the client's ownership and executive management;

(c) the nature of the client's business;

(d) the products and services offered by the client;

(e) the client's regulatory status and history;

(f) the client's AML controls;

(g) whether the client had any business arrangements with shell banks; and

(h) the client's adherence to the Wolfsberg Standards.

269. The 2002 Wolfsberg Standards also required required Financial Institutions to conduct independent, risk-based reviews of all existing correspondent banking accounts to ensure compliance with the policies and procedures of the Financial Institution, and determine whether additional due diligence was required. When conducting such reviews, Financial Institutions were required to consider the same type of information as was required for new correspondent banking clients.

270. The 2002 Wolfsberg Standards required that at least one person senior to and other than the banker responsible for a particular correspondent account approve all correspondent banking relationships, including previously existing relationships. The 2002 Wolfsberg Standards also required a representative of the Financial Institution to visit the premises of correspondent banking clients in order to conduct due diligence.

271. The 2002 Wolfsberg Standards also noted that enhanced due diligence may be required for correspondent banking clients whose risk profile was higher than that of a typical correspondent banking client. This enhanced due diligence was required to focus on:

(a) ownership and management of the correspondent banking client;

(b) involvement of any PEP with the correspondent banking client;

(c) the correspondent banking client's AML controls; and

(d) any downstream correspondent clearing.

272. Finally, the 2002 Wolfsberg Standards required Financial Institutions to establish organization-wide policies and programs to address unusual or suspicious transactions. These policies and programs were required to provide examples and guidance as to what was to be considered unusual or suspicious and establish reporting protocols in accordance with applicable laws.

The 2003 Applicable Standards

273. By 2003, in addition to complying with the previously implemented Applicable Standards, Financial Institutions were required to comply with the 2003 OSFI Standards, the 2003 FATF Standards and the 2003 Basel Standards.

274. Among other things, the 2003 OSFI Standards required Financial Institutions to:

(a) ensure that senior management was responsible for the development of AML and risk management programs;

(b) keep their boards of directors adequately informed about their AML and risk management programs and those programs' effectiveness;

(c) obtain their boards of directors' approval of their AML and risk management programs at both the initial implementation stage and whenever those programs were reviewed; and

(d) report all suspicious transactions in accordance with applicable legislation.

275. Among other things, the 2003 FATF Standards required Financial Institutions to:

(a) have a risk management system in place to determine the existence of any clients or potential clients who were PEPs; and

(b) incorporate AML policies that addressed the risks associated with non-face-to-face business relationships and transactions.

276. With respect to PEPs, in addition to normal due diligence measures, according to the 2003 FATF Standards, Financial Institutions were required to ensure that senior management approval was granted before establishing the business relationship. They were also required to establish the source of any PEP's wealth and funds and to conduct enhanced, ongoing monitoring of their business relationship with any PEP.

277. With respect to correspondent banking clients, the 2003 FATF Standards also required Financial Institutions to determine from publicly available information the reputation of the respondent institution and whether it had been the subject of past money laundering or terrorist financing investigations or regulatory action.

278. Among other things, the 2003 Basel Standards required Financial Institutions to take decisions to enter into business relationships with higher risk clients, including correspondent banking clients, at the senior management level.

279. The 2003 Basel Standards also required Financial Institutions to develop risk management programs that ensured consistent client identification and account monitoring across the Financial Institutions' business lines and geographic locations.

280. Finally, the 2003 Basel Standards explicitly required that Financial Institutions implement rigorous standards for due diligence in high risk areas and develop policies and standards for handling relationships in such areas. One type of high risk relationship identified by the 2003 Basel Standards were those between a Financial Institution and a PEP.

The 2004 Applicable Standards

281. By 2004, in addition to complying with the previously implemented Applicable Standards, Financial Institutions were required to comply with the 2004 OSFI Standards and the 2004 Basel Standards.

282. Among other things, the 2004 OSFI Standards required Financial Institutions to:

(a) conduct higher levels of due diligence when dealing with clients from countries with AML requirements that were considered inadequate; and

(b) have customer identification and verification processes which were fully compliant with the PCMLTFA.

283. In addition, the 2004 Basel Standards required Financial Institutions to implement risk management policies and procedures to be applied across their various business lines and geographic locations. In particular, among other things, the 2004 Basel Standards required Financial Institutions to:

(a) develop standards on what records are to be obtained and retained for customer identification across their banking groups as a whole;

(b) maintain client identification information in a readily retrievable format that was accessible globally by their banking groups as a whole;

(c) have in place systems and processes to monitor and share information on the identity of clients and client account activity throughout their banking groups as a whole;

(d) be alert to clients that use their various business lines across different banking groups (for example, banking, securities and insurance) and undertake transaction monitoring on both a local and centralized basis;

(e) have their internal and external audits evaluate adherence to compliance with relevant standards across their banking groups as a whole; and

(f) implement policies and procedures to identify unusual account activity throughout their banking groups as a whole, regardless of how those accounts were utilized.

The 2007 Applicable Standards

284. By 2007, in addition to complying with the previously implemented Applicable Standards, Financial Institutions were required to comply with the 2007 FATF Standards.

285. Among other things, the 2007 FATF Standards required Financial Institutions to:

(a) utilize information generated by competent third parties to identify suspicious activity;

(b) exercise increased awareness of higher risk clients and any transactions such clients undertook across their various business lines; and

(c) develop policies and procedures so that senior management could independently validate the development and operation of their risk assessment and risk management processes.

The 2008 Applicable Standards

286. By 2008, in addition to complying with the previously implemented Applicable Standards, Financial Institutions were required to comply with the 2008 OSFI Standards.

287. Among other things, the 2008 OSFI Standards required Financial Institutions to:

(a) comply with all PCMLTFA requirements, including with respect to correspondent banking;

(b) take reasonable measures to obtain the names and occupations of all directors and beneficial owners of 25 percent or more of their corporate clients;

(c) report all transactions or attempted transactions that were suspicious to FINTRAC;

(d) conduct self-assessment of AML controls at least annually; and

(e) have independent auditors conduct effectiveness testing of their AML controls at least every two years, with the results thereof being reviewed by a senior officer.

288. In addition, the 2008 OSFI Standards explicitly recognized that the identity and beneficial ownership of a client can be determined using a credible public or other database and that enhanced account monitoring should include the gathering of information from open public sources.

289. The 2008 OSFI Standards also required that, where a Financial Institution determined that a foreign financial institution for which it provided correspondent banking services did not have in place AML policies consistent with the PCMLTFA, ongoing monitoring of all transactions should occur to mitigate the higher risk.

290. Further, the 2008 OSFI Standards required Financial Institutions to determine whether a client is a politically exposed foreign person ("PEFP"). When making that determination, Financial Institutions were required to consult public databases. According to the 2008 OSFI Standards, if a Financial Institution had a client who was a PEFP, the Financial Institution was required to:

(a) take measures to determine the source of the PEFP's funds;

(b) obtain senior management approval to open or maintain the PEFP's account; and

(c) conduct enhanced ongoing monitoring of the PEFP's account.

291. Similarly, where a Financial Institution was aware that a PEFP owned or control 25 percent or more of a corporate client, or if a PEFP was a director or officer of a corporate client, the 2008 OSFI Standards required the Financial Institution to assess the risk of providing banking services and apply enhanced due diligence as appropriate.

3. Financial Institutions Adopt the Standards

292. At all times, Financial Institutions were required to adhere to the Applicable Standards. As a result, it was customary for Financial Institutions to adopt the Applicable Standards into their banking practices.

293. For example, as a result of the Applicable Standards, since at least 1990, it was customary for Financial Institutions to continuously review existing correspondent accounts to ensure they met required standards and to close accounts and decline to provide service to correspondent banking customers that were not in compliance with such standards.

294. For instance, in 2001, several major American banks testified before the U.S. Permanent Subcommittee on Investigations that their practices in respect of correspondent banking included heightened due diligence, heightened monitoring and strict KYC procedures. More specifically, these practices included:

(a) evaluating the overall adequacy of banking supervision in the jurisdiction of the respondent bank;

(b) reviewing media reports for information on the respondent bank;

(c) establishing a detailed understanding of correspondent banking customers' ownership structure;

(d) establishing an understanding of correspondent banking customers' cash flows; and

(e) regularly preparing memoranda summarizing contacts with the bank and information about its staff and operations, all of which appears from the U.S. Senate Report.

295. Notably, one bank testified that it reviewed individual accounts, particularly Antiguan accounts, and would close the account if the review was unsatisfactory.

296. Further, in February 2000, the Ranking Minority Member of the Permanent Subcommittee on Investigations distributed a survey on correspondent banking to 20 banks providing correspondent banking services from locations in the U.S., at least two of which were Canadian banks. All 20 banks responded to the survey. The survey responses revealed the following:

(a) of the 12 banks that detailed their specified account opening procedures in response to the survey, all but three banks said that they evaluate the overall adequacy of banking supervision in the jurisdiction of the respondent bank and review media reports for information on the applicant; and

(b) a majority of the surveyed banks said they inquire about the applicant with the jurisdiction's bank regulator, check with local bank branches (if applicable), check with bank rating agencies, obtain bank references and complete a customer profile.

297. The survey also specifically addressed the provision of correspondent banking services to offshore banks, such as SIB. In response, nine banks said they would not in any circumstance open a correspondent account for an offshore bank, while eight of the banks said there are times when

they would open such an account, but that they would do so only when the offshore bank is part of a well-known financial group or a subsidiary or affiliate of an internationally reputable bank.

298. Responses to the survey also addressed the provision of correspondent banking services to an Antiguan respondent bank. The report in respect of the survey results states that "most banks have no relationships" with banks in Antigua. It further noted that one bank responded that it monitors every transaction involving Antigua, while another bank said that it does not accept any transfers from or to Antigua at all.

B. Canadian AML Legislation

299. In addition to complying with the Applicable Standards, Financial Institutions such as TD Bank are also required to comply with the laws of Canada which address AML and banking practices and directly incorporate the Applicable Standards. In Canada, such practices are primarily addressed by way of the PCMLTFA and its regulations.

300. The PCMLTFA, which was originally titled the *Proceeds of Crime (Money Laundering) Act*, came into force in 2000. Section 7 of the Act came into force in 2001 and required Financial Institutions to:

> report to [FINTRAC], in the prescribed form and manner, every financial transaction that occurs in the course of their activities and in respect of which there are reasonable grounds to suspect that the transaction is related to the commission of a money laundering offence or a terrorist activity financing offence.

301. In 2007, the PCMLTFA was amended to include codification of many of the aforementioned Applicable Standards. For instance, subsection 9.4(1) required Financial Institutions to

take the following measures before entering into a correspondent banking relationship with a prescribed foreign entity:

(a) obtain prescribed information about the foreign entity and its activities;

(b) ensure that the foreign entity is not a shell bank as defined in the regulations;

(c) obtain the approval of senior management;

(d) set out in writing their obligations and those of the foreign entity in respect of the correspondent banking services; and

(e) any prescribed measures.

302. In 2002, the General Regulation to the PCMLTFA, SOR/2002-184 (the "Regulations") came into force. The Regulations were amended in 2007 to include further codification of the aforementioned Applicable Standards. For instance, subsections 15.1(2) and 15.1(3) of the Regulations state:

(2) Every financial entity shall, when it enters into a correspondent banking relationship, keep a record in respect of the foreign financial institution containing the following information and documents:

(*a*) the name and address of the foreign financial institution;

(*b*) the names of the directors of the foreign financial institution;

(*c*) the primary business line of the foreign financial institution;

(*d*) a copy of the most recent annual report or audited financial statement of the foreign financial institution;

(*e*) a copy of the foreign financial institution's banking licence, banking charter, authorization or certification to operate from the relevant regulatory agency or certificate of corporate status or a copy of another similar document;

(*f*) a copy of the correspondent banking agreement or arrangement, or product agreements, defining the respective responsibilities of each entity;

(*g*) the anticipated correspondent banking account activity of the foreign financial institution, including the products or services to be used;

(*h*) a statement from the foreign financial institution that it does not have, directly or indirectly, correspondent banking relationships with shell banks;

(*i*) a statement from the foreign financial institution that it is in compliance with AML and anti-terrorist financing legislation in its own jurisdiction; and

(*j*) the measures taken to ascertain whether there are any civil or criminal penalties that have been imposed on the foreign financial institution in respect of AML or anti-terrorist financing requirements and the results of those measures.

(3) The financial entity shall take reasonable measures to ascertain whether the foreign financial institution has in place AML and anti-terrorist financing policies and procedures, including procedures for approval for the opening of new accounts and, if not, shall, for the purpose of detecting any transactions that are required to be reported to [FINTRAC] under section 7 of the Act, take reasonable measures to conduct ongoing monitoring of all transactions conducted in the context of the correspondent banking relationship.

303. Further, since 2007, Section 55.1 of the Regulations states the following with respect to correspondent banking relationships:

55.1 Every financial entity that enters into a correspondent banking relationship shall

(*a*) ascertain the name and address of the foreign financial institution by examining a copy of the foreign financial institution's banking licence, banking charter, authorization or certification to operate from the relevant regulatory agency or certificate of corporate status or a copy of another similar document; and

(*b*) take reasonable measures to ascertain, based on publicly available information, whether there are any civil or criminal penalties that have been imposed on the foreign financial institution in respect of AML or anti-terrorist financing requirements and, if so, to conduct, for the purpose of detecting any transactions that are required to be reported under section 7 of the Act, ongoing monitoring of all transactions in the context of the correspondent banking relationship.

304. Section 9.6 of the PCMLTFA came into force in 2008 and required Financial Institutions to establish and implement compliance programs for correspondent banking relationships, and required enhanced due diligence in higher risk circumstances. Pursuant to section 9.6:

(1) Every person or entity referred to in section 5 shall establish and implement, in accordance with the regulations, a program intended to ensure their compliance with this Part.

(2) The program shall include the development and application of policies and procedures for the person or entity to assess, in the course of their activities, the risk of a money laundering offence or a terrorist activity financing offence.

(3) If the person or entity considers that the risk referred to in subsection (2) is high, the person or entity shall take prescribed special measures for identifying clients, keeping records and monitoring financial transactions in respect of the activities that pose the high risk.

305. The requirements of section 9.6(3) of the PCMLTFA are further articulated in the 2008 amendments to Regulations. In particular, section 71 lays out the requirements that Financial Institutions must follow when implementing a compliance program:

(1) For the purpose of subsection 9.6(1) of the Act, a person or entity referred to in that subsection shall, as applicable, implement the compliance program referred to in that subsection by

(*a*) appointing a person — who, where the compliance program is being implemented by a person, may be that person — who is to be responsible for the implementation of the program;

(*b*) developing and applying written compliance policies and procedures that are kept up to date and, in the case of an entity, are approved by a senior officer;

(*c*) assessing and documenting, in a manner that is appropriate for the person or entity, the risk referred to in subsection 9.6(2) of the Act, taking into consideration

(i) the clients and business relationships of the person or entity,

(ii) the products and delivery channels of the person or entity,

(iii) the geographic location of the activities of the person or entity, and

(iv) any other relevant factor;

(*d*) if the person or entity has employees, agents or other persons authorized to act on their behalf, developing and maintaining a written ongoing compliance training program for those employees, agents or persons; and

(*e*) instituting and documenting a review of the policies and procedures, the risk assessment and the training program for the purpose of testing their effectiveness, which review is required to be carried out every two years by an internal or external auditor of the person or entity, or by the person or entity if they do not have such an auditor.

(2) For the purposes of the compliance program referred to in subsection 9.6(1) of the Act, every entity referred to in that subsection shall report the following in written form to a senior officer within 30 days after the assessment:

(*a*) the findings of the review referred to in paragraph (1)(*e*);

(*b*) any updates made to the policies and procedures within the reporting period; and

(*c*) the status of the implementation of the updates to those policies and procedures.

306. In addition, section 71.1 of the Regulations require Financial Institutions to take the following steps when faced with a higher risk client:

The prescribed special measures that are required to be taken by a person or entity referred to in subsection 9.6(1) of the Act for the purpose of subsection 9.6(3) of the Act are the development and application of written policies and procedures for

(*a*) taking reasonable measures to keep client identification information and the information referred to in section 11.1 up to date;

(*b*) taking reasonable measures to conduct ongoing monitoring for the purpose of detecting transactions that are required to be reported to [FINTRAC] under section 7 of the Act; and

(*c*) mitigating the risks identified in accordance with subsection 9.6(3) of the Act.

307. The 2008 amendments to the Regulations also incorporated subsection 11.1(1). That subsection requires Financial Institutions to, having confirmed the existence of a corporate client, take reasonable measures to obtain the name and occupation of all directors of the corporation and the name, address and occupation of all persons who own or control, directly or indirectly, 25 percent or more of the shares of the client corporation.

308. Since 2008, pursuant to section 9.3 of the PCMLTFA, Financial Institutions are required to determine whether they were dealing with a PEFP. In instances where a Financial Institution determines that it is dealing with a PEFP, senior management approval is required for the banking relationship to proceed. Moreover, since 2008, subsection 14(n) of the Regulations require

Financial Institutions to undertake enhanced, ongoing monitoring of their relationships with any PEFP.

309. Pursuant to section 462.31(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, anyone commits a "money laundering offense" for the purposes of the PCMLTFA who

> uses, transfers possession of, sends, delivers, transports, transmits, alters, disposes or otherwise deals with, in any manner and by any means, any property or any proceeds or any property with intent to conceal or convert that property or those proceeds, knowing or believing that all or a part of that property or of those proceeds was obtained as a result of fraud.

310. Any transaction in respect of which there were reasonable grounds for a Financial Institution to suspect any of these activities automatically required that Financial Institution to report to FINTRAC.

C. TD Bank's Internal Policies

311. During the time that it provided correspondent banking services to SIB, TD Bank was required to have in place and execute internal polices ("Internal Policies") that reflected the rules and requirements laid out in the Applicable Standards, the PCMLTFA, the Regulations and the *Criminal Code*. TD Bank's Internal Policies were required and sought to address such areas as identification, client relationship reviews, enhanced due diligence, open source intelligence monitoring, transaction monitoring and reporting, risk assessment and risk mitigation practices.

312. In April 2000, Frank Craddock, TD Bank's Chief Security Officer and the person responsible for TD Bank's deterrence programs, gave evidence before the Canadian Parliament's Standing Committee on Finance on Bill C-22. Commenting on money laundering, he stated:

> In order to protect against this criminal activity, we have established sound policies and programs that detect and prevent money laundering.

> Just a few of the preventative measures taken by Canadian banks include: the right to refuse financial transactions suspected of being proceeds of crime as defined by the Criminal Code; a requirement that a declaration of source of funds be signed by customers for financial transactions involving $10,000 or more; a requirement for bank employees to report any financial transactions that are judged to be suspicious, regardless of the amount; the placement of a senior bank officer in every branch, known as the designated officer, to whom suspicious transactions are reported; a strong emphasis on the know-your-customer rule, whereby employees must obtain appropriate identification and documentation from clients, as well as understand the client's usual pattern of financial transactions; an audit of branch compliance with AML policies; and various staff awareness and education programs, including the distribution of related videos produced by the CBA corporate security committees.
>
> We all work within the scope of the existing legislation, together with the guidelines issued by the Office of the Superintendent of Financial Institutions, known as OSFI, and we believe we have developed a very effective measure to identify money-laundering activities while avoiding high volumes of irrelevant reports.

313. Similarly, by at least April 2006, TD Bank publicly stated on its website that it had in place a Global AML Program. In particular, the TD Bank Financial Group of Companies' AML Statement provided:

> Although a Canadian based financial institution, TDBFG is subject to the AML statutes and regulations in various countries around the globe. TDBGF's AML program (described below) contemplates and accommodates these statutes and establishes minimum standards and requirements across all our businesses throughout the world.
>
> In order to comply with applicable Canadian and AML laws in the countries in which we operate, TDBGF has implemented a Global AML Program. The Global AML Progam includes appointing a Chief AML Officer who is responsible to senior management and the board of directors for establishing and maintaining the TD Bank Financial Group's AML Compliance Program; a risk-based Global AML Policy including Know Your Customer and Enhanced Due Diligence, record keeping & retention (the Global AML Policy establishes minimum standards across all our business units and often adopts standards higher than local requirements); currency transaction and suspicious transaction monitoring and reporting; a hierarchy of designated AML officer functions; periodic training of appropriate employees; and independent internal audits.

> This program is routinely evaluated, updated and enhanced in order to reflect changes to TDBFG's business activities and applicable supervisory standards and legal requirements.
>
> All employees are required to read and acknowledge the TDBGF Code of Conduct & Ethics annually. The guidelines require that and employee not knowingly initiate or be a party to a money laundering scheme. TDBGF is committed to complying with the *United Nations Suppression of Terrorist Regulations*. No employee shall deal, directly or indirectly, with any person or group known or reasonably known to be involved in or supporting terrorism activities. Employees are require to report illegal, suspicious or unusual activity.
>
> Annually all employees are required to complete an enterprise wide AML training program which includes a test indicating they have mastered the concepts.

314. To the extent that TD Bank's Internal Policies did not comply with the requirements of the Applicable Standards, the PCMLTFA, the Regulations and the *Criminal Code*, TD Bank violated of the laws of Canada and breached the standard of care required by a reasonable bank.

315. Alternatively, TD Bank also violated the laws of Canada and breached the standard of care required by a reasonable bank if its Internal Polices adhered to the Applicable Standards, the PCMLTFA, the Regulations and the *Criminal Code* but failed to implement its Internal Policies.

VII. TD BANK IS LIABLE FOR ITS FAILURE TO ACT

316. For the reasons described above, TD Bank should never have opened correspondent bank accounts for SIB and, having done so, should have determined that those accounts needed to be closed. If it had declined to open SIB's correspondent bank accounts, TD Bank would not have processed the plaintiffs purchases of SIB CDs and the plaintiffs would not have been able to make such purchases. However, TD Bank at all relevant times continued unabated in its provision of banking services to SIB and processed the plaintiffs' purchases of SIB CDs. It did so notwithstanding that it was uniquely situated to uncover the secret in respect of Tier III and the SIB Looting. As a result, TD Bank is liable to the plaintiffs.

A. Duty of Care

317. The plaintiffs plead that TD Bank owed them a duty of care to prevent the use of its facilities for fraudulent purposes since, in all of the circumstances described herein, it:

(a) had actual knowledge of, or was reckless and/or willfully blind to, the SIB Looting; or,

(b) ought to have known of the SIB Looting (that is, had constructive knowledge).

318. The plaintiffs plead that, as a result of TD Bank's actual knowledge (willful blindness or recklessness) or constructive knowledge of the SIB Looting, it was reasonably foreseeable that TD Bank's acts or omissions described herein would cause harm to SIB and, in turn, the plaintiffs.

319. TD Bank also had sufficient information such that it actually knew of, or was reckless or willfully blind to Stanford's and the Other Insiders' breaches fiduciary duties and trust through their orchestration of the SIB Looting and that, by providing banking services to SIB, TD Bank knowingly assisted in those breaches.

320. Those acts and omissions are the proximate cause of the harm suffered by the plaintiffs. In all the circumstances, there was sufficient proximity between TD Bank and the plaintiffs to give rise to a duty of care owed by TD Bank to the plaintiffs and there is no basis on which to negate that duty of care.

B. Standard of Care

321. At the very least, a reasonable banker was required to act at all times in accordance with the Applicable Standards, the PCMLTFA, the Regulations and the *Criminal Code*.

322. Had TD Bank acted as a reasonable banker, it would have, through the exercise of reasonable care and skill, never provided banking services to SIB, discovered the SIB Looting, terminated SIB's access to TD Bank's facilities, reported the conduct of Stanford and the Other Insiders to the appropriate authorities, frozen SIB's accounts and/or declined to process the plaintiffs' purchases of SIB CDs. Due to the acts and omissions described herein (including breach of contract), TD Bank failed to act as a reasonable banker in the circumstances. As a result, TD Bank breached the duties it owed to the plaintiffs.

C. Damages Caused by TD Bank and Other Relief

323. TD Bank's acts and omissions described herein are the proximate cause of the harm suffered by the plaintiffs. As a result of TD Bank's breaches of duty, it repeatedly missed opportunities to reveal and stop the SIB Looting being orchestrated and undertaken by Stanford and the Other Insiders and/or turned a blind eye to the SIB Looting. Instead, TD Bank allowed Stanford and the Other Insiders to continue perpetrating the SIB Looting, with the result being that SIB lacks the funds to repay the plaintiffs' investments in SIB CDs. The plaintiffs plead that if TD Bank had performed even its basic duties to SIB and the plaintiffs as required, the discovery of the SIB Looting at an earlier date would have avoided the losses and damages incurred by the plaintiffs.

324. It was reasonably foreseeable that the plaintiffs would suffer the damages described herein as a result of the acts and omissions of TD Bank described herein.

325. By failing to act as a reasonable banker, TD Bank facilitated and allowed the SIB Looting to continue when it ought to have been reported and prevented. But for TD Bank's conduct, the

fraudulent transactions at issue would not have been completed and damages would not have been suffered by the plaintiffs.

326. The plaintiffs suffered damages in the amount of approximately CAN$17,553,751 plus further amounts to be particularized prior to trial.

327. Given its misconduct as pleaded herein, TD Bank is also liable to provide a full accounting of all revenues and profits from its dealings with SIB and the processing of the plaintiffs' purchases of SIB CDs, and to disgorge and make restitution of all such revenues and profits up to the amount of the plaintiffs' losses.

VIII. LOCATION AND CONDUCT OF THE TRIAL

328. The plaintiffs propose that this action be tried in Toronto. The plaintiffs further propose that this action be tried in tandem with or immediately after the action bearing Court File Number CV-12-9780-00CL.

Date: September 23, 2014

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Court File No. CV-09-8373-00CL

DYNASTY FURNITURE MANUFACTURING LTD. ET AL
Plaintiffs

-and-

TORONTO-DOMINION BANK
Defendants

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

FRESH AS AMENDED STATEMENT OF CLAIM

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THE TORONTO-DOMINION BANK
Defendant

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

AMENDED RESPONDING MOTION RECORD OF THE PLAINTIFFS

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