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TD Bank Has Improperly Withdrawn Admissions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 In its amended statement of defence, TD Bank has improperly withdrawn these admissions.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.
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> [...]
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> 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.

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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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