Court File No.: CV-22-00684100-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N :

CANADIAN WESTERN BANK

Applicant

- and -

2722959 ONTARIO LTD. AND 2156775 ONTARIO LIMITED

Respondent

SUBMISSIONS OF CANADIAN WESTERN BANK

July 13, 2023

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1. Canadian Western Bank ("**CWB**") is the applicant in these receivership proceedings. Provided that the terms and draft Order proposed by the receiver are adopted, CWB does not take a position on the motion of 2156775 Ontario Limited ("**215**") presently before the Court, in which 215 seeks to lift the stay of proceedings with respect to certain actions it initiated against the Regional Municipality of Peel, the City of Mississauga and others.

2. However, in 215's materials on this motion, it makes statements and presents as evidence relevant to this lift stay motion disputed facts which relate to a separate claim bearing court file no. CV-22-00001968-0000 (the "**D'Angelo Claim**"). The D'Angelo Claim arises from the lending arrangements between CWB and 2722959 Ontario Ltd., a corporation related to 215 and controlled by the same principals. The disputed facts are not relevant or at issue on this motion. Therefore, no findings of fact should be made in relation to the disputed matters.

3. The D'Angelo Claim, in which the plaintiffs seek damages in the amount of $280M against CWB, was commenced by 2722959 Ontario Ltd. ("**272**") and its principals, Frank D'Angelo and Gemma Runaghan against CWB and one of its employees, John Butler. The D'Angelo Claim has been consolidated with claims by CWB against D'Angelo and Runaghan for enforcement on personal guarantees of unpaid loans to 272 bearing court file no's CV-22-00685418-00CL and CV-22-00685420-00CL (the **"CWB Claims"**). The D'Angelo Claim and the CWB Claims are ongoing and are being case-managed by Justice Osborne. Discovery has not taken place in any of these claims.

4. The allegations made by the plaintiffs in the context of the D'Angelo Claim (and which have been repeated in Mr. D'Angelo's supplementary affidavits sworn in support of this motion) are vigorously contested by CWB. In particular, paragraphs 26-40 of the supplementary affidavit of Frank D'Angelo sworn April 27, 2023, and paragraphs 5-9 of the second supplementary affidavit of Frank D'Angelo sworn July 12, 2023 relate to disputed points of evidence which will be at issue in, and subject to adjudication in, the D'Angelo Claim and the CWB Claims.

5. A copy of the D'Angelo Claim is attached as Tab 1. A copy of CWB's Statement of Defence from the D'Angelo Claim, which provides a fulsome response to the allegations against it, is attached as Tab 2. CWB will lead evidence in support of these points in the context of the D'Angelo Claim and the CWB Claims.

6. It is respectfully submitted that the disputed facts relevant to the D'Angelo Claim and the CWB Claims are not relevant or at issue on this lift stay motion. As such, CWB respectfully suggests that this Court should not make any findings of fact on this lift stay motion that would impact on the D'Angelo or CWB Claims. Any adjudication on these points should be made in the context of claims themselves, when the Court has the benefit of a full record on the disputed issues before it.

TAB 1

Court File No.:

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

2722959 ONTARIO INC., FRANK D'ANGELO, and GEMMA RUNAGHAN
Plaintiffs

- and -

CANADIAN WESTERN BANK and JOHN BUTLER
Defendants

STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiffs. The claim is 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 the 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 the United States of America, the period of serving and filing your statement of defence is forty days. If you are served outside Canada or the United States of America, the period for serving and filing your statement of defence is sixty days.

Instead of serving and filing a Statement of Defence, you may 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 in which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGEMENT 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: June 13, 2022

Issued by:____________________

50 Eagle St W, Newmarket,
Ontario L3Y 6B1

TO: **CANADIAN WESTERN BANK**
101-200 Argentia Road
Mississauga, Ontario L5N 1P7
T. 289 998 2600
F. 833 341 7556

AND TO: **JOHN BUTLER**
101-200 Argentia Road
Mississauga, Ontario L5N 1P7
T. 289 998 2600
F. 833 341 7556

CLAIM

1. The Plaintiffs, 2722959 Ontario Inc., Frank D'Angelo, and Gemma Runaghan (hereinafter referred to as "the Plaintiffs"), claim against the Defendants, Canadian Western Bank ("CWB") and John Butler ("Butler") jointly and severally:

A. As against the Defendant CWB:

a) General damages for breach of contract, breach of duty of care, breach of trust, breach of fiduciary duty, misrepresentation in the amount of $250 million dollars ($250,000,000.00), which includes damages for loss of contract revenues of $140 million US dollars ($140,000,000.00 USD) per year for the next 5 years, loss of inventory and equipment in the amount of $12 million dollars ($12,000,000.00), all of which the full particulars will be provided prior to trial;
b) Punitive damages in the amount of $30 million dollars ($30,000,000.00);
c) Special damages in an amount to be determined prior to trial;
d) Pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act,* R.S.O. 1990, c. C.43 as amended;
e) Their costs on a substantial indemnity basis, plus any applicable HST; and
f) Such further and other relief as this Honourable Court may deem just.

B. As against the Defendant Butler:

a) General damages for breach of contract, breach of duty of care, breach of trust, breach of fiduciary duty, misrepresentation in the amount of $250 million dollars ($250,000,000.00), which includes damages for loss of contract revenues of $140 million US dollars ($140,000,000.00 USD) per year for the next 5 years, loss of inventory and equipment in the amount of $12 million dollars ($12,000,000.00), all of which the full particulars will be provided prior to trial;
b) Punitive damages in the amount of $30 million dollars ($30,000,000.00);

c) Special damages in an amount to be determined prior to trial;

d) Pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act,* R.S.O. 1990, c. C.43 as amended;

e) Their costs on a substantial indemnity basis, plus any applicable HST; and

f) Such further and other relief as this Honourable Court may deem just.

The Parties

2. The Plaintiff, 2722959 Ontario Inc., operating as D'Angelo Brands, is an entity incorporated pursuant the laws of Ontario which manufactures and packages beverage drinks and edible oils, it also warehouses and provides logistics to its customers, and sells directly to the retail markets.

3. The Plaintiff, Frank D'Angelo, ("D'Angelo") is an individual who resides in the City of Kleinburg. D'Angelo is the partner of Gemma Runaghan.

4. Gemma Runaghan ("Runaghan") is an individual who resides in the City of Kleinburg. Runaghan was, at all material times, the sole shareholder of 2722959 Ontario Inc. and is the partner of Frank D'Angelo.

5. The Defendant John Butler ("Butler") was at all material times the Assistant Vice President and Team Lead of Canadian Western Bank.

6. The Defendant Canadian Western Bank ("CWB") is a financial service organization providing specialized service in banking, trust, and wealth management. CWB is a federally incorporated financial institution with a national presence across Canada with office in the City of Mississauga in the province of Ontario.

Overview

7. On or about October 2021, the Plaintiffs engaged Rick Arnone ("Arnone") and Suzanne Kekely ("Kekely") as commercial financing consultants and advisors in order to

assist the Plaintiffs in obtaining a loan with a financial institution.

8. The Plaintiffs wished to secure financing for the growth of the company and to meet its production contracts for 2022. At this time, 2722959 Ontario Inc. had an approved mortgage with another lender in the amount of approximately $11,000,000.00 for the purchase of its landlord's building.

9. Arnone and Kekely were at all material times advisors, consultants, and agents for the Plaintiffs, and they owed the Plaintiffs a fiduciary duty and were at all times not to be in a position of conflict when acting on behalf of the Plaintiffs.

10. Both Kekely and Arnone introduced the Plaintiffs to Butler, the Assistant Vice President of Canadian Western Bank. Butler expressed to the Plaintiffs that he and CWB were in interested in pursuing a financial relationship with the Plaintiffs and that CWB would be the lender and would satisfy the Plaintiffs' financial needs.

11. By January 2022 the Plaintiffs were approved for a bridge loan by the Defendants.

12. As an agreement was reached to use CWB as lender for the 2722959 Ontario Inc., on or about February 3, 2022, the Plaintiffs' consultant, Kekely, Principal of Vision Business Consulting, sent an email and an interim reporting package to Butler and Colin O'Regan ("O'Regan"), Manager, Business Development for CWB. The package sent by Kekely consisted of (a) Interim financial statements, (b) comparative financial presentation, (c) aged accounts receivable, (d) inventory listing and (e) accounts payable listings.

13. On or about February 22, 2022, O'Regan sent Kekely via email an Amended Discussion Paper for the Plaintiff to sign. The summary of the Discussion Paper summarized that the Lender, CWB would consider lending to 2722959 Ontario Inc. the loan amount of $10,150,000.00 where the Plaintiffs D'Angelo and Runaghan would be personal guarantors to the loan and that 2156775 Ontario Inc. would be the corporate guarantor of the loan.

14. On or about March 3, 2022, O'Regan sent an email to Kekely advising, amongst other things, that *"in our opinion and the avenue for which we believe we will have the greatest success will be keeping the commercial term advances around $5.5 million range and implementing whatever level of operating facility we can layer on over and above…. Our priority will be to meet the largest needs as discussed: Landlord obligations, city of Mississauga payable and equipment refurbishment."*

15. In order to proceed with the application immediately and to satisfy the Plaintiffs' deadlines, O'Regan requested that Kekely deliver to him a list of documents including D'Angelo and Runaghan's Notices of Assessment, personal mortgage statements, and RRSP Statements. These requests were fully satisfied by the Plaintiffs.

16. Between January and mid-March 2022, D'Angelo, Arnone, Kekely, O'Regan, and Butler had various exchanges by email, telephone discussions, and in person meetings. The Defendants knew in January that the Plaintiffs requested a loan to increase the production line and to meet the production order for their customers. The Plaintiffs state that it was important to have financing resources to improve the production lines to meet their orders to customers. The loan amount that would be approved by the defendants was approximately $6,500,000.00, or at least this was the loan amount that the Defendants were considering in advancing to the Plaintiffs.

17. By mid-March 2022, the loan funding had been delayed. In explaining such delay, Butler advised that the Bank was busy with many other files, and he was pushing the Plaintiffs' loan application as a priority. Butler kept on advising and representing to the Plaintiffs that "we are almost there…everything looks good…you have nothing to worry about… the loan is coming…"

18. As the delays caused a shortage on the cash flow, on the advice of Butler, he recommended that D'Angelo and Runaghan obtain a high-priced mortgage loan on their personal properties and use such funding to satisfy the immediate debt liabilities until

such time that the commercial loan would be advanced. According to Butler, the loan advance would be immediate.

19. During this time frame, while the loan funding had been delayed, Butler made representations to the Plaintiffs and assured them that the loan would be advanced shortly.

20. Butler also assured the Plaintiffs that he would be personally instrumental in helping into 2722959 Ontario Inc. growth.

21. The Plaintiffs state that from January until March 2022, they were losing revenues as the production line could not keep up with the demands of their clients. The Defendants recognized that the Plaintiffs needed loan funds to improve and fix their production line to keep with the demands by its customers.

22. At a meeting in March 2022 with Arnone, Kekely, O'Regan, Butler and D'Angelo, Butler advised that, despite the delays in being funded, Butler would be sending letters to the Plaintiffs' suppliers assuring them that the Plaintiffs would be receiving a loan to satisfy the suppliers' debts.

23. Butler, on numerous occasions, assured the Plaintiffs that they had been approved for the loan, but in the short-term, he advised to D'Angelo to cash in his RRSPs and not to worry about it.

24. Between Butler and D'Angelo, a special relationship of trust developed, and D'Angelo relied upon Butler's advice guidance and representations. Butler had also become D'Angelo's advisor where he advised D'Angelo to cash the family's RRSPs in order to support the Plaintiff's financial obligations until the loan was advanced. On the advice of Butler, D'Angelo cashed his RRSPs and used such funds to meet some of the corporate Plaintiff's financial obligations.

25. Butler knew of the pressing urgency in getting funding for the Plaintiffs. He was aware that if the Plaintiffs did not receive funding by April, or by the first week of May

2022 the latest, the Plaintiffs would suffer catastrophic losses to both the business and personally. Butler was not only aware of such urgency in providing the loan to the Plaintiffs, which had been delayed by his own actions, but was also aware of the existence of the debtors and the amounts of the debts that had to be satisfied by the Plaintiffs in a timely fashion. Butler was aware and neglected to advance the loan to Plaintiffs by the deadlines imposed by the Plaintiffs' landlords and suppliers.

26. Butler, in the presence of various parties, including Arnone and Kekely, always assured and represented to the Plaintiffs that they would be in receipt of the loan by the latest, May 8, 2022.

27. On or about April 1, 2022, Kekely confirmed via email to D'Angelo that *"CWB has completed their internal approvals and is proceeding with funding mechanics for next week"*. Kekely requested additional documents, all of which were provided.

28. On or about April 3, 2022, D'Angelo spoke to Butler as he was concerned about the funding delays respecting the substantial portion of the loan. D'Angelo spoke to Butler advising that the company could not have any further delays for the funding as suppliers and the landlord were insisting on payment. Butler again advised D'Angelo that the loan had been approved, they were experiencing some delays, but not to worry about the loan as it would be advanced shortly.

29. As Butler knew that the Plaintiffs had immediate financial obligations to others, a partial loan was advanced to the Plaintiffs on or about April 5, 2022. According to Butler, this advance was to assists the Plaintiffs meet their pressing financial obligations on a temporary basis. This was considered to be a bridge finance facility to support the operating needs of the Plaintiffs until the balance of the larger loan would be advanced.

30. The Plaintiffs state that on April 4, 2022, Kekely provided the Plaintiffs with the Commitment Letter of a loan consisting of 3 segments:

a. Loan Segment (1): Demand Loan $100,000.00, to finance day-to-day operations of the Borrower's business;

b. Loan Segment (2): Demand Non-Revolving Loan #1 (DNR #1) $500,000.00, to assist with financing the purchase and installation of new 100 head can filler carriage/carousel from Bevcorp LLC and associated installation costs; and
c. Loan Segment (3): Corporate Credit Card $25,000.00, to assist with day-to-day expenses.

31. The Plaintiffs state that the advance of the above loan was an assurance to them by the Defendants that the balance of the remaining loan would be advanced shortly.

32. The Plaintiffs state that they were induced by the Defendants to take this loan for which they provided personal guarantees and now the Plaintiffs, by such commitment to the loan, were unable to seek out other loan opportunities with other financial institutions.

33. The Plaintiffs further state that despite the representations and advice from Butler, as of April 12, 2022, the balance of the remaining funds of the loan were not advanced and the Plaintiffs were at risk of being locked out by the landlord and having the hydro service disconnected to the Plaintiffs' manufacturing facility.

Misrepresentations By Butler

34. The Plaintiffs state that on April 13, 2022, Butler wrote to Eastgate Group Inc., one of the Plaintiffs landlords, and advised of the following:

> *This letter is to confirm to you that CWB recently on-boarded D'Angelo Brands as a client, and that we completed our initial tranche of Equipment financing on April 8, 2022.*
>
> *This letter is to further confirm to you that we are in the process of finalizing additional financing for the client, which we fully intend to fund by May 8, 2022. This additional financing will provide for the full pay-out of funds owing to you relative to the Leasehold Improvement costs. In this regard, can you kindly provide the undersigned with a Pay-Out Statement, as of May 8, 2022, as we intend to direct funds to you on this date.*

I understand that you recently met with Mr. D'Angelo and impressed upon the need to complete his financing arrangements on an immediate basis, in order to avoid distraint. We believe that it is in the best interest of all parties to avoid such action and are seeking your cooperation in this manner.

If you should have any questions regarding this matter, please do not hesitate to contact the undersigned at your convenience.

Yours Truly,
CANADIAN WESTERN BANK
[Signed by John Butler, AVP & Market Lead]

35. On or about May 5, 2022, the Plaintiffs' consultant/advisor, Arnone, directed to the Plaintiffs' solicitor a letter of direction for the payment of their commission for the loan. The email from Arnone to D'Angelo and Runaghan reads as follows:

Dear Frank/Gemma,

We appear to be near the finish line with CWB. As a result, I have attached a Letter of Direction for your lawyer so that Suzanne and I get paid as per our agreement.

36. In addition to the letter Butler sent to the Plaintiffs' Landlord, Butler wrote a similar letter to other suppliers advising them that funding would take place by May 8, 2022.

37. Butler also in early May wrote to the Plaintiffs' lawyer requesting a pay-out of the landlord's debt so that these could be funded without further delay.

38. In response to Butler's letter, Alectra advised D'Angelo confirming that:

We have received the attached letter from the bank. To confirm, the bank will be providing funds to you by May 8th, which is Sunday. We will be extending the date of payment for both 4500 Eastgate & 5901 Tomken until May 9th. Both payments need to be paid in full by May 9th with proof of payment sent in to us.

39. On May 11, 2022 Butler wrote to another of the Plaintiffs advising that funds would be released not later than next week. In his email Butler writes

Although we have made significant progress towards funding, we have been delayed slightly as we work through loan documentation and pay-outs. The loan proceeds are being advanced to the Bank's Counsel, who is in turn coordinating with the suppliers and their counsel, where applicable.

The delay has been due strictly to the Bank and our legal counsel – and is in no way related to D'Angelo Brands – please accept our apologies.

From a timing perspective, we are somewhat at the mercy of Counsel, who understanding the priority of completing funding. I believe we will be able to release funds not later than next week.

In the interim, if you have any questions, please let me know.

40. On May 12, 2022, Butler and CWB destroyed the Plaintiffs' business as Alectra disconnected the hydro utility, and later the landlords locked out the Plaintiffs from their business for not delivering payments as promised by Butler. It turned out to be the case that Butler had deceived and lied to the Plaintiffs including their suppliers and landlords.

41. On May 13, 2022, following the Plaintiffs' plant being shut down due to the negligent misrepresentations made by the Defendants, the Defendants presented to the Plaintiffs a Commitment Letter dated May 12, 2022. The Plaintiffs states and the fact is that such new Commitment Letter forms the basis of all the misrepresentation and negotiations in bad faith undertaken by Butler to the Plaintiff's detriment as the loan as promised by Butler was not yet approved despite Butler assurances to the Plaintiffs that the loan had been approved. Had the Plaintiffs been informed of the fact that the loan had not yet been approved, the Plaintiffs would have secured a loan in March or April with another financial institution.

42. The Plaintiffs state that the Commitment Letter of May 12, 2022 presented to the Plaintiffs on May 13, 2022 had new conditions, never discussed with the Plaintiffs and these were impossible to satisfy in a timely fashion. One of the conditions was for a new appraisal be conducted on the Plaintiffs' equipment while the plant was now shut down having no access to it without Hydro.

43. Contrary to Butler's advice and representations, the Plaintiffs did not receive the loan funds as committed by the Defendants. The Plaintiffs state that the Defendants made serious misrepresentations which were relied upon the Plaintiffs to their detriment, such misrepresentations were done in bad faith which ultimately caused the Plaintiffs to suffer damages to the point of having their business shut down after the D'Angelo family had been in business for over 25 years.

44. The Plaintiffs state that the conduct and misrepresentations of Butler were egregious, reprehensible, and reckless.

45. Butler in his dealings with the Plaintiffs, Arnone and Kekely knew or ought to have known that one of the suppliers of the Plaintiffs, Alectra, would disconnect the hydro utility from the Plaintiffs' facility if it was not paid by the first week in May for the hydro bill owed to them by the Plaintiffs.

46. The Plaintiffs state that as of April, and again by May 3rd or 4th, 2022, Butler knew that if Alectra was not paid as promised by the Defendants, the Plaintiff's company would be shut down and over 200 employees would be without a job.

47. The Plaintiffs state that Butler and CWB were negligent and reckless in allowing Alectra to disconnect the hydro when they knew or ought to have known this would happen if funds were not delivered to them by the deadline imposed, which Butler had promised to satisfy.

48. The Plaintiffs state that:

a. The representations were made in the context of a special relationship;
b. The representations were untrue;
c. The representations were made negligently;
d. The plaintiffs relied on the representations;
e. The Plaintiffs' reliance on the representations were reasonably foreseeable by the Defendants;

f. The Defendants knew or ought to have known that the Plaintiffs would rely on the representations; and

g. As a result, the Plaintiffs have suffered damages for which the Defendants should be liable.

49. Butler understood from the Plaintiffs the necessity and urgency in having loan funds available immediately at their disposal in order to satisfy debts owed to Alectra, the hydro utility, and the Landlord. Butler advised and confirmed and falsely misrepresented on many occasions that the loan had been approved and that he would be funding immediately. Despite these false misrepresentations, Butler advised D'Angelo to cash in his RRSP and not to worry about the penalties as the loan would be forthcoming any day now.

50. On the advice of Butler, acting also as his financial advisor, D'Angelo cashed his RRSPs, and the family took high ratio mortgages on personal properties to service the company's debts, believing on the advice of Butler that the loan had been approved and that funds were to be delivered in a short time span and such loan would make the personal Plaintiffs whole again.

Breach of Fiduciary Duty

51. Butler misrepresented to the Plaintiffs that they would be fully financed by May 8, 2022.

52. The Defendants failed to follow through with the loan commitment.

53. The Plaintiffs further state that despite the wording in the Letters of Intent or other agreements signed by the Plaintiffs, through the representations and assurances made by Butler, the Defendants now had an obligation to advance funds despite other terms that the Defendants may now be alleging were not satisfied. The representations and assurances made by Butler to the Plaintiffs constitute a verbal and/or oral agreement by which the Defendants are now bound.

54. The Defendants owed a duty of care to D'Angelo and Runaghan to act with reasonable care and judgment. Such duty of care included to act for the Plaintiffs' sole benefit and best interests, and to place the Plaintiffs' interests ahead of their own interests or those of its employers. Butler failed to be diligent and independent and made erroneous recommendations and advice in pressing upon the Plaintiffs to cash out their family RRSP and take mortgages on their personal properties to keep the business running.

55. The Plaintiffs would have not committed to the loan presented by the Defendants had they been advised in a timely manner by them that the loan was not approved.

56. The Plaintiffs, as a direct result of having the hydro utility disconnected by the actions of the Defendants, they are unable to reengage the everyday operations of the company and are unable to fulfil any orders to its customers. The Plaintiffs relied on the Defendants misrepresentations and at each and every step of their promises to their detriment. The Defendants' representations were misleading, untrue, and/or inaccurate. The Defendant's misrepresentations to the Plaintiffs were negligent.

57. The Defendants were negligent in making representations that the loan would be advanced when promised, as Butler did not have the approval nor the authorization to advance the loan.

58. The Defendants knew or ought to have known that the Plaintiffs would rely on their representations, and it would be detrimental to the Plaintiffs should those representations be untrue. The Plaintiffs' reliance on those representations was reasonable in those circumstances. The Defendants owed the Plaintiffs a duty of care based on a special relationship. It was reasonably foreseeable, and/or the Defendants knew or ought to have known that the Plaintiffs would rely on representations made by senior banking officials for the Defendants in the course of the loan considerations. The Plaintiffs have also suffered prejudice to their reputation in the eyes of various suppliers and customers.

59. The detrimental reliance has caused damages to the Plaintiffs and the Defendants are liable to the Plaintiffs for negligent misrepresentation, breach of contract, breach of duty of care, breach of trust, breach of fiduciary duty.

60. At all times, the Defendants failed to realize the financial circumstances of the Plaintiffs. They failed to proceed diligently and expeditiously and lacked the consideration of the Plaintiffs' financial position. After the Plaintiffs' manufacturing facility was shut down of May 12, 2022, the Plaintiffs requested an updated accounts payable listing a week after the manufacturing facility was shut down. By this time, the Plaintiffs missed their payroll obligations to their employees. No one could enter the plant without electricity, and access to any information on their computers, without electricity, would be impossible.

Conflict of Interest, Bad Faith and Further Breaches of Fiduciary Duties

61. The plaintiffs further state that the Defendants acted dishonestly and in bad faith by hiring the Plaintiffs' advisor, consultant, and employee, Kekely. The Defendants hired Kekely as Assistant Vice President, Commercial Accounts for CWB. The Defendants did not advise the Plaintiffs that Kekely was interviewed or hired for the position of being an employee of CWB. The Plaintiffs plead that the Defendants have breached their duty of good faith owed to the Plaintiffs. The Defendants also acted in bad faith and placed themselves in a conflict-of-interest position when on or about late March early April 2022 they hired Kekely while she was an advisor, agent, and employee of the Plaintiffs. The Defendants' conduct caused damages to the Plaintiffs, and they suffered damages.

62. The Plaintiffs allege that the CWB misused confidential information when it hired Kekely while being an employee of the Plaintiffs. The Plaintiffs states that due to this egregious conduct by CWB, the court should make an adverse inference in favour of the Plaintiffs by finding that the Defendants conduct merits an award of punitive damages against them.

63. Also, the Plaintiffs state that the Defendants owed a fiduciary duty as well as a duty to act in good faith in dealing with the Plaintiffs.

64. The Plaintiffs state that the actions and conduct of the Defendants were malicious, harsh, misleading, and intentional. The Plaintiff states that punitive damages, aggravated damages, and exemplary damages will serve a rational purpose in this instance and that an award of $20 million dollars should be made against the Defendants.

Irreparable Harm

65. By not advancing the loan funds as promised by Butler, and by the Defendants causing the hydro utility service to be disconnected, and by having the Plaintiffs RRSPs cashed and by taking mortgages on their personal properties as advised by Butler, the Plaintiffs continued to be unable to secure any other finances and as a result, these steps taken by the Plaintiffs on the advice of Butler stand to cost them millions of dollars.

66. The Plaintiffs, until May 12, 2022, had lucrative contracts with Arizona beverages and others ranging approximately $150 million USD of sales per year for the next 5 years. Such contract has been terminated as the Plaintiffs' manufacturing plant has been shut down by the conduct of the Defendants. The Plaintiffs also claim for damages to their inventory and equipment which had a value as of May 12, 2020 of approximately $11 millions dollars. The full particulars of the full damages suffered by the Plaintiffs will be made available prior to trial.

67. The Plaintiffs propose that this action be tried at the City of Newmarket.

Date: June 13, 2022

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Court File No.:

2722959 ONTARIO INC. et al.
Plaintiffs

-and-

CANADIAN WESTERN BANK et al.
Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Newmarket

STATEMENT OF CLAIM

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TAB 2

Court File No.: CV-22-00001968-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

2722959 ONTARIO INC., FRANK D'ANGELO, and GEMMA RUNAGHAN
Plaintiffs

and

CANADIAN WESTERN BANK and JOHN BUTLER
Defendants

FRESH AS AMENDED STATEMENT OF DEFENCE

1. The Defendants, Canadian Western Bank ("**Bank**" and "**CWB**") and John Butler ("**Butler**") deny each and every one of the allegations contained in the Statement of Claim ("**Claim**") and put the Plaintiffs to the strict proof of thereof.

Defence in a Nutshell

2. The Claim has been brought to distract from the fact that the Plaintiffs sought and obtained a $625,000 loan from the Bank under false pretenses and have failed to pay any amounts owed on that loan when due, or on related personal guarantees. The essence of the Claim is that CWB and its agents made representations to the Plaintiffs and their third party creditors that somehow ground a fanciful legal duty by CWB to have lent a further $6.55 million to a hopelessly insolvent debtor who was actively deceiving the Bank and had no ability to satisfy the ordinary pre-conditions to any such loan advance, including providing a first ranking security charge on the assets of the

corporate plaintiff. The Claim is commercially absurd, has no basis in law, is strategic in nature and should be struck with costs on the appropriate scale.

Overview

3. A commercial loan is a discretionary, debt-based funding arrangement between a borrower (usually a business) and a financial institution, such as a bank. Banks commonly provide non-binding discussion papers to potential borrowers as an initial step, allowing for due diligence to be completed by the lender. Only once the diligence process is complete will a loan be sent to a bank's internal credit department for formal approval.

4. After a loan is approved, the lender will prepare and circulate a commitment letter indicating a) the credit facilities that have been approved, b) the security required by the bank in exchange for the loan, and c) the conditions precedent to the loan. It is customary that commitment letters include certain criteria not initially mentioned in the non-binding discussion paper, to account for any issues that may have been discovered by the bank during its diligence process or to update stale information. This is the standard process that is generally followed by CWB when it makes loans and was the process followed in this case.

5. The Plaintiffs, Frank D'Angelo and Gemma Runaghan, are sophisticated businesspersons with knowledge of the ordinary commercial lending process due to their experience obtaining commercial financing for their various businesses. In addition to their own experience, at all material times the Plaintiffs relied on an Advisory Team (defined below) comprised of accountants and lawyers throughout their dealings with the Defendants.

6. At all material times it was known to the Plaintiffs that:

(a) There is no funding commitment until a loan is approved by the lender;

(b) A lender requires due diligence and up to date appraisals prior to making an asset-based loan;

(c) Monies will not flow until all pre-conditions to the loan are satisfied;

(d) Any material change in business prospects will negate a lending commitment;

(e) No representations regarding funding are final until the loan documentation is signed; and

(f) Each loan discussed with a lender is a separate and distinct obligations with its own diligence process, documentation and pre-conditions.

7. No binding commitments or representations were ever made that would obligate the Bank to have advanced any sum to the Plaintiff, 272 (defined below) as alleged. To the extent any representations were made, they were made to third party creditors for the benefit of 272 and not to its detriment. Moreover, the Plaintiff and the Bank were not in an exclusive financing arrangement and the Plaintiffs were free to and had a duty to concurrently seek financing from other sources if that was in the best interests of the corporate Plaintiff.

8. The claim against Butler in his personal capacity is improper, has no basis in fact or in law and has been included for purely strategic and spurious purposes.

9. Critically, the Claim must fail because, among other things, the Plaintiffs did not provide full and frank disclosure to the Bank regarding the assets and obligations of 272 and its relationship to a related or associated company, 215 (defined below). Instead, the Plaintiffs and their agents deliberately misled the Bank in order to obtain financing under false pretences.

10. Specifically, the Bank made the $625,000 Small Loan (defined below) based on the fundamental misrepresentation by the Plaintiff through the lawyer representing the Plaintiffs in the

Claim, Joseph Lo Greco, that the assets of 215 had been transferred to 272. This transfer, which did not occur, was a pre-condition to that Loan. The Plaintiffs also deliberately failed to disclose the full assets and obligations of 272, its relationship to 215, and any carry-over liabilities from 215 to 272. The Plaintiffs therefore obtained the Small Loan under false pretenses and sought to obtain the $6.55 million Large Prospective Loan (defined below) on the same false pretenses.

11. At all material times, the Plaintiffs were aware that either 215 or 272 owed the following liabilities, all of which were concealed from the Bank as to identity and/or quantum including, *inter alia*:

(a) Approximately $7.7 million to Canada Revenue Agency for HST arrears, which create a "super priority" deemed trust over the assets of the tax debtor and any assets transferred to third parties pursuant to the Income Tax Act and Excise Tax Act;

(b) Approximately $2 million to Alectra, its electricity provider;

(c) Approximately $9 million to AriZona, which payable was secured by a GSA;

(d) Undisclosed liabilities (in the millions) to the Landlord (defined below);

(e) Undisclosed liabilities (in the millions) to the City of Mississauga/Region of Peel; and

(f) Potentially significant unpaid source deductions and other employee related amounts.

12. Ultimately, the Plaintiffs were unable to meet the Bank's due diligence requirements and ordinary pre-conditions, including to provide a first ranking security charge on the assets of 272. The nature and quantum of 215's undisclosed or partially disclosed obligations (which would have become obligations of 272 had the transfer of assets occurred) are such that 272 could never have fulfilled the standard pre-conditions to the Large Prospective Loan, which was entirely out of the Defendants' control. Regardless, the Plaintiffs' misrepresentations and material non-disclosures

vitiates any duty the Bank may have been said to owe to advance funds to 272, which duty is specifically denied.

13. Further, the damages claimed are remote, speculative and factually unsustainable. The Claim purports that the Bank's failure to advance $6.55 million to 272 predicated the shut down of the D'Angelo Brands business and the loss of more than 10 years of speculative future revenue. This is notwithstanding that the business has never run at a profit and that at all material times the Plaintiffs were aware that their largest customer, representing 98% of their annual revenues, refused to enter into a production agreement for that period.

14. The demise of the D'Angelo Brands business was caused by factors outside of the Defendants' control, but within the Plaintiffs' control, including the Plaintiffs' failure to pay creditors (including tax liens owed to CRA), satisfy payroll and make the appropriate government remittances.

15. Even if the Bank had advanced the Large Prospective Loan, the quantum of that loan would have fallen far short of what 272 required to satisfy its largely undisclosed liabilities as they came due. 272 would not have been able to continue in business for any materially longer period than it did. Even if it had found a source of financing, there is no basis upon which to presume future profitability and therefore any loss occasioned on a failure to fund.

16. The Claim is illogical and divorced from commercial reality. The Plaintiffs have failed to put forward any coherent, rational commercial explanation for why the Defendants would do what they are alleged to have done, or how the Defendants would have benefited from their alleged breaches, which are denied. The Claim is plainly an abuse of process of this Honourable Court.

Parties and Relevant Non-Parties

17. The Plaintiff, 2722959 Ontario Ltd. (improperly named in the Claim as 2722959 Ontario Inc.), ("**272**"), is an entity incorporated on October 23, 2019. 272 is the borrower/debtor of the Small Loan (defined below), which remains in default as of the date of pleading.

18. The main business activities of 272 up until May 12, 2022, were the manufacturing and packaging of beverage drinks and edible oils, both through private labels and pursuant to co-packaging arrangements for brands such as AriZona (defined below). Although the Claim alleges that 272 is the owner of "D'Angelo Brands", the Defendants understand the actual owner of that trade name to be 2156775 Ontario Inc.

19. The non-party, 2156775 Ontario Inc. ("**215**"), is a related or associated company to 272. It was incorporated on December 6, 2007. 215 historically operated under the business under the trade name "D'Angelo Brands" and carried on the business operations of D'Angelo Brands at least until the incorporation of 272. 215 was at all material times the tenant of 4540 and 4544 Eastgate Parkway, Mississauga, Ontario, out of which 272 operated ("**Premises**").

20. Both presently and at the time the Plaintiffs were dealing with the Bank, both 272 and 215 were insolvent, impecunious, and without assets. The D'Angelo Brands business has operated at a loss year-over-year since at least and has never been run at a profit. For instance, in the four months ending August 31, 2007, D'Angelo Brands incurred a net loss of approximately $8.1 million before income taxes.

21. The true nature of the relationship between 215 and 272 is not clear due to the Plaintiffs' deception. 215 or its predecessor company was historically funded for approximately ten years by

the late Barry Sherman. The facts surrounding this funding are set out in the 2007 CCAA filing of D'Angelo Brands[1] which facts are incorporated into this pleading as necessary. 215 appears to have owned a majority, if not all, of the assets of the D'Angelo Brands business and may still own them.

22. As will be further described below, it was a condition precedent of the Large Prospective Loan (defined below) that all of the assets, debts, and liabilities of 215 be transferred to 272. Counsel to the Plaintiffs in this litigation, Joseph Lo Greco of Lo Greco Stilman LLP ("**Lo Greco**"), misrepresented on the Plaintiffs' behalf that this had occurred when it had not, and has not to date.

23. Frank D'Angelo is the directing mind of 272 and at all material times held himself out as being the principal and authorized representative of 272 with whom CWB dealt. D'Angelo is a significant shareholder of 215 and is 215's directing mind. D'Angelo provided an unlimited personal guarantee in respect of the Small Loan and was similarly required to provide an unlimited personal guarantee in respect of the Large Prospective Loan, had it been finalized. D'Angelo also received independent legal advice from the Plaintiffs' counsel, Joseph Lo Greco, regarding the guarantee for the Small Loan. Mr. Lo Greco acted as the witness for that guarantee.

24. Gemma Runaghan is the sole officer and director of 272. Runaghan provided an unlimited personal guarantee in respect of the Small Loan and was similarly required to provide an unlimited personal guarantee in respect of the Large Prospective Loan, had it been finalized. Runaghan

[1] https://www.insolvencies.deloitte.ca/Documents/ca_en_insolv_steelback_apprecordwexhibitnov1507_121509.pdf

received independent legal advice from the Plaintiffs' counsel, Joseph Lo Greco, regarding the guarantee for the Small Loan. Runaghan and D'Angelo are spouses.

25. CWB is a Schedule I Bank pursuant to the *Bank Act*, S.C. 1991, c.46 with its head office is in Edmonton, Alberta. CWB provides banking, lending, and various related financial services to clients across Canada. CWB operates a banking centre in Mississauga, Ontario.

26. Butler is an individual residing in Whitby, Ontario. Butler is the Assistant Vice President and Team Lead with CWB. At all material times, Butler acted within the scope of his authority as an employee of the Bank. Butler at no time owed any duties of any kind to the Plaintiffs.

27. The non-party, Eastgate Group Inc., is an entity incorporated pursuant to the laws of Ontario and owns the commercial property known municipally as 4500 Eastgate Parkway, Mississauga, Ontario, which forms part of the Premises.

28. The non-party, Rovinelli Holdings Ltd., is an entity incorporated pursuant to the laws of Ontario and owns the commercial property known municipally as 4544 Eastgate Parkway, Mississauga, Ontario, which forms part of the Premises. Together, Eastgate Group Inc. and Rovinelli Holdings Ltd. are hereinafter referred to as the "**Landlord**".

29. The non-party, AriZona Beverages USA LLC ("**AriZona**"), is a US incorporated entity with whom the Plaintiffs did the vast majority of their business. According to the August Financial Statement (defined below), 272 derived 98% of its revenue from AriZona, and as of August 31, 2022, AriZona represented more than 78% of 272's total accounts receivable. AriZona holds a first ranking GSA over the assets of 215 for a debt of approximately $7,780,943 USD (the **"Arizona Debt"**).

October 2021 to February 2022

30. In October 2021, Butler, on behalf of the Bank, was approached by Robert Blades of Farber Financial, on behalf of 272, about a potential lending relationship. At this time, the Plaintiffs were being advised and counselled by financial advisors Suzanne Kekely (in her role as principal of Vision Business Consulting) ("**Kekely**") and Rick Arnone ("**Arnone**"). Blades and Kekely were former colleagues at Farber.

31. At the time, the Plaintiffs also retained several lawyers to represent them in various lawsuits and during the financing process with the Bank, including but not limited to Lo Greco, Greg N. Hemsworth of Capo Sgro LLP, Leo Klug of Klug Law, and Jules Berman. The Plaintiffs also relied on the accountants for 272 and 215, Feldstein & Associates LLP. These lawyers, Felstein, Kekely and Arnone are hereinafter referred to collectively as the Plaintiffs' "**Advisory Team**".

32. Contrary to paragraph 8 of the Claim, the Plaintiffs had not sought financing "for the growth of the company and to meet its production contracts". At all material times, the Bank understood, and it was a fact that the Plaintiffs were refinancing to refurbish/repurchase specific production equipment and to fund significant outstanding payables owed to creditors of 272 and/or 215, including the Landlord, the City of Mississauga, and a hydro utility supplier.

33. Contrary to paragraph 10 of the Claim, the Defendants never pursued the Plaintiffs nor provided them with any assurances, whether verbal, written, express or implied, that CWB would act as lender to 272 or "satisfy the Plaintiffs' financial needs". The defendants plead that the decision to lend funds is entirely discretionary and there is no obligation at law for any lender to lend to any potential borrower, let alone an insolvent company, who cannot satisfy the ordinary conditions precedent to the loan under discussion.

34. Contrary to paragraph 11 of the Claim, the Plaintiffs were not approved for any credit facilities in January 2022. From November 2021 to February 2022, the Bank and 272 were in discussions with respect to potential credit facilities. Butler oversaw those discussions and was directly engaged with 272 (through its principal, D'Angelo) as well as Lo Greco, who represents the Plaintiffs in this action. As set out further herein, unbeknownst to the Bank, Lo Greco appears to have made a personal, unsecured loan to the Plaintiffs at the end of 2021.

35. Contrary to paragraph 12 of the Claim, there was no "agreement" reached on February 3, 2022, that the Bank would act as 272's lender. On this date, one of the Plaintiffs' financial advisors, Kekely, merely sent the Bank an interim reporting package on behalf of 272 for the Bank's consideration as an initial step of the Bank's diligence process.

36. 215 was funded for approximately ten years by the late Barry Sherman. Following his death, protracted negotiations ensued between the Sherman Estate and D'Angelo to separate their interests in 215. The Plaintiffs confirmed to the Bank that as part of a settlement, D'Angelo retained his interest in 215 as well as title to the assets of 215, free of liabilities. The full particulars of the foregoing are known to the Plaintiffs.

37. The Plaintiffs purported to be unable to deliver the historical financial statements of 215 to the Bank due to confidential terms of the Sherman settlement. As such, the Bank relied on the Plaintiffs' representations and those of their Advisory Team regarding the assets and liabilities of 215, 272's relationship with 215 and what assets/liabilities would be transferred from 215 to 272.

38. As part of the interim reporting package, the Plaintiffs provided 272's interim financial statements for January 1, 2021, to August 31, 2021 ("**August Financial Statement**") and for

September 1, 2021 to January 31, 2022 ("**January Financial Statement**"). These statements were prepared by the Plaintiffs in conjunction with Feldstein.

39. The August Financial Statement represented, *inter alia*, that a) 215 is a "related company" of 272, b) as of August 31, 2021, there were no amounts payable with respect to government remittances, and c) 272 had been charged $4,988,912.00 worth of expenses by "a company controlled by a director" of 272. The Plaintiffs confirmed to the Defendants that this "company" refers to 215. As will be further described below, the material representations in relation to government remittances turned out to be deliberately false and untrue.

40. The January Financial Statement represented that 272 had assets valued at $17,741,383. The January Financial Statement also represented that, "On February 1, 2022, Arizona Beverages USA LLC forgave indebtedness due by the company in the amount of $7,780,943 USD". As will be further described below, these material representations about the forgiveness of the AriZona Debt were also deliberately false and untrue.

41. The Plaintiffs further provided the Defendants with a letter of intent from AriZona dated December 20, 2021 ("**LOI**"). The LOI set out preliminary terms of a "potential production agreement" between AriZona and 215 (and not the prospective borrower, 272) "for the production of AriZona branded products…at D'Angelo's facility" which would be "…entered into within forty-five (45) days after the date of [the] LOI". The LOI contemplated that AriZona would place orders for up to 12 million raw cases of beverages annually for a term of five years and would supply the raw materials (bottles, flavouring ingredients, sugar, pallets, caps cans etc).

42. The LOI further stated, "…unless and until such Agreement has been executed and delivered, no Party, nor any stockholders, members, owners, managers or officers of a Party shall

have any legal obligation of any kind whatsoever with respect to the other by virtue of this LOI or any other written or oral expression with respect to the relationship between the two parties except for the matters specifically agreed to herein".

43. At all material times, it was represented by the Plaintiffs to the Defendants that the LOI would be converted into an executed production agreement with AriZona. Further to this representation, and as will be described further below, it was a condition precedent to the Large Prospective Loan (defined below) that the Plaintiffs would deliver to the Bank a final sales contract between AriZona and 272 (who was not the contracting party contemplated by the LOI), confirming no material changes to the LOI (the "**AriZona Contract**").

44. The Defendants were further provided with a letter from one of the Plaintiffs' lawyers, Leo Klug, dated January 26, 2022, stating, "I am advised by Mr. Frank D'Angelo that the rents owed are in good standing with respect to 4544 Eastgate Parkway" [emphasis added]. As further described below, this representation too was untrue.

45. On January 19, 2022, at a time when the Bank was not aware of the Plaintiffs' misrepresentations and non-disclosures, as described below, a non-binding discussion paper for a total loan amount of $550,000.00 was circulated by the Bank to the Plaintiff's financial advisors, Kekely and Arnone. This non-binding discussion paper was never signed by 272. In any event, a non-binding discussion paper is not a loan agreement nor a commitment to lend.

46. On February 22, 2022, another non-binding discussion paper for a total loan amount of $10,150,000.00 was circulated by the Bank to the Plaintiffs' financial advisors, Kekely and Arnone. This discussion paper similarly was not signed by 272.

47. On March 4, 2022, an amended non-binding discussion paper for a total prospective loan amount of $6,550,000.00 was circulated by the Bank to the Plaintiffs' financial advisors, Kekely and Arnone ("**Discussion Paper**"). This potential loan was to be comprised of three separate facilities: 1) a $1,000,000 operating line of credit and revolving line of credit to assist with the ongoing day-to-day working capital requirements, 2) a $5,500,000 demand non-revolving loan to refinance and refurbish existing equipment, and to fund debts owed to the landlord of the Premises and to the City of Mississauga for an outstanding water utility payable and 3) a $50,000 corporate credit card to assist with day-to-day expenses ("**Large Prospective Loan**").

48. The Discussion Paper set out the following security requirements which the Bank would require in advance of any drawdown on any loan:

(a) 1st ranking general security agreement over all present and future assets of the borrower, to be PPSA registered;

(b) Satisfactory insurance coverage over business fixed assets to be reviewed and approved by the Bank's insurance consultant;

(c) Personal and joint and several guarantees signed by Runaghan and D'Angelo for the full amount of any advances;

(d) Subrogation/postponement of Runaghan's shareholder loan;

(e) Corporate guarantee signed by 215 for the full amount of any advances;

(f) Solicitor's favorable Letter of Opinion, confirming the validity and enforceability of the Bank's security and loan documentation;

(g) Letter of Acknowledgement that upon settlement with City of Mississauga (Water Utility dispute) a TBD amount of proceeds will be directed back as a permanent reduction to Facility #2. TO be signed by borrower and all guarantors; and

(h) **Any other security deemed necessary.** [emphasis added]

49. The Discussion Paper also had several pre-conditions to drawdown, including:

(a) Opinion on status of pending litigation with City of Mississauga/City of Peel Region Water Company;

(b) Transmittal letters for the equipment letters provided by Kohli Appraisers;

(c) Approval of insurance policy by Bank's insurance consultant; and

(d) Executed document(s) relating to forgiven payable by supplier "Arizona".

50. These pre-conditions and security requirements are typical for an asset-based loan of the nature and size that was being discussed. No commitment letter was issued at this time in respect of the Large Prospective Loan.

March 2022 – April 2022

51. In March 2022, to alleviate 272's immediate needs with respect to working capital and equipment refurbishment, the Bank suggested a smaller loan to satisfy the Plaintiffs' immediate financial needs relating to day-to-day operations. This smaller loan was proposed as the Large Prospective Loan required formal approval by the Bank's credit department, which, due to the size of the Loan, the pre-conditions and security requirements, would not be for some time. The Small Loan was a separate and independent obligation from the Large Prospective Loan.

52. On March 2, 2022, a non-binding discussion paper entitled "2722959 Ontario Ltd. (Interim Financing Proposal)" for a loan in the aggregate amount of $625,000 was circulated by the Bank to the Plaintiffs. This loan was comprised of three separate facilities: 1) a $100,000 demand non-revolving loan to finance 272's purchase and installation of a new 100-head can filler carriage/carousel and associated installation costs, 2) a $500,000 demand loan to finance day-to-day operations of the Debtor's business, and 3) a $25,000 credit card to assist with the Debtor's day-to-day business expenses ("**Small Loan**").

53. The Plaintiffs signed the discussion paper for the Small Loan on March 7, 2022, thereby acknowledging and accepting the terms contained therein. The Small Loan was a separate and independent obligation from the Large Prospective Loan, as evidenced by its terms. The Large Prospective Loan continued to be subject to due diligence and further approvals from the Bank's formal credit department and satisfaction of all conditions.

54. Butler emailed D'Angelo, Kekely and Arnone on March 24, 2022. This email clearly set out that the Small Loan was separate from the Large Prospective Loan that the parties were "continuing to work towards". Butler wrote:

> Good afternoon Frank,
>
> Please find attached our letter outlining what we have authorized as an interim financing solution. Please feel free to share this with your equipment supplier(s) – and also let them know that I'm available to speak to them, if needed.
>
> In addition to the interim financing approval, **we are continuing to work towards obtaining a broader, long-term financing/banking arrangement.**
>
> In the interim, if you have any questions, please let us know.
>
> Best,
>
> John [emphasis added]

55. The letter referred to in Butler's email, also dated March 24, 2022, stated in respect of the Large Prospective Loan, "We are also **in the process of finalizing additional long-term credit facilities**, which we anticipate will be authorized over the next 4-6 weeks". Regarding the Small Loan, Butler wrote in the letter, "In recognition of your timing considerations, we are prioritizing our loan documentation and funding processes for the interim financing arrangement. Based on our current volumes and capacity, we anticipate the funding of the equipment finance term will be completed within 1 to two weeks".

56. The Small Loan was approved seven days later on March 31, 2022. No formal approval from the Bank's formal credit department was required and Butler was able to process the Small Loan on an expedited basis for the sole benefit of 272 and its stakeholders. At this time, 272 had not satisfied a single condition precedent to the Large Prospective Loan.

57. At paragraph 27 of the Claim, the Plaintiffs mischaracterized an email from Kekely on April 1, 2022, to support their claim that the Defendants made a promise to fund the Large Prospective Loan, which is specifically denied. Kekely's email referred to the funding of the *Small Loan*. In fact, Kekely was correct that "CWB had completed their internal approvals" for the Small Loan, which had been approved one day prior. Funding took place six days later. The Defendants deny that Kekely's email provided any assurances or commitments whatsoever in respect of the Large Prospective Loan. The Defendants further deny that any representations made by Kekely would have the effect of binding the Bank in any event.

58. Contrary to paragraph 28 of the Claim, the Defendants specifically deny that Butler ever represented to the Plaintiffs that the Large Prospective Loan "would be advanced shortly". The discussion between D'Angelo and Butler on April 3, 2022, was again specifically with respect to the funding of the Small Loan.

59. Contrary to paragraph 17 of the Claim, Butler never assured the Plaintiffs that "we are almost there…everything looks good…you have nothing to worry about…the loan is coming" and the Defendants put the Plaintiffs to the strict proof thereof. Although the Plaintiffs have attempted to legitimize this alleged assurance by placing it in quotation marks, the fact is Butler never said these words to the Plaintiffs. The quote at paragraph 17 of the Claim is a fabrication.

60. On April 5, 2022, the Bank delivered a commitment letter to 272 for the Small Loan, outlining the approved terms and conditions of those credit facilities. Contrary to paragraph 29 of the Claim, the Small Loan was not a "partial loan" and it was not "advanced" to the Plaintiffs on April 5th. The commitment letter represented the Bank's approval of the Small Loan. However, as clearly set out in that commitment letter, the Small Loan was subject to security requirements and conditions precedent, including the provision of personal guarantees, which the Plaintiffs had to satisfy before any funds would be advanced.

61. Aside from the credit facilities, the security documents listed in the commitment letter for the Small Loan included:

(a) General Security Agreement providing a first security interest in all present and after acquired property to be registered in all appropriate jurisdictions;

(b) Full liability guarantees from Frank D'Angelo and Gemma Runaghan in favour of the Bank guaranteeing all indebtedness of the Borrower to the Bank;

(c) Assignment and postponement of creditors claims executed by Gemma Runaghan and 215;

(d) Acknowledged assignment of insurance coverage for full insurable values of all assets of the Borrower taken as security by the Bank with first loss payable to the Bank; and

(e) Such additional securities as the Bank may deem necessary or advisable for the purpose of obtaining and perfecting the foregoing security.

62. Full liability personal guarantees were signed by D'Angelo and Runaghan on April 5, 2022.

63. The Small Loan was an asset-based loan. The Bank required a first ranking security over the production equipment at the Premises, which the Plaintiffs advised were owned by 215. In that regard, an important condition precedent of the Small Loan was "confirmation from counsel that legal title to the equipment is held by [272]". This was crucial to the Bank's decision to make the

Small Loan because it would confirm the Bank's collateral was owned by the corporate entity from whom the Bank was receiving security.

64. On April 6, 2022, Lo Greco represented to the Bank on behalf of the Plaintiffs that 272 possessed "legal entitlement" to the production equipment used for the D'Angelo Brands Business. Based on this representation, funds under the Small Loan were advanced on April 7, 2022. The Defendants now understand that this representation was not true and that the assets of 215 were never transferred to 272. The Small Loan was therefore advanced under false pretenses and based upon the deliberate misrepresentations made by the Plaintiffs.

65. Contrary to paragraph 31 of the Claim, the Defendants specifically deny that the advance of the Small Loan represented an assurance or commitment of any kind with respect to the status of the Large Prospective Loan whether written, verbal, express or implied. The Plaintiffs were never assured of additional financing. The Plaintiffs knew or ought to have known that the Large Prospective Loan was entirely separate from the Small Loan, given that they accepted and acknowledged the terms of the Discussion Paper on March 7, 2022, which described completely separate credit facilities. Further, the Discussion Paper clearly stated that the credit facilities under discussion were not to be construed as a formal loan commitment.

66. Upon advancement of the Smaller Loan, Butler and his team immediately commenced the underwriting process for the Large Prospective Loan.

67. Contrary to paragraph 22 of the Claim, at the meeting in March 2022, Butler did not offer to send any letters to the suppliers of 272. It was D'Angelo who asked Butler to provide him with a letter outlining the status of the credit application for the Large Prospective Loan. At various points, D'Angelo tried to convince Butler to use specific words such as "approved" and to provide

an exact confirmation of a funding date, which Butler refused to do. Butler specifically advised D'Angelo that this language would be misleading and inaccurate, because formal credit department approval had not yet been obtained and a definitive funding date could not be determined until 272 satisfied all conditions precedent determined by the Bank in its discretion.

68. Butler prepared two letters on April 13, 2022. The first was addressed to the Landlord and the second was addressed to "Suppliers of D'Angelo Brands" (the "**Letters**"). Contrary to paragraph 22 and 34 of the Claim, the Letters contained no assurances that 272 would be approved for the Large Prospective Loan, nor any commitments that created an obligation on the Bank to advance any sum to 272. The Letters were clear that the Large Prospective Loan was not yet finalized and that May 8th was the *intended funding date* that all parties were working towards.

69. At this time, the Plaintiffs were well aware of the Bank's approval process because (i) D'Angelo and Runaghan were sophisticated and experienced with obtaining commercial financing, (ii) the Plaintiffs had just gone through the process for the Small Loan, and (iii) the Plaintiffs' Advisory Team provided assistance throughout.

70. At all material times, the Plaintiffs knew or ought to have known that (i) approval of the Large Prospective Loan would take the form of a commitment letter, (ii) that it was subject to the Bank's receipt of signed loan/security documentation from 272, and (iii) that any subsequent disbursement of funds was subject to the satisfaction by 272 of all conditions precedent to funding over which the Defendants had no control.

71. The Defendants relied on the Plaintiffs, and the Plaintiffs had a duty, to provide true, complete and accurate information about their assets and liabilities. Contrary to paragraph 25 of the Claim, at the time the Letters were sent, the Defendants were only aware of the following

creditors: a) the Landlord, b) City of Mississauga/Region of Peel for an outstanding water usage bill, and c) AriZona. Critically, the Plaintiffs did not accurately advise the Defendants of the amounts owed to these creditors or as to other significant obligations that would attach to any assets of 272.

72. From early April 2022 onwards, the Defendants sought a pay-out statement from the Landlord to determine exactly what amounts were owed. By April 27, 2022, the Landlord still had not provided a pay-out statement to the Defendants. On this date, Butler wrote to the Landlord,

> Apologies for sending a follow up inquiry Mr. Rovinelli. We are **trying to finalize our approval** and require your payout amount in order to complete same. I'm worried that **not having the figure could impact our ability to meet the funding date**. On this basis I'm hoping you can provide an update as soon as possible. We can complete our approval process with the figure, and can wait on the formal payout letter in due course. [emphasis added]

73. Also on April 27, 2022, Rick Arnone (a member of the Plaintiffs' Advisory Team) wrote to D'Angelo:

> Frank the landlord is not responding and the Bank needs this information. Also, your lawyer has not responded to a similar request regarding the amount owed to the Region of Peel. **They need these numbers to finalize the request and ensure timely payment**. Can you please push these people.

74. These correspondences demonstrate, contrary to paragraphs 22-23 of the Claim, that the Plaintiffs and their Advisory Team were aware that the Bank had not yet approved the Large Prospective Loan. They further demonstrate that, contrary to paragraph 25 of the Claim, there were several delays outside of the Defendants' control which impacted the Bank's ability to obtain the necessary approvals for the Large Prospective Loan.

75. The Defendants have no knowledge of the correspondence sent by the Plaintiffs' electricity supplier, Alectra Utilities ("**Alectra**"), pleaded at paragraph 38 of the Claim. However, the plain

reading of that excerpt simply demonstrates D'Angelo was making misrepresentations to creditors. At the time of this correspondence, D'Angelo appears to have misrepresented to Alectra that 272 had been approved for the Large Prospective Loan when the Plaintiffs knew this was not the case.

76. The Defendants specifically deny that they delayed the approval of the Large Prospective Loan and put the Plaintiffs to the strict proof thereof. Throughout the entire process, the Defendants worked diligently to obtain formal credit approval of the Large Prospective Loan. The Defendants' goal was to meet the proposed funding date of May 8, 2022. However, the Bank's ability to approve the Large Prospective Loan was dependent on forthcoming information from the Plaintiffs with respect to 272's assets and liabilities as well as their ability to satisfy all preconditions and security requirements, all of which was outside the Bank's control.

77. Moreover, the Defendants plead that the timeline for the Bank's ordinary due diligence process is not a relevant factor to any consideration of a claim recognized at law. No lender is required to conform to the timeline of a prospective debtor in completing its due diligence. A lender is simply not required to advance funds until it is satisfied with the due diligence it has performed and the potential debtor has furnished all information and satisfied all required pre-conditions to a loan.

<u>May - June 2022</u>

78. By early May, D'Angelo continued to make promises to creditors about the funding of the Large Prospective Loan, which had not been approved by the Bank.

79. On May 2, 2022, Butler received an email containing a chain of communication between the Plaintiffs' lawyers, Lo Greco and Leo Klug. Lo Greco represented to Klug that "Frank and

Gemma signed the agreements for the registration of the loan. All documents have been signed and delivered. The loan has been confirmed for May 9, 2022". At the time this statement was made, it was not true. D'Angelo then forwarded this correspondence to the property manager of the Premises, representing that payment to the Landlord would be made on May 9th when the Bank had made no confirmation to the Plaintiffs that this was the case.

80. On May 4, 2022, Butler wrote to the property manager of the Premises noting that the Bank was "in the process of finalizing additional financing". This confirmed to the property manager that the Large Prospective Loan had not, in fact, been approved.

81. Thereafter, D'Angelo continued to misrepresent to creditors that funding was imminent. On May 10, 2022, without a commitment letter in hand, D'Angelo wrote to the property manager, "We are hopeful for payments to you late today or Tomorrow" and, separately, "We are there". The Plaintiffs knew these representations were untrue. The Defendants are not liable for the Plaintiffs' misrepresentations to third party creditors.

82. The Bank's credit department approved the Large Prospective Loan on May 11, 2022, subject to fulfillment of the Loan's essential terms and conditions.

83. Also on May 11, 2022, Butler wrote to the Plaintiffs advising that there had been a slight delay as the Bank worked through loan documentation and pay-outs, which delay (at that time) was not on account of 272. This communication was not a promise, representation or assurance that funds associated with the Large Prospective Loan would flow.

84. The next day, on May 12, 2022, the Defendants provided the Plaintiffs with a commitment letter documenting the approved terms and conditions for the Large Prospective Loan

(“**Commitment Letter**”). The Commitment Letter stipulated the following conditions precedent, all of which required satisfaction before any funds could be disbursed:

(a) A solicitor’s letter of opinion confirming that the business, assets and financial condition of 272 and the guarantors, and all security documentation and supporting agreements were in a form satisfactory to the Bank and its solicitors;

(b) An update to the existing FMV equipment appraisal prepared by Kohli Group on December 1, 2020. The appraisal update is to confirm the current FMV of the equipment and its updated remaining economic useful life after contemplating the planned increased production per the terms of [272’s] sales arrangement with Arizona Beverages USA. The appraisal is to be accompanied by a Letter of Transmittal addressed to the Bank;

(c) Receipt of letter from [272’s] solicitor confirming the amount payable to the City of Mississauga and Region of Peel in order to remove water bill obligation from the property tax bill of 4500 Eastgate Parkway;

(d) Funds in the amount of $2,200,000 for the purpose of assisting with the outstanding water claim with the Region of Peel/City of Mississauga are to be advanced upon confirmation of the claim being resolved;

(e) Receipt of letter from the landlord confirming funds outstanding;

(f) The Bank shall receive and be satisfied with the final signed sales contract between the borrower and AriZona Beverages USA LLC, confirming no material changes to the Letter of Intent dated December 20, 2021;

(g) Executed document(s) signed by Arizona Beverages USA and [272] confirming the date and amount of the ingredients trade payable that has been forgiven, with confirmation that Arizona has no claim on the assets of [272] other than finished goods inventory;

(h) [272’s] external CPA accountant is to provide a final version pro forma opening balance sheet at February 1, 2022;

(i) [272] is to provide a written overview of equipment refurbishment to date and associated costs and expected capital expenses for the remainder of the year. To be reviewed by the Bank;

(j) Satisfactory review by the Bank’s solicitor of the existing leases and amending agreements to be signed with [272] and landlords of 4500 Eastgate Parkway, 4544 Eastgate Parkway, 4560 Eastgate Parkway, and 5901A Tomken Road to transfer existing leases to [272];

(k) The Bank's solicitor will pay out the existing corporate credit card facility provided by TD Bank to [215] on funding, and allow for discharge of the TD PPSA registration within 30 days; and

(l) The Bank's solicitor is to confirm that ownership of the assets has been legally transferred to [272].

85. As is typical with the underwriting/adjudication process, the Bank's credit department added certain stipulations to the Commitment Letter which were not listed in the Discussion Paper. The Plaintiffs were always aware of this possibility. The Discussion Paper stated that the Bank may require "any other security deemed necessary" and may request "any other information and documentation as the Lender may reasonably request to satisfy its credit requirements".

86. The requirement for an updated equipment appraisal, for example, was commercially standard and reasonable. The appraiser was unable to provide a transmittal letter for the existing appraisal prepared in December 2020 because it was outdated by more than six months. Similarly, the requirement for an assignment and postponement of creditors' claims by Runaghan and 215 was typical and commercially reasonable.

87. The Plaintiffs signed the Commitment Letter on May 13, 2022. Drawdown was premised on the Plaintiffs' ability to meet the conditions precedent and to provide the requisite security.

88. On May 16, 2022, D'Angelo forwarded Butler an email chain showing communications between Lo Greco and a representative of Alectra. This email chain revealed that Alectra had shut off electricity to the Premises due to non-payment. This was the first time the Defendants became aware that Alectra had disconnected hydro to the Premises.

89. Contrary to paragraph 45 of the Claim, the Defendants had no way of knowing that Alectra was considering shutting off power to the Premises. The Plaintiffs failed to disclose to the

Defendants the extent of the concern with Alectra, who was not listed in the Accounts Payable listing they provided to the Bank and who was corresponding separately with the Plaintiffs.

90. Thereafter, the Defendants continued to learn of new and undisclosed creditors to whom the Plaintiffs were indebted, such as the extent of payroll and statutory remittance arrears, Greenway Eco Services and, as will be further described below, CRA.

91. Throughout May 2022, Butler corresponded with creditors of the Plaintiffs including the Landlord and Alectra to provide an update on the status of the Large Prospective Loan. These communications assisted the Plaintiffs in obtaining forbearance when they would have otherwise been subject to enforcement proceedings by these creditors.

92. On May 16, 2022, Butler emailed the Plaintiffs that the Bank understood "the gravity of the situation and want to assure you that we are working with urgency to address same". The Plaintiffs responded by threatening a lawsuit if funding was not received that day.

93. On May 17, 2022, the Bank's solicitor wrote to Lo Greco to request standard information and documentation required in order to confirm 272's security position and to draft the security documentation associated with the Large Prospective Loan.

94. On May 18, 2022 Butler wrote to the Plaintiffs and their counsel, "It is urgent/critical that our Solicitor be provided with the Landlord Waiver, and confirmation from Arizona etc. The most efficient/effective way to meet our financing objective, is for the Solicitor's [sic] to be dialoguing directly." Butler was referring to the condition precedent requiring confirmation that the AriZona Debt had been waived.

95. By May 19, 2022, the majority of the conditions precedent to the Large Prospective Loan were unsatisfied. The Bank's solicitor advised the Plaintiffs that if the necessary documentation was not received by May 26, 2022, the Bank would reassess the Large Prospective Loan.

96. The Plaintiffs responded by taking the unreasonable position that 272 would not execute any loan documentation without a "guarantee" that funds would be advanced by that day at 11:00AM. They further threatened to sue the Bank and Butler in his personal capacity if funding was not received on their subjective timeline.

97. On May 26, 2022, the Plaintiffs had made no progress on satisfying the outstanding conditions precedent. It was becoming increasingly clear that the Plaintiffs were misrepresenting their ability to satisfy the major conditions precedent, such as providing the Bank with a first ranking GSA, obtaining a landlord waiver, and obtaining the AriZona Contract. As such, the Bank's solicitor wrote to the Plaintiffs' lawyer, Lo Greco,

> "On Thursday, May 19, 2022, we advised you that if your client could not satisfy all outstanding conditions, nor provide CWB with a first ranking security interest by May 26, 2022, that CWB would be re-assessing its position pertaining to its facility with your client…We have now spoken with CWB and have been instructed to advise that they are formally rescinding their financing offer to your client."

The AriZona Contract Does Not Exist and the AriZona Debt was not Forgiven

98. On June 1, 2022, Butler spoke on the phone with the owners of AriZona, Don Voltaggio and David Minarchy. They advised Butler that they had received a request from the Plaintiffs' lawyer for a copy of the AriZona Contract but that the contract did not exist. Butler was told that, contrary to the Plaintiffs' misrepresentations, AriZona was not interested in entering into a formalized agreement with D'Angelo Brands.

99. At this time, Voltaggio and Minarchy further advised Butler that AriZona would not write off or post-pone the AriZona Debt, even though they knew it was a condition precedent to funding of the Large Prospective Loan. AriZona offered to incrementally write down the AriZona Debt over time as 272 demonstrated its production capabilities. AriZona would not confirm that their security interest in 272 and/or 215 pursuant to the GSA would be restricted to the finished goods inventory. Contrary to the terms of the LOI, AriZona expected D'Angelo Brands to fund the input costs to prepare the beverages itself. As such, 272 would not have been able to provide a first ranking security interest over its assets.

100. On June 2, 2022, Sterling Bailiffs Inc. ("**Bailiff**") served 215 with a Landlord's Distress Warrant with respect to 4500 Eastgate Parkway for rent arrears and additional rental arrears in the amount of $4,971,496.72 plus costs. Also on June 2, 2022, the Bailiff served 215 with a Notice to Terminate for Failure of Tenant to Pay Rent Arrears, in the amount of $200,719.38 with respect to 4544 Eastgate Parkway.

101. The Defendants understand that the Landlord has exercised, and continues to exercise, distraint against 215.

102. The Bank subsequently discovered that 215 is indebted to the CRA for unpaid GST/HST in the amount of approximately $7.7 million, which debt constitutes a super-priority tax lien over 215. This deemed trust, super-priority lien would have followed the assets on their transfer from 215 to 272 (had it actually occurred). As such, CRA would have a super-priority lien over 215, ahead of the Bank, which meant many of the conditions precedent to the Large Prospective Loan could never be satisfied.

The Large Prospective Loan Could Never Have Been Extended

103. Even if the Defendants had known that Alectra threatened to disconnect hydro to the Premises, which is specifically denied, the advancement of funds from the Large Prospective Loan was entirely contingent on the Plaintiffs' ability to satisfy the conditions precedent, which they were never in a position to do. Below is a non-exhaustive list of conditions precedent that the Plaintiffs did not satisfy and were therefore a complete bar to funding.

Transfer of all 215 assets to 272

104. As secured lending facilities, both the Small Loan and the Large Prospective Loan were conditioned on the basis that the proposed debtor, 272, held clear title to assets sufficient to provide appropriate collateral for the advances being made. Despite material misrepresentations made by the Plaintiffs and their agents that 215 had transferred its assets to 272, this did not in fact occur.

The transfer of the existing leases of the Premises from 215 to 272

105. The Commitment Letter contained a condition that the existing leases of the Premises would be assigned by 215 to 272. This required the Landlord's affirmative consent. Although the Landlord was involved in communications respecting the targeted funding date, by at least May 16, 2022, the Plaintiffs had not approached the Landlord about fulfilling this condition. The transfer of leases never took place, as evidenced by the Landlord distraining against 215 only.

106. The Commitment Letter also required a landlord waiver in favour of the Bank. The Bank's solicitor took steps to negotiate the waiver with the Landlord. However, the Landlord would not give the waiver unless the Plaintiffs discharged a lien by the City of Mississauga/Region of Peel registered against the Premises for unpaid water services. The Plaintiffs were engaged in litigation

with the municipality and would not pay the amounts owing to discharge the lien. Therefore, the waiver was never executed.

Providing the Bank with a first ranking GSA over all present and future assets of 272

107. This is a standard pre-requisite to an asset-based loan. However, 272 could never give the Bank first priority over its assets and/or the appropriate waivers, postponements or comfort that the obligations of 215 would not sound against the assets of 272 in priority to the Bank. The CRA super priority tax lien over the assets of 215, which would have followed any transfer of assets to 272, made this impossible. Moreover, neither the Landlord nor AriZona would subordinate their GSAs to the Bank. Further, 272 may also have other undisclosed priority obligations, including for employee obligations, of which the Bank is not presently aware.

The AriZona Contract

108. AriZona was fundamental to the D'Angelo Brands business, representing the Plaintiffs' most significant co-packaging customer. AriZona represented 98% of the annual revenues of D'Angelo Brands. At all material times, the Plaintiffs knew that the Bank required a copy of the AriZona Contract without which the Bank would not advance funds.

109. The LOI clearly referenced the AriZona Contract, pursuant to which the relationship between 272 or 215 and AriZona would be governed, which was to be entered into within 45 days of the LOI. The AriZona Contract was critical to the Bank's due diligence and was a condition precedent to the Large Prospective Loan. As explained above, despite the Plaintiffs' representations, the AriZona Contract never existed and therefore could not be provided to CWB.

Confirmation from AriZona that it had written off the AriZona Debt

110. The Plaintiffs owed AriZona Debt for which Arizona maintained a GSA against 272 and/or 215. Contrary to the Plaintiffs' representations, AriZona would not postpone this GSA in favour of the Bank, would not confirm that it had no claim over the assets of 272 other than finished goods inventory, nor would it agree to subordinate its interests. This would have been fatal to the Small Loan if known and was fatal to the Large Prospective Loan because the Bank's primary collateral was over the production equipment.

Updated FMV Equipment Appraisal

111. The Plaintiffs provided the Defendants with an equipment appraisal dated December 1, 2020. Due to the passage of time, the appraisers would not certify this appraisal or provide a transmittal letter to the Bank. The Bank required the Plaintiffs to obtain an updated appraisal to confirm the value of the Bank's collateral. The Plaintiffs refused to provide this updated appraisal.

Material Misrepresentations and Non-Disclosures by the Plaintiffs

112. The true nature and quantum of the obligations and assets of 215 and 272, and the relationship between 215 and 272, were deliberately concealed from the Bank to obtain advances from the Bank under false pretenses. These included, *inter alia*:

(a) Approximately $7.7 million to Canada Revenue Agency for HST arrears;
(b) Approximately $2 million to Alectra;
(c) Undisclosed liabilities (in the millions) to the Landlord (defined below);
(d) Undisclosed liabilities (in the millions) to the City of Mississauga/Region of Peel; and
(e) Potentially significant source deductions and other unpaid employment related amounts.

113. The Plaintiffs' material misrepresentations and non-disclosures with respect to information the Bank required prior to any advance vitiates any duty or obligation the Bank may have been said to owe to advance funds to 272, which duty is denied.

114. If the Defendants were unaware of the Plaintiffs' true financial circumstances, as pleaded in paragraph 60 of the Claim, the blame lies entirely at the Plaintiffs' feet. The Defendants state they were entitled to rely on the truth of the representations made by the Plaintiffs, their Advisory Team, and those contained in the January and August Financial Statements.

215 Assets Were Never Transferred to 272

115. The negotiations regarding the Large Prospective Loan and the advances made under the Small Loan were predicated on the fundamental misrepresentation made by the Plaintiffs that the production equipment owned by 215 had been transferred to 272.

116. The Defendants relied on the Plaintiffs' representations that the assets had, in fact, been transferred from 215 to 272 for two reasons. First, Lo Greco represented on behalf of 272 that 272 held "legal entitlement" to the production equipment as of April 6, 2022. Second, 272's January Financial Statement listed zero assets for 2020. By contrast, 272 was listed as having $16,023,913 in assets (including ARs, manufacturing equipment, fleet vehicles, trailers, and cash) in 2021.

117. Despite these representations, the transfer of assets from 215 to 272 never took place. The January and August Financial Statements were therefore deliberately false and misleading.

118. By making deliberately false misrepresentations which the Plaintiffs knew would be relied upon by the Bank prior to advancing funds, the Plaintiffs sought to induce the Bank to fund under

false pretenses. They succeeded in obtaining the Small Loan under these false pretenses. They failed in respect of the Larger Prospective Loan.

Purported Forgiveness of the AriZona Debt

119. 272's August Financial Statement represented that, "On February 1, 2022, Arizona Beverages USA LLC forgave indebtedness due by the company in the amount of $7,780,943 USD". The Defendants relied on the representation that AriZona had written off the AriZona Debt which was a condition precedent to the Large Prospective Loan. This representation was a complete fabrication.

120. On May 18, 2022, Lo Greco represented on the Plaintiffs' behalf that "Arizona will be providing the [confirmation] letter as requested". No letter was ever received and the AriZona Debt was never forgiven.

The AriZona Contract Never Existed

121. At all material times, the Defendants relied on the Plaintiffs' misrepresentations that the LOI had been converted into the AriZona Contract. The Plaintiffs never confirmed otherwise.

122. The Bank only discovered that the AriZona Contract did not exist after it had rescinded the Large Prospective Loan. Regardless, AriZona appears nothad no intention to enter into a formalized agreement with D'Angelo Brands, contrary to the Plaintiffs' misrepresentations, a fact that they concealed from the Bank.

Government Remittances

123. The August Financial Statement materially misrepresented that no amounts were payable for government remittances. This was untrue. The fact is, 215 (whose assets and liabilities were to be transferred to 272 prior to drawdown) had accrued a CRA tax liability in the amount of approximately $7.7 million, forming a super priority tax lien over the assets of 215.

124. Had the Bank been aware of the tax lien, it would have immediately ceased negotiations with the Plaintiffs because it meant the Plaintiffs could never provide the first position security package over the assets of 272 required by the Bank prior to making any advance.

Non-Disclosure of Alectra Payable

125. The Plaintiffs never disclosed to the Defendants what amounts were owed to Alectra, who was omitted from the AP listing provided to the Bank. The particulars of the Alectra payable are known to the Plaintiffs but are unknown to the Defendants. The Plaintiffs also failed to advise that Alectra had threatened to shut off the electricity to the Premises due to non-payment.

126. To the extent that the Plaintiffs maintain that their business was "destroyed" as a result of the power being shut off on May 12, 2022, the Plaintiffs are the authors of their own misfortune.

Loan from Lo Greco to 272

127. Lo Greco, who is representing the Plaintiffs on the Claim, is listed as a supplier on 272's AP listing and is a creditor of 272 in the amount of over $350,000 for a "loan" ("**Lo Greco Loan**").

128. The Lo Greco Loan was not raised with the Defendants prior to advancing the Small Loan. It was only discovered after Alectra shut off electricity to the Premises. At that time, the Plaintiffs

had provided the Bank with a list of loans requiring repayment as it had requested further interim financing. The Lo Greco Loan was included in this list of loans requiring repayment.

<u>The D'Angelo Brands Business Was Doomed *Ab Initio*</u>

129. Several issues outside of the Bank's control contributed to the decline and ultimate demise of the D'Angelo Brands business.

130. 272 is a shell corporation with little or no assets. D'Angelo Brands, however corporately constituted, operated at a year-over-year loss and never turned a profit. It was insolvent from the moment it approached the Bank for funding and was only able to remain in business because D'Angelo and Runaghan injected funds from other sources into 272 to make payroll. The Defendants bear zero liability for the insolvency of 272 and the Plaintiffs' inability to operate their business.

131. Even if the Bank had advanced the Large Prospective Loan, the quantum of that loan would have fallen far short of what 272 required to satisfy its largely undisclosed liabilities. Therefore, it cannot be assumed that 272 would have been able to continue in business for any longer period than it did. Even if 272 had found a source of financing, there is no basis on which to presume future profitability and therefore any loss occasioned on a failure to fund.

132. Further, the Plaintiffs purchased a large piece of equipment (a carousel) with the funds advanced under the Small Loan, but that carousel never shipped due to supply chain issues. This was entirely outside of the Defendants' control. These specific details are not within the knowledge of the Defendants but are known to the Plaintiffs.

133. Without the main carousel, the operations of 272 would have been severely limited. This would have reduced, or eliminated, 272's ability to satisfy purchase orders (particularly from AriZona). The loss of AriZona as a customer and the failure of the business was inevitable.

134. Lastly, AriZona was unwilling to convert its LOI into the AriZona Contract. AriZona's refusal to do so demonstrates it was not willing to commit to five years' worth of business with D'Angelo Brands. According to the August Financial Statement, the loss of AriZona (who represented 98% of the Plaintiff's revenue) would have "a material adverse effect on the company's results of operations, financial position and cash flows". Without AriZona, who was under no contractual obligation to continue working with D'Angelo Brands, the Plaintiffs' business would have been decimated.

Security for Costs

135. 272 admits it is insolvent and ceased active business operations as of May 12, 2022. It has been locked out of its Premises by the Landlord. It has no operations and no source of revenue.

136. 272's principals singed guarantees in respect of the Smaller Loan and actions have been initiated against them on those personal guarantees.

137. Accordingly, the Defendants will be bringing a motion under Rule 56 for security for costs.

No Coercion or Undue Influence

138. Contrary to paragraph 32 of the Claim, the Defendants specifically deny that they induced the Plaintiffs to take any loan from the Bank. The Plaintiffs actively sought financing from the Bank under false pretences. The Plaintiffs accepted the terms and conditions of the Small Loan

and of the Large Prospective Loan (including the provision of personal guarantees) of their own volition, without any undue influence, pressure or coercion from the Defendants.

139. The Defendants further deny they exerted any undue influence over the Plaintiffs or that the terms of the Small Loan and the Large Prospective Loan were unconscionable in any way and put the Plaintiffs to the strict proof thereof. D'Angelo and Runaghan are sophisticated businesspersons who at all material times relied upon the advice of their Advisory Team. The Plaintiffs had the appropriate agency when negotiating the terms of the Small Loan and the Large Prospective Loan and were represented by legal counsel throughout.

140. If the advice and recommendations of the Plaintiffs' Advisory Team was inadequate, which is not within these Defendants' knowledge but solely within the Plaintiffs' knowledge, that claim is properly brought against the Plaintiffs' Advisory Team who acted for them at all material times.

141. The Plaintiffs were not in relationship of exclusivity with the Bank. They could have concurrently sought financing from other sources if such financing was realistically available and in the best interest of the corporate Plaintiff. Any failure to do lies with the Plaintiffs and not with the Bank.

142. Finally, to the extent any inducement took place, it was the Bank who was induced by the Plaintiffs to extend funding under the Small Loan based upon the Plaintiffs' fundamental and material misrepresentations, as describe above.

No Claim Against Butler

143. Butler in his personal capacity is not a proper party to this action. There is no basis whatsoever to impose personal liability on him or for a lawsuit against him personally. The claim against him is strategic and should be dismissed with costs on a substantial indemnity basis.

144. Butler acted on CWB's behalf as its AVP and Team Lead with respect to the matters at issue in this proceeding. His only relationship with the Plaintiffs was as an employee of the Bank. Butler denies that he, at any time, acted outside of his capacity as AVP and Team Lead of CWB. The Defendants specifically deny that Butler, or any member of the Bank, owed the Plaintiffs a duty of care and put them to the strict proof thereof.

145. Butler was not and is not the operating mind of CWB. Butler reports to other senior representatives of the Bank and to the Bank's credit department who approve all strategic and directional decisions involving CWB, including the matters at issue in this proceeding.

146. Butler denies that he owed any common law duties to the Plaintiffs in his personal capacity, including any fiduciary duties or duties of confidentiality. In the alternative, if Butler did owe any common law duties, which is denied, then he did not breach them.

147. If Butler acted in his personal capacity with respect to the matters at issue in this proceeding, which is strictly denied, Butler denies that he or the Bank engaged in any wrongdoing, breached any duties, or that he directed the Bank to do so. It was the Plaintiffs, not Butler, who materially misrepresented facts that were critical to the Bank's underwriting process, concealed the existence of creditors and the quantum of liabilities owed to known creditors.

148. In the further alternative, Butler denies that he caused or persuaded CWB to breach any duties, or that he intended to do so.

Butler Was Not a Financial Advisor to the Plaintiffs and Did Not Owe any Fiduciary Duties

149. Butler was never in a special relationship of trust with the Plaintiffs. Butler is a commercial banker and employee of CWB who at all times acted appropriately, with a view to the best interests of CWB. He is not a personal financial advisor and did not assist the Plaintiffs in this capacity at all. At all times, Butler was diligent, reasonable and accommodating to the Plaintiffs and did his utmost to assist them to the extent he could within the bounds of his authority on behalf of the Bank.

150. In this regard, Butler obtained approval for the Small Loan while the Bank's diligence and underwriting processes were underway with respect to the Large Prospective Loan.

151. The Defendants specifically deny that Butler ever offered personal services to the Plaintiffs or assured them he would be personally assist with 272's growth. All communications between Butler and the Plaintiffs took place against the context of Butler's role as a representative of the Bank. All communications related solely to the Small Loan or the Large Prospective Loan.

152. The Defendants specifically deny that Butler made any suggestion or recommendation to the Plaintiffs in relation to their personal finances. Contrary to paragraphs 23-24 and 49-50 of the Claim, D'Angelo and Runaghan did not liquidate their RRSPs based on any instruction, advice or influence on the part of the Defendants or make nay other recommendations or suggestions regarding their personal finances. Butler discovered that D'Angelo and Runaghan had liquidated

some of their RRSPs after they had already done so. Butler was advised by D'Angelo that he and Runaghan took this step to meet payroll obligations.

153. D'Angelo and Runaghan liquidated their RRSPs of their own volition to allow the D'Angelo Brands business to continue, to insulate themselves from potential liability for unpaid employee obligations, and because they understood CWB had not provided a firm/unconditional date nor any commitments as to when/if the Large Prospective Loan would be approved.

No Conflict of Interest

154. The Defendants specifically deny they were ever in a conflict of interest as a result of the hiring of Kekely into the Bank's commercial accounts department or that it is relevant or probative of any issue in this action.

155. Kekely continued to work on obtaining loan approval for the benefit of the Plaintiffs after she joined the Bank. Kekely's continued involvement in the Large Prospective Loan served only to benefit the Plaintiffs and caused them no detriment whatsoever.

156. Regardless, the Plaintiffs have failed to particularize their claim with respect to the alleged conflict of interest and the Defendants put the Plaintiffs to the strict proof thereof.

Damages are Remote, Exaggerated and the Plaintiffs Failed to Mitigate

157. The damages sought by the Plaintiffs are remote, exaggerated, speculative, factually unsustainable, and not recoverable at law. The Claim asserts that the Bank's failure to advance under the Large Prospective Loan predicated the shutdown of 272 (and, by inference, 215) and the loss of more than 10 years of projected future revenue. The Bank had no obligation to lend to 272

and the Defendants deny that the Plaintiffs suffered losses as a result of the Bank's decision not to lend under the Large Prospective Loan.

158. Any losses suffered by the Plaintiffs are not attributable to the Defendants or the events at issue in this litigation. The fact is, 272 operated for an extended period on a year-over-year loss basis, had never operated at a profit, and was insolvent (based on its true and undisclosed liabilities). 215 and any predecessor company operating as D"Angelo Brands was only able to continue in business because it had been funded for years at a loss by Barry Sherman. The Plaintiffs' pre-existing defaults, including their indebtedness to the Landlord, Alectra, CRA, City of Mississauga/Region of Peel, as well as their supplier issues, developed as a result of a loss of that financing source and/or the Plaintiffs own negligence and failure to operate their own business.

159. At all material times, the obligation to obtain financing, pay creditors and satisfy payroll rested on the Plaintiffs and not, CWB, a third party bank.

160. As pleaded above, the D'Angelo Brands business would have failed even if the Bank had extended funding under the Large Prospective Loan due to the sheer size of its liabilities, notably the super priority tax debt owed to CRA, the failed delivery of the main carousel, and AriZona's refusal to enter into a contract.

161. Further, the Plaintiffs failed to mitigate their damages throughout. The Plaintiffs had an Advisory Team consisting of at least five professionals. It defies logic that the Plaintiffs would not have considered any other lenders, including the Toronto-Dominion with whom they held an existing account, for their refinancing needs.

162. If the Plaintiffs perceived at any point that the Defendants were delaying the approvals or the funding of either the Small Loan or Large Prospective Loan, which is denied, then it was incumbent upon the Plaintiffs to examine their lending options and cast the net wider than simply CWB. Regardless, the Bank was entitled to conduct its diligence as it saw fit, set any preconditions or security requirements as it deemed fit, and had no obligation to lend to the Plaintiffs at all, or by a specific date.

163. The Plaintiffs' choice to continue negotiating with CWB even at a time when they claim the Defendants were "unnecessarily delaying funding", which is denied, was entirely their own choice. Regardless, even if the Plaintiffs had approached other lenders they would have been subject to substantially the same, or even more onerous, pre-conditions.

164. Further, if the Plaintiffs have suffered any reputational damage, which is denied, it is entirely of their own doing. The root cause of the failure of the D'Angelo Brands business was its pre-existing debts and the Plaintiffs' inability to run the business profitably. In fact, in the absence of the Letters sent by Butler, which had the effect of causing creditors to forbear, the D'Angelo Business would have shut down earlier than it did. The Plaintiffs have suffered no damages at the hands of the Defendants and, if anything, received a benefit from the Defendants' involvement, including the Small Loan which has not been repaid in accordance with its terms.

165. The Plaintiffs have further failed to particularize their damages.

166. Lastly, the Plaintiffs are not entitled to the equitable relief they seek given that they materially misrepresented and concealed important facts from the Bank in order to obtain funding under false pretenses, and have not come to the court with clean hands.

General

167. The Defendants deny that Newmarket is the appropriate venue for this Claim. The parties are located in Mississauga and the proper venue is Toronto.

168. The Defendants ask that this action be dismissed with costs on the appropriate scale.

October 23, 2022

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ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at NEWMARKET

FRESH AS AMENDED STATEMENT OF DEFENCE

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RCP-F 4C (September 1, 2020)

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Applicant

and

2722959 ONTARIO LTD.
Respondent

Court File No.: CV-22-00684100-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at TORONTO

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