

C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No. : 500-06-000914-180

SUPERIOR COURT
(Class Action)

MAJESTIC ASSET MANAGEMENT LLC, *ès qualité* of manager, vested with the full administration powers over the **TURN8 TACTICAL EQUITY FUND**

-and-

TURN8 PARTNERS INC.

Representative Plaintiffs

v.

THE TORONTO-DOMINION BANK

Defendant

DEFENCE OF THE DEFENDANT THE TORONTO-DOMINION BANK

IN DEFENCE TO THE REPRESENTATIVE PLAINTIFFS' ("PLAINTIFFS") ORIGINATING APPLICATION, THE DEFENDANT, THE TORONTO-DOMINION BANK ("TD BANK"), RESPECTFULLY SUBMITS THE FOLLOWING:

1. As regards the allegations set forth at paragraphs 1, 2 3 and 4 of the Originating Application ("**Application**") it refers this Honourable Court to the judgment authorizing the institution of the class action rendered by Justice Morrison on June 21, 2019 ("**Authorization Judgment**") and denies anything inconsistent therewith;
2. As regards the allegations set forth at paragraph 5 of the Application, it prays act of the definitions put forth by the Plaintiffs save and except for the terms "Corrective Disclosures" and "Pressure Selling Program" which are unproven terms and therefore denied. Any subsequent reference herein to "Impugned Documents" is strictly for identification purposes and without admission of any kind;
3. It denies the allegations set forth at paragraph 6 of the Application and adds that it is exclusively predicated on the two inadmissible CBC Reports communicated as Exhibits P-10 and P-11, the contents of which are wholly unproven and which Plaintiffs unlawfully characterize as corrective disclosures, as well as two confidential witness statements, which were filed at the authorization hearing but were never communicated as exhibits to the Application;
4. It denies the allegation set forth at paragraph 7 of the Application and adds that Plaintiffs have failed to communicate any evidence, expert or otherwise, establishing that TD Bank's Canadian Retail Business Segment experienced a significant increase in non-interest income, that was not due to "*inter alia* wealth asset growth and higher personal and business banking fee-based revenues" as disclosed in the Impugned Documents;

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5. It denies the allegations set forth at paragraph 8 of the Application and adds that Plaintiffs' characterization of TD Bank's incentives as a "Pressure Selling Program" is a strategic and disingenuous invention;
6. It denies the allegations set forth at paragraph 9 of the Application and adds that they are based exclusively on the two inadmissible CBC Reports communicated as Exhibits P-10 and P-11, the contents of which are wholly unproven and which Plaintiffs unlawfully characterize as corrective disclosures, as well as two confidential witness statements, which were filed at the authorization hearing but were never communicated as exhibits to the Application;
7. It denies the allegations set forth at paragraphs 10, 11, 12, 13 and 14 of the Application and adds that Plaintiffs have not filed any evidence in support thereof;
8. As regards the allegations set forth at paragraphs 15 and 16 of the Application, it denies making any such misrepresentations;
9. As regards the allegations set forth at paragraph 17 of the Application, it denies that Plaintiffs are entitled to any statutory or CCQ relief;
10. As regards the allegations set forth at paragraph 18 of the Application, it refers this Honourable Court to the Authorization Judgment and denies anything inconsistent therewith;
11. As regards the allegations set forth at paragraph 19 of the Application, it refers this Honourable Court to Exhibits P-1 and P-2 and denies anything inconsistent therewith;
12. As regards the allegations set forth at paragraph 20 of the Application, it refers this Honourable Court to Exhibit P-3 and denies anything inconsistent therewith as well as the allegations made in Plaintiff's affidavit filed as Exhibit P-20, and prays act of the fact that Turn8 made all investment decisions for The Fund, which included the purchase of the TD Bank shares in issue;
13. As regards the allegations set forth at paragraph 21 of the Application, it refers this Honourable Court to Exhibit P-4 and denies anything inconsistent therewith;
14. It admits the allegations set forth at paragraph 22 of the Application, but adds that Plaintiffs' proposed causes of action relate solely to TD Bank's Canadian Retail Business Segment;
15. It admits the allegations set forth at paragraph 23 of the Application and adds that the shares traded on the NYSE are irrelevant for the purposes of this class action as the description of the Class specifically excludes shares traded on that exchange;
16. As regards the allegations set forth at paragraphs 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 and 34 of the Application, it refers this Honourable Court to the 2015 MD&A filed as Exhibit P-5 and denies anything inconsistent therewith;
17. As regards the allegations set forth at paragraph 35 of the Application, it refers this Honourable Court to the 2015 Annual Report filed as Exhibit P-6 and denies anything inconsistent therewith;

18. As regards the allegations set forth at paragraphs 36, 37, 38, 39, 40, 41, 42 and 43 of the Application, it refers this Honourable Court to the 2016 MD&A filed as Exhibit P-7 and denies anything inconsistent therewith;
19. As regards the allegations set forth at paragraph 44 of the Application, it refers this Honourable Court to the 2016 Annual Report filed as Exhibit P-8 and denies anything inconsistent therewith;
20. As regards the allegations set forth at paragraph 45 of the Application, it refers this Honourable Court to the quarterly MD&As filed as Exhibit P-19 and denies anything inconsistent therewith;
21. As regards the allegations set forth at paragraph 46 of the Application, it refers this Honourable Court to Exhibit P-23 and denies anything inconsistent therewith;
22. It denies the allegation set forth at paragraph 47 of the Application and adds that it is exclusively predicated on the two inadmissible CBC Reports communicated as Exhibits P-10 and P-11, the contents of which are wholly unproven and which Plaintiffs unlawfully characterize as corrective disclosures, as well as two confidential witness statements, which were filed at the authorization hearing but were never communicated as exhibits to the Application;
23. As regards the allegations set forth at paragraphs 48, 49 and 50 of the Application, it refers this Honourable Court to Exhibit P-9 and denies anything inconsistent therewith;
24. It ignores the allegations set forth at paragraph 51 of the Application and adds that The Fund continued to purchase TD Bank shares even after the alleged corrective disclosures, including on February 14, 2018 (when the stock was trading at \$72.32), thereby contradicting Plaintiffs' allegations of over-inflation, as appears from the trade confirmations communicated herewith as **Exhibit D-1**;
25. It denies the allegations set forth at paragraphs 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62 and 63 of the Application, since the allegations made by the CBC are vague, unsubstantiated, unverifiable, inadmissible and contradicted by the March 20, 2018 report of the Financial Consumer Agency of Canada ("**FCAC**") which reviewed the domestic retail sales practices of Canada's six largest banks and concluded that it "did not find widespread mis-selling during its review". It adds that Plaintiff Turn 8's representative Craig McFadzean admitted during his deposition that he was unaware of the said FCAC report filed as Exhibit P-25;
26. It denies as drafted the allegations set forth at paragraph 64 of the Application and refers this Honourable Court to the contents of Exhibit P-12 alone;
27. As regards the allegations set forth at paragraph 65 of the Application, it refers this Honourable Court to Exhibit P-13 and denies anything inconsistent therewith;
28. As regards paragraphs 66 and 67 of the Application, it admits the existence of the March 10th News Article but denies the contents of the two CBC Reports referred to in the excerpt cited by Plaintiffs for the reasons previously mentioned. It adds that the March 10th News Article (Exhibit P-14) relied upon by Plaintiffs also indicates that one analyst at Barclays likened the story to a "Wells Fargo moment" but noted that they ultimately "do not believe that there will

be much of an impact on TD, as [they] would be surprised if the issues described were as systemic as occurred with Wells Fargo in the U.S.”;

29. It denies as drafted the allegation set forth at paragraph 68 of the Application and refers this Honourable Court to the contents of Exhibit P-12 alone;
30. As regards the allegations set forth at paragraph 69 of the Application, it refers this Honourable Court to Exhibit P-21 and denies anything inconsistent therewith;
31. As regards the allegations set forth at paragraph 70 of the Application, it refers this Honourable Court to Exhibit P-22 and denies anything inconsistent therewith;
32. As regards the allegations set forth at paragraph 71 of the Application, it refers this Honourable Court to Exhibits P-21 and P-22 and denies anything inconsistent therewith, and adds that as previously indicated the FCAC report dated March 20, 2018 concluded that there was no widespread mis-selling at the Canadian banks (Exhibit P-25);
33. It denies allegations set forth at paragraphs 72, 73 and 74 of the Application and adds that Plaintiffs have failed to communicate any evidence of the alleged “Pressure Selling Program” and have failed to communicate any expert or other evidence demonstrating that the increased earnings in TD Bank’s Canadian Retail Business Segment were attributable to any reasons other than those indicated in the Impugned Documents. Furthermore, TD Bank never restated its financial statements which constitutes further evidence of the baselessness of Plaintiffs’ allegations;
34. As regards the allegations set forth at paragraphs 75 and 76 of the Application, it refers this Honourable Court to the terms of the Impugned Documents and denies anything inconsistent therewith;
35. It denies the allegations set forth at paragraph 77, 78 and 79 of the Application since they are nothing more than baseless accusations and specious mischaracterizations;
36. It denies the allegations set forth at paragraph 80 of the Application and adds that Plaintiff Turn8’s representative Craig McFadzean admitted during his deposition that he was unaware of the identity of any employees or managers who allegedly “attempted to escalate such matters” and “were threatened and asked if they were ‘still a right fit for the job’” referred to therein;
37. As regards the allegations set forth at paragraph 81 of the Application, it refers this Honourable Court to TD Bank’s Code of Conduct filed as Exhibit P-23 and denies anything inconsistent therewith;
38. It denies the allegations set forth at paragraphs 82 and 83 of the Application;
39. As regards the allegations set forth at paragraph 84 of the Application, it refers this Honourable Court to TD Bank’s 2015 and 2016 MD&As (Exhibits P-5 and P-7) and denies anything inconsistent therewith;

40. It denies the sweeping and unsubstantiated allegations set forth at paragraphs 85 and 86 of the Application;
41. As regards paragraph 87 of the Application, it refers this Honourable Court to section 225.8 *et seq.* of the QSA and denies anything inconsistent therewith;
42. As regards the allegations set forth at paragraph 88 of the Application, it refers this Honourable Court to Exhibit P-9 and denies anything inconsistent therewith. It adds that The Fund continued to purchase TD Bank shares after the Class Period, including on April 25, 2017 and February 14, 2018, as appears from the trade confirmations (Exhibit D-1);
43. As regards the allegations set forth at paragraph 89 of the Application, it denies having made any misrepresentations in the Impugned Documents;
44. As regards paragraph 90 of the Application, the allegations set forth therein are questions of law;
45. It denies as drafted the allegations set forth at paragraphs 91 and 92 of the Application, since in 2015 TD Bank had more than 81,000 full time employees and operated 1,165 retail branches that served 15 million customers throughout Canada;
46. It denies the allegations set forth at paragraph 93 of the Application;
47. It denies the allegations set forth at paragraphs 94 and 95 of the Application and adds that Plaintiff Turn8's representative Craig McFadzean, who made all the investment decisions with respect to The Fund, admitted during his deposition that he did not rely on anything specific in the Impugned Documents to purchase the TD Bank shares in issue and admitted that he relied upon other factors relevant to a long-term investment strategy;
48. It denies the allegations set forth at paragraphs 96 and 97 of the Application;
49. It denies the allegations set forth at paragraphs 98 and 99 of the Application and adds that Plaintiffs have failed to file any documents or provide any details in support of their primary market claim;
50. As regards the allegations set forth at paragraphs 100, 101, 102, 103 and 104 of the Application, it denies having committed any fault in violation of Article 1457 of the CCQ and that Plaintiffs or any other Class Members suffered any loss;

AND IN FURTHER DEFENCE TO THE PLAINTIFFS' ACTION BUT WITHOUT PREJUDICE TO THE FOREGOING, THE DEFENDANT SUBMITS THE FOLLOWING:

I. ABSENCE OF MISREPRESENTATIONS

A. NO FALSE OR MISLEADING REPRESENTATIONS

51. The Plaintiffs first rely on supposedly false and misleading statements regarding TD Bank's business practices, risk management and ethics policies regarding its Canadian Retail Business Segment;
52. While the Plaintiffs were certainly entitled to regroup this repetitive and overlapping selection of TD Bank representations, they could not legitimately redefine, conflate or otherwise misconstrue these statements in the process;
53. The alleged TD Bank business practice misstatements only refer to its continued delivery of legendary outstanding and efficient customer service, as well as its continued recognition as an extraordinary place to work;
54. Contrary to Plaintiffs' allegations at paragraph 72 of the Application, TD Bank's statements pertaining to its legendary, outstanding and efficient customer service, as well as those asserting that TD Bank is an extraordinary place to work, were entirely accurate and true, as confirmed by the following third-party industry awards and reviews, communicated herewith as **Exhibit D-2 en liasse**:

- i. Customer Service Awards

- a) TD Canada Trust, TD Bank's customer-focused personal and small business banking brand, ranked "highest in customer satisfaction among the big five retail banks" in 2015 for the tenth year in a row according to the J.D. Power Canadian Retail Banking Customer Satisfaction Study which analyzes retail banking customers' satisfaction with their primary financial institution. The 2015 Canadian Retail Banking Customer Satisfaction Study was based on responses from more than 14,000 customers surveyed in April and May 2015 and measured customer satisfaction based on seven factors: product; self-service; personal service; facilities; communication; financial advisor; and problem resolution. TD Canada Trust performed well on all seven factors;
- b) TD Canada Trust ranked first in Customer Service Excellence among the Big Five Retail Banks in 2016 for the twelfth year in a row according to the Ipsos Best Banking Awards, which recognized Canadian financial institutions for excellence in customer experience. The 2016 Best Banking Awards were based on ongoing quarterly Customer Service Index (CSI) survey results with a sample size of 47,305 completed surveys yielding 67,678 financial institution ratings nationally as of August 2016;
- c) TD Canada Trust was voted in 2016 as the Most Trusted Brand in the Bank/Trust Company category for the fifth year in a row according to the 2016 Reader's Digest Trusted Brand Survey in Canada. The Most Trusted Brand is an annual nationwide online survey conducted by Ipsos on behalf of Reader's Digest. The 2016 survey results were based on the opinions of more than 4,000 Canadians surveyed between September 4 and 14, 2015 who were asked in an open-ended question to identify the brands they trust the most across 40 product categories;

- ii. Workplace Awards

- d) For the eighth consecutive year, TD Bank was recognized as one of Canada's Best Employers for 2017 according to Aon Hewitt. TD Bank also ranked in 2016 among the Gold Level Best Employers. The Best Employers in Canada Study is based on the opinions of an average of 700,000 employees across approximately 200 Canadian companies;
 - e) As of 2016, TD Bank had, each year since 2006, consistently been recognized by The Great Place to Work Institute as one of the Best Workplaces in Canada. Great Place to Work's Best Workplaces compilation is the world's largest annual workplace study, representing the opinions of 11 million employees globally;
 - f) TD Bank had also consistently been acknowledged as one of MediaCorp's Top 100 Employers in Canada on a yearly basis since 2008. MediaCorp's Canada's Top 100 Employers is a national competition that recognizes the employers which lead their industries in offering exceptional workplaces for their employees. Employers are evaluated by the editors of Canada's Top 100 Employers according to eight criteria: physical workplace; work atmosphere and social; health, financial and family benefits; vacation and time off; employee communications; performance management; training and skills development; and community involvement;
 - g) TD Bank ranked in the top 25 employers in Canada according to Glassdoor's Canada Best Places to Work 2016 Employees' Choice Awards. The winners were ranked based on their overall rating achieved on Glassdoor's website during the previous year;
55. In any event, the continued pursuit of a successful strategy does not factually equate to the guaranteed delivery of that strategy by every single one of TD Bank's 81,000-plus employees on behalf of 15 million customers in the Canadian Retail Business Segment;
56. The 2015 and 2016 Outlook and Key Priorities sections of the MD&As were TD Bank's goals and objectives which could not reasonably be interpreted as unequivocal guarantees of future conduct for every single TD Bank employee;
57. Contrary to Plaintiffs' allegations set forth at paragraph 79 of the Application, there was also nothing untrue or misleading when affirming that TD Bank had created a Fair and Responsible Banking Compliance Group which provided oversight, monitoring and analysis of unfair, deceptive and abusive practices. This statement instead necessarily confirmed that TD Bank was not perfect and that some of its employees could engage in such isolated practices notwithstanding its enviable and recognized customer service record;
58. Nor is it false or misleading to state that TD Bank's risk management embodied the tone at the top set by management, the acceptance of only risks which could be understood and the promotion of challenges and reporting of unacceptable risks. Again, these statements identified the existence of risks, reputational or otherwise, which any large retail operation could not avoid no matter how vigilant;
59. The disclosure of the existence and duties of TD Bank's senior executive team and reputational risk committee as well as each employee's duty to positively contribute to TD Bank's reputation

was patently accurate and true. What is misleading is to suggest that these disclosures amounted to a public covenant that every single employee would effectively do so in the future;

60. Furthermore, the disclosure of TD Bank's definition of its own reputational risks was neither false nor misleading. On the contrary it was a stark reminder that even the best of reputations can be falsely and temporarily tarnished by the actions of a very few;
61. The statements drawn from TD Bank's Code of Conduct and Ethics were neither deliberately nor unintentionally false or misleading either and Plaintiffs have not adduced any evidence of unethical, illegal or predatory practices which supposedly render this reputational roadmap obsolete;
62. In particular, the Plaintiffs have failed to prove any supposed Pressure Selling Program and have instead gratuitously made up this term based on analogies to the cross-selling scandal involving Wells Fargo. During his deposition, Craig McFadzean admitted he had no knowledge of the origin of the term. The disingenuous and inappropriate use of this colourful definition in the Application is not a lawful substitute for evidence;
63. Moreover, the Plaintiffs' concurrent reliance on the hearsay allegations included in the CBC Reports is equally unavailing. These reports only in turn refer to vague, unverifiable, unsubstantiated and subjective opinions of a few supposed yet unidentified tellers and managers;
64. The CBC Reports fail to identify any employees who were supposedly fired or threatened as well as any meaningful evidence of actual unrealistic incentive targets and policies. They do not provide any crucial context necessary to assess any of the breaches allegedly committed. They do not contain or refer to any actual witness statements or reports derived from the alleged clandestine investigation of five Vancouver branches. The reports also fail to identify any minimal verifications of the supposed employee affirmations which it appears were given repeated airtime merely because they could be utilized as fodder for predatory and sensational journalism;
65. Finally, the Plaintiffs have not adduced an iota of evidence confirming that TD Bank "consistently failed to provide adequate monitoring and oversight of identified and escalated reputational risk matters" or that its internal controls were inefficient and defective;
66. Such conclusions cannot be reasonably inferred in respect of about 100 million Canadian retail customer interactions annually involving more than 81,000 employees, based only on isolated, unidentified and unverifiable recriminations;

B. ABSENCE OF MATERIALITY

67. All of the aforementioned impugned statements invoked against TD Bank also invariably fail to qualify as misrepresentations, since they fall well short of the applicable statutory materiality standard;

68. This is also true in respect of the Plaintiffs' further allegation that TD Bank's reported Canadian retail revenue increases were misleading since they omitted to identify that they purportedly were attributable to mis-selling programs and practices;
69. Materiality is an essential and express condition or component of any statutory misrepresentation. Even if a single misrepresentation had been factually established, which is vehemently denied, it could not trigger any statutory securities relief, absent an additional finding of materiality;
70. It is also trite law that materiality involves a case-by-case application of a legal standard to a specific and contextual factual matrix;
71. The burden to establish materiality rests squarely with the Plaintiffs and cannot be presumed save when common sense inferences are warranted, which is clearly not the case here;
72. The Plaintiffs' failure to meet this burden is glaring for a number of fundamental reasons including the fact that they rely at the outset, on the wrong standard – the reasonable investor test – to determine materiality;
73. The QSA's approach to materiality is not grounded on a reasonable investor test but rather on a narrower market impact test;
74. While the distinction between disclosures of material fact and changes is paramount, both are specifically subject to an objective market impact test as appears from the unequivocal wording of Sections 5 and 5.3 of the QSA. The same is true for all other statutory securities schemes adopted in Canada;
75. Plaintiffs' allegation pertaining to materiality, set forth at paragraph 96 of the Application, is not only grammatically incongruent but is also predicated on a purported expert report (Exhibit P-24), which repeatedly invokes and relies on the reasonable investor test to arrive at erroneous conclusions of market impact;
76. The statutory definition of materiality does not rest on a plurality of possible factors which could have been considered by the reasonable investor but rather on whether the particular misrepresentations alleged could objectively have had a significant effect on the market price or value of the shares in question;
77. The market impact test is defined in strictly economic terms and limits actionable misrepresentations to those which impact the objective interest of all investors in a financial return. It represents a legislative choice to prudently balance consumer protection imperatives and the promotion of sound economic policy;
78. Remarkably, the Plaintiffs are fully aware that TD Bank's financial statements were never restated following the purported CBC Reports' corrective disclosures and that no sanctions, criminal or regulatory were ever asserted let alone levied against the Bank or its directors and officers in relation to the CBC Reports;

79. These facts alone suffice to preclude any finding of materiality and thus any misrepresentations, including the alleged omitted disclosure of supposed mis-selling and its enhancement of domestic non-interest retail revenues;
80. Purported instances of mis-selling which are insufficient to precipitate or compel a restatement of revenues cannot be seriously qualified as significantly impactful to the capital markets and are thus immaterial;
81. Moreover, given TD Bank's market capitalization and its 81,000-plus employees' engagement in Canadian retail activities in 1,165 branches with 15 million customers, it is inconceivable that isolated concerns would have had any significant effect on the market price or value of TD Bank stock during the Class Period;
82. Only systemic mis-selling practices could potentially have had a significant impact on the markets. As discussed earlier, the inadmissible CBC Reports communicated as Exhibits P-10 and P-11 do not establish any actual evidence and in any event did not refer to any widespread or systemic business practice violations;
83. It is the Plaintiffs alone who have without any factual basis alleged widespread and systemic mis-selling. Even their expert report (Exhibit P-24) has instead recognized this absence of systemic evidence by relying entirely on an assumption of the truthfulness of Plaintiffs' allegations;
84. The FCAC was established in 2001 by the Government of Canada as an independent agency, responsible for monitoring and enforcing compliance with consumer protection legislation, regulations and industry commitments by federally regulated financial entities. The Plaintiffs and their expert were or ought to have been fully aware prior to filing suit that the FCAC had launched an investigation into the domestic retail sales practices of Canada's six leading banks, following the abovementioned CBC Reports, and had concluded that there was no evidence of any systemic or widespread mis-selling practices at TD Bank and these other banks;
85. The FCAC did so following the review of 4500 complaints, 100,000 pages of sales incentive, compliance and governance banking documentation and 600 interviews with bank personnel including board chairs and directors, senior management, middle management and frontline employees;
86. The Courts have long ago confirmed that class actions are not commissions of inquiry and should not be utilized to attempt to overturn the findings of industry regulators merely to please unharmed and opportunistic Plaintiffs;
87. The courts instead owe deference to the findings of highly specialized and expert regulators who have already invested considerable public resources in order to arrive at sound investigative conclusions;
88. Finally, in this vein, the Plaintiffs were necessarily aware that the temporary decline in TD Bank's share price was not alone evidence of materiality, especially since this drop was

precipitated by speculation as to the veritable scope of unsubstantiated and exaggerated editorials;

- 89. It is precisely because they did not view the alleged misrepresentations as material that Plaintiff Turn8 purchased TD Bank shares on February 14, 2018 at the price of \$72.32 following the CBC Reports;
- 90. The Plaintiffs' action is thus not only self-serving but also clearly abusive;

II. ABSENCE OF VERITABLE CORRECTIVE DISCLOSURES

- 91. As addressed earlier herein, the CBC Reports do not even amount to admissible evidence and could hardly form the legal basis of any correction or signpost for a QSA claim;
- 92. Moreover, even if the vague, unsubstantiated and unverifiable contents of the CBC Reports were wrongfully presumed to be true, they would not rise to any level of significance when considered in their proper factual context, which is more fully described at paragraphs 78 to 85 herein;
- 93. The CBC Reports did not correct or bring to light any material misstatement or omission but instead encouraged investors to speculate that the reported issues were widespread based on unverifiable and biased sensationalism and exaggeration;
- 94. This lack of veritable and legitimate factual content also precludes the demonstration of any possible nexus with the very real contents of the Impugned Documents;
- 95. The March 6, 2017 CBC Report did not unleash a "firestorm" of anything but speculation;
- 96. Further, a public correction must be identified with precision and the dual date approach adopted by the Plaintiffs is not only indecisive but legally flawed;
- 97. Only the March 6, 2017 CBC Report could have qualified as a corrective disclosure had it reported anything materially true or viable;
- 98. The March 10, 2017 CBC Report was an unverifiable complement of the previously disclosed instances of mis-selling program allegations;
- 99. The fact that TD Bank stock price increased following the March 6, 2017 CBC Report and only dropped temporarily after the March 10, 2017 CBC Report, confirmed that the markets were erroneously responding to stoked fears that unsubstantiated incidents of mis-selling were indicative of the widespread practices previously reported in the Wells Fargo scandal addressed next;

III. CONFOUNDING FACTORS AND ABSENCE OF CAUSATION

- 100. The March 2017 CBC Reports were posted on the heels of a 2016 systemic mis-selling banking scandal involving Wells Fargo Corporation, as appears from a Forbes online article communicated herewith as **Exhibit D-3**;

101. The Wells Fargo scandal involved the opening of 3.5 million unauthorized customer credit-card and bank accounts as well as systemic efforts to hide this illegal activity from customers. Over 5,000 employees had been fired for mis-selling, and seven top members of its executive team were fined as a result of the Wells Fargo scandal, as appears from a CNN online article communicated herewith as **Exhibit D-4**;
102. Wells Fargo was not only investigated but charged and fined by a group of regulatory agencies to the tune of \$US185 million on September 8, 2016. It also paid out \$US2.7 billion in civil and criminal lawsuits and its chief executive John Stumpf was not only forced to resign but also subsequently banned from ever working in the banking sector;
103. TD Bank's stock drop following the March 10, 2017 CBC Report was not at all attributable to a proven and truthful factual corrective disclosure but rather to speculative fears that the CBC Reports had scooped the next Wells Fargo;
104. Most of the market analyst reports which were issued in the days following the CBC Report (Exhibit P-11) confirmed TD Bank's stock drop was attributable to unproven fears and speculation that TD Bank might be the next Wells Fargo or that its stock would not command its usual premium while the CBC hearsay allegations were being properly investigated, as appears from the analyst reports communicated herewith as **Exhibit D-5 en liasse**;
105. For instance, the March 13, 2017 Credit Suisse report confirmed the following:
- “The immediate reaction has been to draw parallels to the allegations regarding WFC's [Wells Fargo Corporation's] sales practices which resulted in a US\$185m settlement on Sept.8th, 2016.”
106. The BMO report issued on the same date also confirmed fear and not TD Bank factual corrections were at the heart of the stock drop:
- “The market's rush to judgment is understandable, especially in the wake of the Wells Fargo cross-selling scandal; but to conclude that what is suggested to be happening at TD is the same as what transpired at Wells Fargo is a stretch, in our view.”
107. As further appears in part from the Eight Capital report of the same date, the stock drop precipitated by the CBC Reports extended to the entire banking sector, again demonstrating that speculation and not any specific TD Bank corrective disclosure was the market driver:

“It was not surprising to see the group sell off in sympathy to TD through Friday's trading session, which we interpret in part as the market concluding that other banks may not be immune to similar allegations. Few would be surprised to learn that there was increased pressure on front line sales personnel on the back of lower retail banking volumes over the past several years.

We should note, however, there is nothing that we have observed that would suggest that TD Bank specifically has more aggressive or inappropriate sales practices relative to peers.”

108. Finally, in this regard, it is remarkable that the March 20, 2018 FCAC report specifically considered the Wells Fargo scandal before concluding that it had found no evidence of any widespread mis-selling at TD Bank or the five other largest Canadian banks;
109. The subsequent communication by Plaintiffs of a further CBC report (Exhibit P-26) suggesting that Canada's six largest banks interfered with the FCAC report finding of no widespread mis-selling is entirely false and their beleaguered attempt to sway this Honourable Court with additional hearsay opinions on the contrary attests to the significance of the FCAC findings;

IV. CCQ CLAIM

110. The CCQ Class Member claims invoked by the Plaintiffs are each subject to and conditional on a finding of reliance, as they do not benefit from any statutory presumption in this regard;
111. Even so, no evidence of any reliance on the Impugned Documents has been adduced;
112. The deposition of Plaintiff Turn8's representative Craig McFadzean instead confirmed that while he alone made the decision to purchase TD Bank stock on behalf of The Fund, he never relied on any of the Impugned Documents;
113. Similarly, the Class Members do not benefit from any statutory calculation facilitating their burden to each establish a veritable loss under the CCQ;
114. Consequently, even if the Class Members were able to establish any lawful evidence of any material representation, liability could not be determined on a class wide basis and an individual recovery scheme would be necessary to preserve TD Bank's fundamental right to a full and unfettered defence;
115. Subsidiarily, any Class Members residing outside of Québec cannot avail themselves of Québec law in any event;

WHEREFORE, PLEASE THIS HONOURABLE COURT:

DISMISS Plaintiffs' Application;

MAINTAIN the Defence of The Toronto-Dominion Bank;

THE WHOLE with costs, including expert fees.

Montréal, February 8, 2021

INF S.E.N.C.R.L./LLP

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COPY



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