

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

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	: Index No. 653594/2018
	:
IN RE RENREN, INC.	: Hon. Andrew Borrok
	:
DERIVATIVE LITIGATION	: Mot. Seq. No. 021
_____	X

AFFIRMATION OF SAMUEL MARTIN PIERCE DAWSON

I, **SAMUEL MARTIN PIERCE DAWSON**, of PO Box 10008, Grand Cayman, KY1-1001, Cayman Islands, hereby affirms the following under the penalty of perjury under the laws of New York, pursuant to CPLR 2106:

1. I have been asked to provide this affirmation as an expert in the law of the Cayman Islands by Reid Collins & Tsai LLP who are the attorneys of the plaintiffs in derivative litigation against Renren, Inc. ("**Renren**"), which subsequently settled (the "**Proceeding**").
2. There is exhibited to this declaration a paginated bundles of documents which I refer to herein as **Exhibit SD1**.

Qualifications

3. I am a Partner in, and the head of, the Litigation and Insolvency Department of the Cayman Islands law firm Carey Olsen. Carey Olsen is a leading offshore law firm with offices in 9 different jurisdictions, employing over 450 people.
4. I obtained dual undergraduate degrees in Law and Arts (Art History) from Otago University, New Zealand, both of which were conferred on me in 1996. I was admitted as a barrister and solicitor of the High Court of New Zealand in 1996.

5. In February 2006 I joined the commercial litigation and insolvency practice of the Cayman Islands law firm of Solomon Harris and was admitted as an attorney-at-law in the Cayman Islands at the same time. I became a partner of Solomon Harris in 2010. I thereafter joined my current firm Carey Olsen as a partner in its commercial litigation and insolvency practice in June 2016.
6. Throughout my 15 years as an admitted attorney in the Cayman Islands (and during my 5 years of practice in New Zealand), I have specialised in advising clients with respect to complex commercial litigation and insolvency matters. I also regularly appear as an advocate before the Cayman Islands' courts representing clients in relation to commercial litigation and insolvency matters.
7. I have previously provided expert written evidence as to Cayman Islands' company and insolvency law for hearings conducted before the High Court of England and Wales as well as District Courts of the United States of America.

Instructions

8. I understand that, having settled the Proceeding, certain persons have now raised various objections as to that settlement. I have been asked by Reid, Collins & Tsai LLP to opine on Cayman Islands law as relates derivative actions and to those objections.

Material provided

9. I have been provided with, and have reviewed copies of the following:
 - a) Amended and supplemental consolidated stockholder derivative complaint, dated 22 March 2021 (the "**Complaint**");
 - b) Affirmation of Thomas Lowe QC in support of Renren's motion to dismiss, dated 10 May 2019 ("**Lowe 1**");

- c) Consolidated affirmation of Felicity Toubé QC and Dr Riz Mokal in support of Plaintiffs' opposition to Defendants' motion to dismiss, dated 9 July 2019 ("**Toubé 1**");
 - d) Second affirmation of Thomas Lowe QC in support of Renren's motion to dismiss, dated 9 August 2019 ("**Lowe 2**");
 - e) Decision and order on motion, dated 20 May 2020;
 - f) Affirmation of Felicity Toubé QC and Dr Riz Mokal in support of Plaintiffs' motion for leave to file amended and supplemental complaint, dated 16 March 2021 ("**Toubé 2**");
 - g) Affirmation of Thomas Lowe QC in opposition to plaintiffs' motion of a preliminary injunction or prejudgment attachment, dated 30 April 2021 ("**Lowe 3**");
 - h) Stipulation of Settlement dated 7 October 2021;
 - i) Scheduling Order dated 18 October 2021; and
 - j) Notice to Shareholders dated 18 October 2021.
10. I adopt the abbreviations and definitions utilised in the Complaint and elsewhere in this declaration.
11. I note for completeness that I have previously provided Cayman Islands law advice to Reid, Collins & Tsai LLP in relation to the Proceedings and continue to be instructed as Cayman Islands counsel for the Plaintiffs in the Proceeding (the "**Plaintiffs**"). Accordingly, I will have reviewed other material in relation to the Proceeding and the parties to it.

Legal context of derivative actions

The Cayman Islands' legal system

12. The Cayman Islands legal system is a common law system modelled on English law. By operation of statute, all laws and statutes of England as at 1772 continue as laws in the Cayman Islands, save insofar as any such laws or statutes have been, or may be, repealed or amended by any law in the Cayman Islands.
13. The Cayman Islands traditionally adopts statutes that are broadly in line with English statutes. However, such statutory developments occur less regularly, and as a result, the statutory framework in the Cayman Islands tends to reflect the statutory framework in England some decades prior. The statute relevant to this opinion, the Companies Act (as revised), has grounds in historical English equivalent statutes.
14. In addition to statutory law, the Cayman Islands also has the common law, referring to the body of law developed over time through decisions of the courts.
15. The superior court of record of first instance in the Cayman Islands is the Grand Court, being a court of both common law and equity. Appeals are heard by the Cayman Islands Court of Appeal ("**CICA**"). Further appeals are heard by the Judicial Committee of the Privy Council ("**JCPC**"), which sits in England, and is the highest appellate court for the Cayman Islands. Decisions of the CICA are binding on the Grand Court, and decisions of the JCPC on appeal from the CICA are binding on the CICA and the Grand Court.
16. Given the close historical connection between England and the Cayman Islands (and other commonwealth jurisdictions), English jurisprudence exerts considerable influence over the Cayman Islands, although decisions from English courts are not binding on the Cayman Islands courts. The strength of that influence will often depend on the circumstances and the relevant statutory framework, where applicable. Given statutes tend to be subject to greater statutory reform in England, English judicial decisions which consider the legal position in England prior to such statutory reform will tend to be more relevant than judicial decisions which take into account new English legislation. That is not to say that judgments that follow English statutory reform are not influential, but greater care is required to analyse whether judicial comments reflect common law positions, or statutory positions which have not necessarily been adopted in the Cayman Islands.

Derivative actions

17. The original source of derivative actions across all common law jurisdictions was the English decision of *Foss v Harbottle*.¹ As has been summarised by the Cayman Islands Court of Appeal in *Schultz v Reynolds*:²

"The general principle established in Foss v Harbottle is what where a wrong has been done to a company, prima facie the only proper plaintiff is the company itself and that an action by a shareholder claiming relief for the company is not available. The plaintiff may only bring a derivative action if it falls within the exceptions to the rule in Foss v Harbottle."

18. The principle that the only proper plaintiff to a wrong committed against a company is the company itself, is described as the 'proper plaintiff rule'. That rule may only be avoided in the circumstances of one of the exceptions established in *Foss v Harbottle*.³ There are a number of exceptions established by that authority, but the pertinent exception is the 'fraud on the minority' exception. Where there has been a 'fraud on the minority', a shareholder may be able to sue in the name of, and for the benefit of, a Company when the directors or majority, who are in control of the company, abuse their power to secure a benefit at the expense of the company.⁴ Such a claim is known as a derivative action.
19. Within the United Kingdom, the 'fraud on the minority' rule has now been largely superseded by provisions of Part 11 of the UK Companies Act 2006. In the Cayman Islands, there have been no substantive statutory developments as to the 'fraud on the minority' exception. However, the Grand Court Rules set out the *process* by which a shareholder claimant may bring a derivative action. Order 15, rule 12A sets out the

¹ *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 [Exhibit SD1, pp 1-29].

² *Schultz v Reynolds* [1992-93 CILR 59] at 63 [Exhibit SD1, p 397].

³ Those exceptions have been subsequently expanded, but the further exceptions are not relevant to the substance of this declaration.

⁴ This is meant to be only a high-level summary of the exception; a full breakdown of the test can be found in *Edwards v Halliwell* [1950] 2 All ER 1064 at 1066-1067 [Exhibit SD1, pp. 32-33]

process by which a prospective shareholder claimant must seek the leave of the Grand Court to continue a derivative action.

20. Importantly, notwithstanding the legislative developments in the United Kingdom, the British courts still recognise a tangential common law right of shareholders to commence derivative actions in circumstances not covered by the UK Companies Act 2006.⁵ This means that recent decisions of the English courts and learned commentary on those decisions (insofar as they relate to the continuing common law right) will still have persuasive precedential value for Cayman Islands law, notwithstanding that the Cayman Islands (unlike England) has not created a legislative right for shareholders to bring derivative actions.

The shareholders in Renren did not have grounds to bring direct claims against the company.

21. The shareholders in Renren would not have had grounds to bring direct claims against the defendants in the Proceeding (the "**Defendants**").
22. In this section, I will address:
- a) What a derivative claim is, and how it differs from a non-derivative, direct claim.
 - b) Why the causes of action under Cayman Islands law in the complaint were only available to Renren (and shareholders derivatively), but not available to a shareholder by way of a direct claim.
 - c) Why, in my opinion, the facts averred in the Complaint do not appear to give rise to any other potential causes of actions by shareholders of Renren directly against the named defendants.

⁵ *Iesini v Westrip Holdings Ltd* [2010] BCC 420 [81] – [82] [Exhibit SD1, pp 56-57].

What is a derivative claim?

23. In order to facilitate my explanation of a derivative claim, and how it differs from a non-derivative or direct claim, I utilise the following hypothetical entities:
- A will refer to a hypothetical company (analogous to Renren)
 - B will refer to a hypothetical shareholder (analogous to the Plaintiffs); and
 - C will refer to a hypothetical third party who committed a wrong against A (analogous to the Defendants; in the hypothetical this could, for example, refer to directors of A or third parties who assisted, or benefitted from, that wrongdoing).
24. Example one: Under the law of the Cayman Islands, presuming C's wrongdoing caused harm to A, then A would have a cause of action against C.
25. Example two: Unless there was some special relationship between B and C (which I will explore later in this declaration), B will never have a direct cause of action against C. If A suffers damages, that does not mean that B has suffered personal loss; accordingly B has no standing for a claim against C.
26. Example three: If A in example one does not pursue a cause of action against C, then B may be able to (in certain circumstances, discussed later) bring proceedings against C *in the name of A*. This is not a direct claim against C by B, but a "derivative action", as the ability for B to bring the claim is derived from its interest in A.
27. Accordingly, a derivative action is not a standalone claim; rather it is a procedural mechanism by which B can bring a claim in the name, and for the benefit, of A against C, in circumstances where A would not otherwise bring a claim against C. If B is able to surmount the legal obstacles to be able to bring a derivative action in example three, then the substance of that cause of action would be identical to example one.
28. Importantly however, the existence of a derivative action does not and will not affect the fact that B does not have a direct cause of action against C.

The causes of action under Cayman Islands law in the Complaint were only available to Renren (and shareholders derivatively), but not available to a shareholder in a direct claim.

29. The Complaint alleges three causes of action under Cayman Islands law against a variety of defendants:⁶

a) The first count is a breach of directors' fiduciary duty, made against Joseph Chen and David Chao in their capacity as directors of Renren,

b) The fourth, sixth and ninth counts are for dishonest assistance, made against Duff & Phelps, the DCM Defendants, and the SoftBank Defendants respectively.

c) The seventh count is for knowing receipt, made against OPI.

30. I address the causes of action in turn.

a) Breach of fiduciary duty

31. It is well established that directors of a Cayman Islands company do not owe fiduciary duties directly to the shareholders of that company; those duties are only owed to the company itself.⁷ As per *Directors' Duties* by Professor Andrew Keay, the leading academic authority on directors' duties:⁸

⁶ Counts 2, 3, 5, 8, 10, 11, 12 and 13 are claims made under New York law; I am unable to advise whether claims under New York law and outside of my expertise can be brought directly by a shareholder and so I do not address them.

⁷ As directors owe their fiduciary duties to the company and not the shareholders, the "proper plaintiff" rule (as explained above) would prevent the shareholders from bringing a claim for breach of those duties directly against the directors.

⁸ Professor Andrew Keay *Directors' Duties*, 4th ed (Jordan Publishing, 2020) at [3.77] ("*Directors' Duties*"). I note that it is an English text, but is relevant and would be persuasive to Cayman Islands courts to the extent that its commentary does not refer to English statutory provisions for which there is no Cayman Islands' equivalent [**Exhibit SD1, p 96**].

Duties to individual shareholders?

No matter what approach one takes concerning to whom directors' duties are owed, clearly directors do not owe duties to the shareholders individually except in special circumstances.

32. The "special circumstances" referred to in *Directors' Duties* are limited. The extent of this exception to the usual rule is discussed in *Sharp v Blank* where Nugee J rejected a claim by shareholders of Lloyds Bank that the directors of the Bank owed, and had breached, fiduciary duties to the shareholders.⁹ His Lordship acknowledged that duties are only owed to shareholders in a special factual relationship. The judge went on to say:¹⁰

"[T]his special relationship must be something over and above the usual relationship that any director of a company has with its shareholders. It is not enough that the director, as a director, has more knowledge of the company's affairs than the shareholders have: since they direct and control the company's affairs this will almost inevitably be the case. Nor is it enough that the actions of the directors will have the potential to affect the shareholders – again this will always, or almost always, be the case."

33. From my review of the factual assertions made in the Complaint, I see no assertion being made that the directors of Renren had a "special relationship" to any shareholders of the company outside of the usual director – shareholder relationship. In making those observations I am mindful of, and would repeat, the very high threshold required to overturn the ordinary position that directors do not owe fiduciary duties to shareholders. As such I do not see anything from the pleaded facts of this case which would suggest that the usual rule, being that the directors of Renren owed the pleaded fiduciary duties to the Company and not the shareholders individually, should not apply.

⁹ *Sharp v Blank* [2015] EWHC 3220 (Ch) [Exhibit SD1, pp 101-116].

¹⁰ *Ibid* at [12] [Exhibit SD1, p 108].

b) Dishonest assistance

34. A claim for dishonest assistance requires, as one of its elements, proof of a breach of fiduciary duty.¹¹ As inherent in the name of the cause of action, it relates to the dishonest assistance of another wrongdoer's breach of fiduciary duty.
35. In relation to the Complaint, the relevant defendants were alleged to have dishonestly assisted in the directors' breach of the fiduciary duty owed to Renren. For the reasons explained in the section above, the shareholders are not capable of bringing (or 'proving') a direct claim against the directors for breach of a fiduciary duty owed to the company, and therefore are equally not able to bring a claim for dishonest assistance against other defendants for allegedly assisting that breach. The wrong, being the breach of fiduciary duty, was committed against Renren, and therefore any claim to litigate that wrong, including claims against parties who assisted in the commission of that wrong, lies with the company itself and not with the company's shareholders.

c) Knowing receipt

36. As with dishonest assistance, a claim for knowing receipt requires as one of its elements proof of a breach of fiduciary duty.¹²
37. In relation to the Complaint, the relevant defendant was alleged to have benefitted from the directors' breach of fiduciary against Renren. For the reasons explained in the earlier section, the shareholders are not capable of bringing (or 'proving') a direct claim against the directors for breach of fiduciary duty as the pleaded, and therefore are equally not able to bring a claim for knowing receipt against other defendants for allegedly benefitting from that breach. The wrong, being the breach of fiduciary duty, was committed against Renren, and therefore any claim to litigate that wrong, including claims against parties who assisted

¹¹ *William Ritter & Geneva Insurance SPC Limited (In Voluntary Liquidation) v Butterfield Bank (Cayman) Limited* (unreported, 29 May 2018, William J) [Exhibit SD1, pp. 117-244].

¹² *Brown v Bennett* [1999] 1 BLCL 649 [Exhibit SD1, pp. 245-258].

in the commission of that wrong, lies with the company itself and not the company's shareholders.

Derivative claims can only be brought in certain circumstances

38. The prospects of success of any derivative action in the Cayman Islands will be entirely dependent on the facts of that particular case; some facts will lend themselves to a higher likelihood for success, and vice versa.
39. Leaving to the side the importance of the facts of a particular claim, it is undoubtedly the case that the bringing of a derivative claim imposes a number of hurdles and is significantly more onerous than a standard proceeding. I understand that the purpose of these hurdles is to filter unmeritorious claims, and to minimise undue interference in corporate governance. As noted in *Directors' Duties*, in Chapter 14: Derivative Claims:¹³

"...even if the company had a good claim against the alleged wrongdoers, an action brought on the company's behalf by a minority shareholder would not succeed unless the shareholder could establish standing to sue on the company's behalf. The rules on standing were restrictive."

40. To obtain leave to bring a derivative action in establishing standing to bring a derivative claim,¹⁴ a prospective shareholder plaintiff must show a *prima facie* case in relation both to:¹⁵
- a) the merits of the claim by the company; and
 - b) that the alleged wrongdoing has been perpetrated by the majority who are in control or are otherwise in a position to prevent the company from pursuing the claim against them.

¹³ *Directors' Duties* at [14.2] [Exhibit SD1, p. 259].

¹⁴ For a domestic derivative action, pursuant to Order 15, rule 12A of the Grand Court Rules [Exhibit SD1, pp. 342-344].

¹⁵ *Renova Resources Private Equity Ltd v Gilbertson* [2009] CILR 268 at [12] [Exhibit SD1, p. 357].

41. The complexities of applying that test are extensive; as evidenced by the detailed discussion in Lowe 2 and Toube 2, which between them provide 15 pages of expert evidence on the legal test for the requisite prima facie standard, and a further 29 pages of expert evidence considering whether the alleged causes of action reach that standard. The following is not intended to completely canvass a comprehensive discussion of complex law, but I would summarise as follows. In order to bring a derivative action, a prospective shareholder plaintiff must, at a *prima facie* level, demonstrate:
- a) that the shareholder falls within one of the four limited *Foss v Harbottle* exceptions to the normal rule prohibiting shareholders to bring a claim;
 - b) presuming the plaintiff relies on the 'fraud on the minority' exception, they must show:
 - a. That the wrongdoers control the company;
 - b. That that control is or would be exercise to prevent a proper action being brought against the wrongdoer; and
 - c. There must be a 'fraud' such that the persons in control of the company improperly benefit;
 - c) there is no other reason that would prevent the prospective shareholder plaintiff from progressing a derivative action.¹⁶
42. The prospective shareholder plaintiff bears the onus of proving these matters.¹⁷
43. Presumably as a consequence of the above, successful derivative actions in the Cayman Islands appear to be rare. I am aware of only two written decisions in the Cayman Islands where permission for leave to bring a domestic derivative action has been sought.¹⁸ Leave

¹⁶ I provide some examples of these at paragraph 44.

¹⁷ *Barrett v Duckett* [1995] 1 BCLC 243 [Exhibit SD1, pp. 380-392].

¹⁸ The *Renova* line of cases and *Schultz v Reynolds*, the latter of which pre-dated Order 15, rule 12A of the Grand Court Rules.

was granted in both cases, and only one appears to have ultimately gone to trial, in which the plaintiff shareholder was successful.

44. While Cayman Islands' decisions are limited, I am aware of decisions in the English jurisdiction which have refused permission for a shareholder to continue a derivative claim (under a similar legal test), which reflects the complexities alluded to above, for example where:

- a) alternative redress was available and recovered monies were unlikely to be returned to shareholders by way of distribution;¹⁹
- b) no hypothetical director would continue the claim given the lack of clearly identified benefit and the problems that it would cause the company if pursued;²⁰ and
- c) the claim was speculative and dependent upon the favourable resolution of factual issues and potentially controversial points of law, which would likely result in drawn out and expensive litigation;²¹ and
- d) an independent majority of the minority did not wish a derivative action to proceed.²²

45. Professor Keay also observes that successful derivative claims are few, stating:²³

"Since 2016 there has not been a great increase in claims so that the corpus of claims is still not large. So, we can say that the number of occasions on which a shareholder has succeeded in obtaining permission to continue a claim has always been low since 2007 and continues to be so."

¹⁹ *Kleanthous v Paphitis* [2011] EWHC 2287 (Ch), [2011] All ER (D) 33 (Sep) [Exhibit SD1, p. 426].

²⁰ *Robert Glew & Denton And Co Trustees Ltd & Anor v Matossian-Rogers & Ors* [2019] EWHC 3183 (Ch) [Exhibit SD1, pp. 443-469].

²¹ *Hughes v Burley and others* [2021] EWHC 104 (Ch) [Exhibit SD1, pp. 470-515].

²² *Smith v Croft (No 2)* [1988] Ch 114 at 159 [Exhibit SD1, p. 561].

²³ *Directors' Duties* at [14.8] [Exhibit SD1, p. 262].

The company obtains the benefit of a successful derivative action, not the shareholder plaintiffs

46. As I have already explained above, a derivative action only permits a shareholder to sue a wrongdoer in the name of a company; it is not a direct claim between a shareholder and the wrongdoer.
47. The benefit of any successful derivative action is accrued by the company in whose name the action is brought, not the shareholder plaintiff. As is noted in *Directors' Duties*,²⁴ "Remedies for a successful derivative claim will be the same as they would for a claim brought by the company". The text later reiterates, regarding indemnities:²⁵ "in reality there is little incentive for shareholders because any relief that is ultimately ordered by a court will go wholly to the company itself".

Only registered shareholders may pursue a derivative action

48. A prospective shareholder plaintiff must be a current registered shareholder of the relevant company to bring and maintain a derivative action.
49. It would be my view that this conclusion is trite law, but to the extent that it needs judicial support it can be found in the following cases:
- a) The Cayman Islands Court of Appeal, in *Schultz v Reynolds*²⁶ determined that a beneficial owner of shares did not have standing to bring a derivative action. The judgement cites *Foss v Harbottle* and concluded that as the appellant did not fall within the statutory definition of a member of a company (which requires the member/shareholder to be entered on the company's share register), they did not have *locus standi* and did not fall within the exceptions in *Foss v Harbottle*.

²⁴ 14.29 [Exhibit SD1, p. 269].

²⁵ 14.40 [Exhibit SD1, p. 273].

²⁶ *Schultz v Reynolds* [1992-93 CILR 59] [Exhibit SD1, pp 393-416].

- b) The English Court of Appeal in *Boston Trust Company Ltd & Anor v Verhoef*²⁷ considered an appeal of a decision of the High Court granting conditional permission for a shareholder plaintiff to continue a derivative action pending the resolution of that same plaintiff's rectification application to have its name added to the share register. The Court noted that because the rectification application had been successful, that the claimants:

"...are deemed to have been members of Tellisford, with standing to bring these proceedings, both when the present proceedings were issued in October 2019 and when the permission application was heard in April 2020."

The Court of Appeal went on to note that permission to continue the derivative action was required under common law, not under the statutory provisions (as it was a so-called "double derivative claim") but found that conditional permission to commence a derivative action should not have been granted at first instance because at that stage the rectification application had not yet been granted and therefore the claimant was not a registered shareholder / member of the relevant company. The Court stated:

"As the claimants were not members of Tellisford, and did not have not [sic] standing on any other basis, they had no basis in law on which to bring the proceedings."

Accordingly, the English Court of Appeal also considers that a shareholder seeking to commence a derivative action on behalf of a company must be a registered shareholder, and the crucial date is from when proceedings were issued. This decision would be highly persuasive in the Cayman Islands.

- c) The English Companies Act was preceded by a report of the Law Commission of England & Wales entitled *Shareholder Remedies*.²⁸ That report was cited by the Grand Court and assisted with its reasoning in *Top Jet Enterprises Limited v Sino Jet*

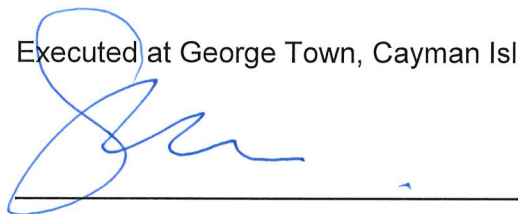
²⁷ *Boston Trust Company Ltd & Anor v Verhoef* [2021] EWCA Civ 1176 [Exhibit SD1, pp. 593-601].

²⁸ Published on 24 October 1997.

*Holding Limited.*²⁹ That report states, under the heading "Permitting former members to bring proceedings": "*We feel that there can be no point in extending the derivative action to former members...*". Accordingly, it was the also perspective of the Law Commission that under common law, only current members had standing to bring a derivative action.

I affirm this 2nd day of December 2021, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that I am physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, that the foregoing is true, and we understand that this document may be filed in any action or proceeding in a court of law.

Executed at George Town, Cayman Islands on 2 December 2021



SAMUEL MARTIN PIERCE DAWSON

²⁹ *Top Jet Enterprises Limited v Sino Jet Holding Limited & Anor* (Unreported, 19 January 2018, Segal J) at [38] [Exhibit SD1, pp. 626-627].

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**EXHIBIT SD1 TO THE AFFIRMATION OF
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