

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

M. SOFFERIN

Plaintiff

- and -

**WESTERN UNION FINANCIAL SERVICES (CANADA), INC., WESTERN UNION
FINANCIAL SERVICES, INC. AND THE WESTERN UNION COMPANY**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: November 15, 2013

Issued by (S) signature
Local Registrar

Address of court office: 161 Elgin Street
2nd Floor
Ottawa, ON K2P 2K1

**TO: Western Union Financial Services
(Canada), Inc.**
4000-199 ST Bay
Toronto, Ontario
M5L 1A9

Tel: 416-683-5500

AND TO: Western Union Financial Services, Inc.
6200 South Quebec Street
Greenwood Village, Colorado 80112
USA

Tel: 303-488-8000
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AND TO: The Western Union Company
12500 Mount Belford Avenue
Englewood, Colorado 80112
USA

Tel: 720-332-3361
Fax: 302-655-5049

DEFINED TERMS

1. In this Statement of Claim, in addition to the terms that are defined elsewhere herein, the following terms have the following meanings:

- (a) “**Western Union Money Transfer Service(s)**” or “**Money Transfer Services**” means consumer-to-consumer or consumer-to-business money transfer transaction(s) initiated using **Defendant Services**;
- (b) “**Money Transfer Funds**” means the principal amount of money that the owner sent to the receiver using **Western Union Money Transfer Services**;
- (c) “**Uncompleted Transfer(s)**” means **Western Union Money Transfer Services** that were not completed;
- (d) “**Uncompleted Transfer Funds**” means **Money Transfer Funds** that were the subject of **Uncompleted Transfer(s)**;
- (e) “**Terms and Conditions**” means the Terms and Conditions that Western Union applies to its **Money Transfer Services**;
- (f) “**Class**” or “**Class Members**” means all residents in Canada, excluding Quebec, (a) who sent money using **Western Union’s Money Transfer Services**, whose **Western Union** transaction was not redeemed within 30 calendar days; and (b) who either (i) have not claimed their **Money Transfer Funds** (nor had that money claimed on their behalf) from **Western Union**; or (ii) who sought and received a refund of their money, but did not

receive a payment for interest on that money and/or where **Western Union** charged an administrative fee deducted against the principal amount of the money transfer;

(g) “*Courts of Justice Act*” means the *Ontario Courts of Justice Act*, RSO 1990, c. C-43, as amended;

(h) “*Class Proceedings Act*” means the *Class Proceedings Act*, 1992, SO 1992, c. 6, as amended;

(i) “*Consumer Protection Act*” means the *Consumer Protection Act, 2002*, SO 2002, c. 30, Schedule A, as amended;

(j) “*Competition Act*” means the *Competition Act*, RSC 1985, c. C-34, as amended;

(k) “*Negligence Act*” means the *Negligence Act*, R.S.O. 1990, c. N-1, as amended;

(l) “**Consumer Protection Legislation**” means:

(i) *Fair Trading Act*, RSA 2000, c. F-2, as amended;

(ii) *Business Practices and Consumer Protection Act*, SBC 2004, c. 2, as amended;

(iii) *The Business Practices Act*, CCSM, c. B120, as amended;

(iv) *Consumer Protection and Business Practices Act*, SNL 2009, c. C-31.1, as amended, and *Trade Practices Act*, RSNL 1990, c. T-7, as amended;

(v) *Business Practices Act*, RSPEI 1988, c. B-7, as amended; and

(vi) *Consumer Protection Act*, SS 1996, c. C-30.1, as amended;

- (m) “**Defendants**” or “**Western Union**” means Western Union Financial Services (Canada), Inc., Western Union Financial Services, Inc. and The Western Union Company;
- (n) “**Plaintiff**” means M. Sofferin;
- (o) “**Western Union Services**” or “**Defendant Services**” means anything other than goods, including any service, right, entitlement or benefit from **Western Union** as per the *Consumer Protection Act*, s. 1; and
- (p) “**Representation**” or “**Omission**” means the **Defendants’** false, misleading or deceptive representations in failing to state material facts which deceives or tends to deceive; i.e. that they would not return **Uncompleted Transfer Funds**, that they would use the **Uncompleted Transfer Funds** to generate income that they would keep for themselves and that they would egregiously charge a fee to finally refund **Uncompleted Transfer Funds** even though they reaped profits from unjustly holding onto the funds.

CLAIM

2. The proposed Representative Plaintiff, M. Sofferin, claims on her own behalf and on behalf of the members of the Class of persons as defined in paragraph 4 below (the “Class”) as against Western Union Financial Services (Canada), Inc., Western Union Financial Services, Inc. and The Western Union Company (the “Defendants”):

- (a) An order pursuant to the *Class Proceedings Act* certifying this action as a class proceeding and appointing the Plaintiff as Representative Plaintiff for the Class Members;

- (b) A declaration that the notice given by the Plaintiff on November 15, 2013, on her own behalf and on behalf of “person similarly situated”, is sufficient to give notice to the Defendants on behalf of all Class Members;
- (c) In the alternative, a declaration, if necessary, that it is in the interests of justice to waive the notice requirement under Part III and s. 101 of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation¹;
- (d) A declaration that the Representation or Omission was made in violation of s. 14 of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation²;
- (e) A declaration that the Representation or Omission was made in violation of s. 15 of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation³;
- (f) A declaration that the Representation or Omission was a false and misleading representation contrary to s. 52 of the *Competition Act*;
- (g) General damages in an amount to be determined in the aggregate for the Class Members to compensate them for (a) all Uncompleted Transfer Funds which have

¹ Specifically, the *Fair Trading Act*, RSA 2000, c F-2, s 7.2(3).

² Specifically, the *Fair Trading Act*, RSA 2000, c F-2, s. 6; *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s 4; *The Business Practices Act*, CCSM, c B120, s. 2; *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, s 2; *Trade Practices Act*, RSNL 1990, c T-7, s. 5; *Business Practices Act*, RSPEI 1988, c B-7, s. 2; and *Consumer Protection Act*, SS 1996, c C-30.1, s. 5.

³ Specifically, the *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s 8; *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, s 8; *Trade Practices Act*, RSNL 1990, c T-7, s. 6; and *Business Practices Act*, RSPEI 1988, c B-7, s. 2.

not been recovered, (b) all income generated from the Defendants' retention of the Uncompleted Transfer Funds and (c) any administrative fees charged by the Defendants for refunding Uncompleted Transfer Funds;

- (h) Punitive, aggravated and exemplary damages in an amount that this Honourable Court deems appropriate;
- (i) A declaration that the Defendants are jointly and severally liable for any and all damages awarded;
- (j) In the alternative, an order for an accounting of revenues received by the Defendants for (a) all Uncompleted Transfer Funds which have not been recovered by the owner, (b) all income generated from the retention of the Uncompleted Transfer Funds and (c) any administrative fees deducted from the principal amount of Uncompleted Transfer Funds;
- (k) A declaration that any funds collected by the Defendants for (a) all Uncompleted Transfer Funds which have not been recovered by the owner, (b) all income generated from the retention of the Uncompleted Transfer Funds and (c) any administrative fees charged for refunding Uncompleted Transfer Funds are held in trust for the benefit of the Plaintiff and Class Members;
- (l) Restitution and/or a refund of all monies paid to or received by the Defendants for (a) all Uncompleted Transfer Funds which have not been recovered by the owner, (b) all income generated from the retention of the Uncompleted Transfer Funds

and (c) any administrative fees charged for refunding Uncompleted Transfer Funds from the Class on the basis of unjust enrichment;

- (m) In addition, or in the alternative, restitution and/or a refund of all monies paid to or received by the Defendants for (a) all Uncompleted Transfer Funds which have not been recovered by the owner, (b) all income generated from the retention of the Uncompleted Transfer Funds and (c) any administrative fees charged for refunding Uncompleted Transfer Funds from the Class, on the basis of *quantum meruit*;
- (n) An order compelling the creation of a plan of distribution pursuant to ss. 23, 24, 25 and 26 of the *Class Proceedings Act*;
- (o) Pre-judgment and post-judgment interest on the foregoing sums in the amount of 2% per month, compounded monthly, or alternatively, pursuant to ss. 128 and 129 of the *Courts of Justice Act*;
- (p) Costs of notice and administration of the plan of distribution of recovery in this action plus applicable taxes pursuant to s. 2(9) of the *Class Proceedings Act*;
- (q) Costs of this action on a substantial indemnity basis including any and all applicable taxes payable thereon pursuant to the *Excise Tax Act*, R.S.C. 1990. C. E-15; and
- (r) Such further and other relief as counsel may advise and/or this Honourable Court may deem just and appropriate in all the circumstances.

THE PARTIES

The Representative Plaintiff

3. The Plaintiff, M. Sofferin, is an individual residing in the City of Toronto, in the Province of Ontario. Ms. Sofferin used Western Union's Money Transfer Services which resulted in an Uncompleted Transfer Service that was never returned to her.

The Class

4. The Plaintiff seeks to represent the following class of which she is a member (the "Proposed Class"):

All residents in Canada, excluding Quebec, (a) who sent money using Western Union's Money Transfer Services, whose Western Union transaction was not redeemed within 30 calendar days; and (b) who either (i) have not claimed their Money Transfer Funds (nor had that money claimed on their behalf) from Western Union; or (ii) who sought and received a refund of their money, but did not receive a payment for interest on that money and/or where Western Union charged an administrative fee deducted against the principal amount of the money transfer.

The Defendants

5. The Defendant Western Union Financial Services (Canada), Inc. ("Western Union Canada") is a Canadian corporation with its principal place of business in Toronto, Ontario. It is a wholly-owned subsidiary of The Western Union Company that is carrying on business throughout Canada, including within the province of Ontario.

6. The Defendant Western Union Financial Services ("Western Union Finance") is an American corporation with its principal place of business in Greenwood Village, Colorado. It is

a wholly-owned subsidiary of The Western Union Company. It is in the business of providing consumer money transfer services.

7. The Defendant The Western Union Company (“Western Union Co.”) is an American corporation with its principal place of business in Englewood, Colorado. It is the parent company of all of the other Defendants. It is in the business of providing financial services and communications.

8. The Defendants are resident in Ontario for the purpose of s. 2 of the *Consumer Protection Act*.

9. The Defendants are jointly and severally liable for the acts and omissions of each other.

THE NATURE OF THE CLAIM

10. The Defendants are and, have been at all relevant times, engaged in the business of global money transfers, particularly consumer-to-consumer transactions, throughout Canada.

11. These class proceedings concern (a) the failure of the Defendants to return Uncompleted Transfer Funds to their owners, and (b) the failure of the Defendants, upon returning Uncompleted Transfer Funds, to remit interest therefrom and their egregious deduction of a fee against the principal amount of the Money Transfer Funds even though they reaped profits from unjustly holding onto the funds.

12. According to Western Union’s 2012 Annual Report, “Individual money transfers from one consumer to another are the core of our business, representing 81% of our total consolidated

revenues for 2012”, and it boasted that it generated “strong cash flow”, but apparently a portion of this “strong cash flow” include the funds that at are issue in this litigation.

13. This “core” consumer-to-consumer business largely relies on individuals, many of whom are economically disadvantaged and/or financially unsophisticated. Indeed, a risk factor in Western Union’s Forward Looking Statements in Part I of its 2012 Annual Report is “changes in immigration laws, interruptions in immigration patterns and others factors related to migrants.”

14. Western Union’s 2012 Annual Report states that “The Western Union® brand is globally recognized and represents speed, reliability, trust and convenience” and that its “consumer-to-consumer money transfer service enables people to send money around the world, usually in minutes”. The Annual Report goes on to reiterate that the “sending agent enters the transaction information into our money transfer system and the funds are made available for payment, usually within minutes”. Western Union thus knows “within minutes” of the funds being provided to it and whether those funds have been successfully transferred.

15. As a general matter, there are two (2) ways that Western Union money transfers are not completed (“Uncompleted Transfers”):

- a) An “Unredeemed Transfer”: If the money transfer funds are never picked up by the intended recipient; and
- b) A “Failed Transfer”: If the transfer fails and money transfer funds are not made available to the intended recipient.

16. Despite having contact information for the sender/owner of the funds, Western Union does absolutely nothing when it learns that a money transfer was not completed regardless of the reason for the money transfer failure. Instead, Western Union holds the money in its own accounts and makes use of the funds, and the interest on the funds, for its general cash flow needs.

17. Western Union continues to freely plunder the income earned on these funds, and the interest on these funds and uses the funds for its own purposes.

18. The Bank of Canada does maintain an “Unclaimed Balance Database”; however, it only applies to negotiable instruments and either a federally regulated bank or a trust company. The fact that this database does not apply to Western Union Money Transfer Services and Uncompleted Transfer Funds has been enabling the Defendants to avoid discovery and to continue to perpetrate their unfair business practices for years.

19. Western Union had a duty to inform the sender about the status of the Uncompleted Transfer and of the availability of the Uncompleted Transfer Funds, which continue to belong to the sender, particularly so given that the sender’s information was clearly available. Western Union failed in this duty as no attempts were made to locate the owner and to return the Uncompleted Transfer Funds.

20. Western Union has been deliberately withholding relevant information to the sender regarding the status of the transfer as uncompleted and has been actively preventing owners from knowing that their property was being held and from knowing that the purpose of the contract which they entered into has been frustrated.

21. Further, in the rare instances where the owner of the Uncompleted Transfer Funds actually does discover and recover the Funds on their own, Western Union does not return any interest on the funds and Western Union charges a non-refundable administration fee, frequently in excess of ten (10) dollars, purportedly to compensate Western Union for its “costs” of holding the money.

22. The imposition of administration charges and fees is wholly unreasonable as there are no costs to Western Union for retaining the funds, only benefits. And for a large number of Class members, Western Union is still, at present, holding onto their Uncompleted Transfer Funds.

23. What Western Union should be doing is promptly notifying customers, i.e., Class members, who have entrusted Western Union with their funds, and informing them that their transfer was not completed. As outlined above, with respect to failed transfers, Western Union knows “in minutes” that the wire transfer has failed.

24. According to Western Union’s 2012 Annual Report (Exhibit R-2), such Uncompleted Transfer Funds, or “unsettled money transfers,” are classified as “settlement assets” and “are not used to support [Western Union] operations”, but are utilized to “earn income” for the company . Western Union reported \$712.5 million of such “settlement assets” on hand in 2011 and \$574.5 million on hand in 2012.

25. Western Union’s business practice of holding unremitted funds without contacting the owner of the funds and of making use of those funds for its own benefit while at the same time seeking a fee from the customer in order to return the funds is civilly fraudulent and deceptive as is clearly laid out below:

- (a) Western Union offers Money Transfer Services for an fee at the outset for services which occasionally fail to transfer customers' money successfully, becoming Uncompleted Transfers;
- (b) Western Union has the contact information for each of its customers, yet when the money the customer paid to have transferred does not go through, Western Union does not return this money to its customers, or even notify them that the transfer has failed and/or their money has not been redeemed despite the ease through which this could be done; and
- (c) Western Union's failure to return its customers' money to them or to notify them that their transaction did not complete is particularly egregious in light of their long-time emphasis on speed as being a major benefit of their service (for instance, using the slogan: "The fastest way to send money – worldwide.").

26. Due to the large volume of money transfers in which Western Union engages, the total value of Uncompleted Transfer Funds in its possession is very large. Although this amount is presently unknown, the publicly available information referenced herein suggests it may be hundreds of millions of dollars. All of this money should rightfully be returned to Western Union's customers, not used as a source of revenue for Western Union.

27. The Defendants' acts of civil fraud and deception have enriched themselves through retaining the Funds belonging to the Petitioner and Class Members, including earning and retaining interest and charging an administrative charge for "holding" those funds. This

enrichment is at the expense of depriving Class Members of their rightful property, including any and all fruits derived therefrom without any justification.

28. The Class Members have suffered injury, loss and damages as a result of (a) the failure of the Defendants to return Uncompleted Transfer Funds to their owners, (b) the failure of the Defendants, upon returning Uncompleted Transfer Funds, to remit interest thereon and their egregious deduction of a fee to against the principal amount of the Money Transfer Funds even though they reaped profits from unjustly holding onto the funds and (c) the failure of the Defendants to disclose their unfair business practices to consumers.

29. To date, Canadian consumers have still never been compensated for damages incurred as a result of the Defendants' unfair business practices.

THE REPRESENTATIVE PLAINTIFF

30. On or about August 1, 2013, the Plaintiff visited a Western Union agent to transfer \$20.00 using Western Union's Money Transfer Service.

31. Western Union charged the Plaintiff \$12.00 to transfer the payment.

32. Western Union did not complete the money transfer and the transfer failed;

33. Western Union kept the Plaintiff's money and did not return it or otherwise notify her that it was in its possession. In addition to unfairly retaining the Plaintiff's Money Transfer Funds, Western Union earned interest and other income on those funds, Western Union kept the \$12.00 it charged her to purportedly transfer the funds;

34. The Plaintiff has suffered damages as a result of the failure of the Defendants to return the Uncompleted Transfer Funds, including interest thereon, trouble, inconvenience and loss of time.

CAUSES OF ACTION

A. Breach of Contract

35. Upon using Western Union's Money Transfer Services, the Plaintiff and Class Members entered into a service agreement with Western Union whereby Western Union would provide Money Transfer Services to consumers in consideration for the payment of a fee.

36. There was either an express or implied contractual term between the Class Members and the Defendants such that the Defendants would provide Money Transfer Services of a "reasonably acceptable quality" to the Class Members pursuant to s. 9(1) of the *Consumer Protection Act*. If the performance of this contract failed, i.e. if the lawful object of money transfer was not completed; it was an express or implied term that the Defendants would inform Class Members rather than leave them completely in the dark. The quality of services provided by Defendants was and is therefore deficient in that it is unacceptable to not disclose failed performance and to retain Class Members' Money Transfer Funds.

37. By reason of the undisclosed failed performance as described above, the Defendants are in breach of contract having breached its express or implied warranty to Class Members by failing to provide services of a reasonably acceptable quality to Class Members. Class Members were unable to receive a substantial benefit from the Money Transfer Services to their detriment.

38. The Defendants' breach of contract with regard to the provision of adequate service to consumers has resulted in injury, economic losses and damages to the Plaintiff and Class Members.

39. The aforesaid loss suffered by the Plaintiff and the Class Members was caused by this contractual breach, particulars of which include, but are not limited to the fact that the Class Members paid money for a service that they did not receive and subsequently, the Defendants failed to adequately perform the object of the contract and/or to reimburse the Money Transfer Funds and/or compensate the Class Members.

40. By virtue of the acts and omissions described above, the Plaintiff and Class Members are entitled to recover damages from the Defendants.

41. The loss, damage and injuries were foreseeable.

B. Breach of Implied Covenant of Good Faith and Fair Dealing

42. It is a well-established tenet of contract law that there is an implied covenant of good faith and fair dealing in every contract.

43. The Plaintiff and Class Members were charged for and paid for Money Transfer Services which were not provided.

44. Further, the Uncompleted Transfer Funds were either:

- (a) Never reimbursed to Class Members; or

- (b) Eventually partially reimbursed, however interest on the funds was not included and an administrative fee was deducted against the principal amount.

45. Further, Defendants had a duty to take reasonable efforts to inform Class Members that performance had failed and that their property was being held as a result of an Uncompleted Transfer, especially so since the contact information for the owner of the Money Transfer Funds; i.e. the Class Members is written directly on the service contract.

46. The Defendants who do absolutely nothing when they fail to perform their legal obligations and then not only benefit from illegally retaining property, but actually charge an administrative fee if the owner discovers, on their own, that the contract has not been performed, cannot be said to be in good faith or dealing fairly with Class Members.

47. As a result of the Defendants' conduct, the Plaintiff and Class Members have suffered injury, been damaged and lost money.

C. Breach of Fiduciary Duty

48. The Defendants and the Plaintiff and Class Members entered into an arrangement whereby for a fee, the Defendants obligated themselves to transfer funds on their behalf. By and through the operation of this relationship, Western Union was acting as a fiduciary to the Plaintiff and to the Class.

49. The Defendants did not complete the Money Transfer Services for the Plaintiff and the Class, which fact they did not disclose. While the contract has a right of refund, the Plaintiff and

the Class Members are not made aware that their refund rights have been triggered because they do not know that their money transfer has not been completed.

50. The Defendants collect contact information from the Plaintiff and Class Members at the time of the transfer. The Defendants breached a fiduciary duty to the Plaintiff and Class Members by failing to notify them that their transfers were not completed, failing to use best practicable notice, failing to notify that their refund rights were triggered, and failing to provide a refund in full.

51. As a proximate result of the Defendants' actions, the Plaintiff and Class Members have suffered damages in the form of (i) the Money Transfer Funds; (ii) lost income and/or lost interest or other use of the Uncompleted Transfer Funds; and (ii) the charging of administrative fees when the fiduciary benefitted from possession of the funds.

52. The Defendants' breach of fiduciary duty was a direct cause of the Plaintiff's and the Class Member's damages. Had the Defendants made reasonable and timely efforts to provide notice of the uncompleted transfer to the Plaintiff and the Class Members, they would have had their Money Transfer Funds refunded to them, would not have lost out on generating income and profits on the funds themselves, and would not have lost the portion of the principal that the Defendants deduct as an administrative fee.

D. Tort of Negligence

53. Western Union had a positive legal duty to use reasonable care to either perform its legal obligations or to inform Class Members on the status of their Money Transfer Funds.

54. Western Union was aware that its customers (including Plaintiff and Class Members) relied on it to provide Money Transfer Services.

55. It was certainly reasonably foreseeable that if Western Union retained the Uncompleted Transfer Funds without disclosing their existence to Class Members, did not compensate Class Members with interest when refunding the Uncompleted Transfer Funds and deducted an administrative fee from the principal amount of Uncompleted Transfer Funds, customers would sustain injury and damages as they would be deprived of their property for a significant amount of time, if not indefinitely, or a portion thereof indefinitely, and would be unable to make use of the services that they were entitled to expect when using a Western Union Money Transfer Services.

56. By its acts described herein, the Defendants failed to take reasonable care to inform the Plaintiff and Class Members of the status of their Money Transfer Funds and failed to take reasonable steps to refund Uncompleted Transfer Funds and, in so doing, breached its duties to Plaintiff and the Class.

57. This breach was a direct and proximate result of Defendants' failure to use reasonable care to implement and maintain appropriate procedures reasonably designed to fulfill its duties.

58. By reason of the foregoing, Plaintiff and each member of the Class are entitled to recover damages and other relief from Defendants.

E. Tort of Conversion

59. The Defendants accepted Plaintiff and Class Members' Money Transfer Funds and charged and accepted a transfer fee with the express undertaking that they would transfer those funds on their behalf.

60. Plaintiff and Class Members' money transfers were never completed.

61. The Defendants could have promptly notified Plaintiff and the Class that the transfers were not completed and returned the Uncompleted Transfer Funds to the Plaintiff and the Class. Instead, when the Defendants learned that the Money Transfer Services were not completed, they did nothing.

62. During the substantial time that Plaintiff and Class Members were without their money, the Defendants had in fact been using the money for its own benefit to generate income for themselves. Further, the Defendants unfairly and inequitably imposed, prior to refunding monies to the Plaintiff and to the Class, an "administrative fee" for holding onto the Uncompleted Transfer Funds, even though they generated significant amounts of income off of those funds.

63. The elements of the tort of conversion are clearly made out in this Statement of Claim as the Plaintiff and Class Members had clear and unconditional legal ownership of the Money Transfer Funds at the time of the conversion, the Defendants gained possession of the Uncompleted Transfer funds through the commission of wrongful acts and there are significant damages resulting to the Plaintiff and the Class Members.

64. The Defendants' conduct deliberately and improperly deprived the Plaintiff and the Class of the rightful access to and use of their money and the degree of harm was and is significant thereby constituting an unlawful conversion of Plaintiff's and Class Member's personal property.

CAUSATION

65. The acts, omissions and breaches of legal obligations on the part of the Defendants are the direct and proximate cause of the Plaintiff's and Class Members' injuries.

66. The Plaintiff pleads that by virtue of the acts, omissions and breaches of legal obligations as described above, they are entitled to legal and/or equitable relief against the Defendants, including damages, consequential damages, specific performance, rescission, attorneys' fees, costs of suit and other relief as appropriate in the circumstances.

DAMAGES

Compensatory Damages (Economic Losses)

67. By reason of the acts, omissions and breaches of legal obligations of the Defendants, the Plaintiff and Class Members have suffered injury, economic loss and damages, the particulars of which include the principal amount of Uncompleted Transfer Funds, the associated foregone interest and the administrative fee amount deducted from the principal amount of Uncompleted Transfer Funds when redeemed.

Punitive, Exemplary and Aggravated Damages

68. The Defendants have taken a cavalier and arbitrary attitude to its legal and moral duties to the Class Members.

69. In addition, it should be noted since the Defendants are parts of a highly-revered, multi-billion dollar corporation, it is imperative to avoid any perception of evading the law without impunity. Should the Defendants only be required to disgorge monies which should not have been retained and/or withheld, such a finding would be tantamount to an encouragement to other businesses to deceive their customers as well. Punitive, aggravated and exemplary damages are necessary in the case at hand to be material in order to have a deterrent effect on other corporations.

70. At all material times, the conduct of the Defendants as set forth was malicious, deliberate and oppressive towards their customers and the Defendants conducted themselves in a wilful, wanton and reckless manner.

STATUTORY REMEDIES

71. The Defendants are in breach of the *Consumer Protection Act*, the *Competition Act*, and/or other similar/equivalent legislation.

72. The Plaintiff pleads and relies upon consumer protection and trade legislation and common law, as it exists in this jurisdiction and the equivalent/similar legislation and common law in other Canadian provinces and territories. The Class Members have suffered injury, economic loss and damages caused by or materially-contributed to by the Defendants'

inappropriate and unfair business practices, which includes the Defendants being in breach of applicable Consumer Protection laws.

A. Breach of the *Consumer Protection Act*

73. At all times relevant to this action, the Plaintiff and Class Members were “consumer[s]” within the meaning of that term as defined in s.1 of the *Consumer Protection Act*.

74. At all times relevant to this action, the Defendants were “supplier[s]” within the meaning of that term as defined in s.1 of the *Consumer Protection Act*.

75. The service agreement entered into between the Plaintiff and Class Members and the Defendants is a “consumer agreement” within the meaning of that term as defined in s.1 of the *Consumer Protection Act*.

76. The transactions by which the Plaintiff and Class Members entered into the consumer agreement to pay for the Defendants’ Money Transfer Services were “consumer transaction[s]” within the meaning of that term as defined in s.1 of the *Consumer Protection Act*.

(i) Unfair Practice – ss. 14, 15 & 17

77. The Defendants have engaged in an unfair practice by making a Representation or Omission to Class Members which was and is “false, misleading or deceptive” and/or “unconscionable” within the meaning of ss. 14, 15 and 17 of the *Consumer Protection Act* in “failing to state a material fact if such use or failure deceives or tends to deceive”. The material facts that the Defendants failed to state was that:

- (a) Should a money transfer not be completed, they would neither notify, nor return the Uncompleted Transfer Funds in a timely fashion;
- (b) They would use the Uncompleted Transfer Funds to generate income that they would keep for themselves; and
- (c) They would deduct an administrative (ostensibly for holding onto said funds) if it finally did return those funds to Class Members years later.

78. The Representation or Omission was and is unconscionable because *inter alia* the Defendants know or ought to know that:

- (a) the consumer is unable to receive a substantial benefit from the subject-matter of the representation;
- (b) the consumer transaction is excessively one-sided in favour of Western Union; and
- (c) the terms of the consumer transaction are so adverse to the consumer as to be inequitable.

79. Further, the Defendants' conduct alleged herein is unfair insofar as it offends public policy, is oppressive and causes consumers substantial injury.

80. The Plaintiff states that the Representation or Omission was false, misleading, deceptive and/or unconscionable such that it constituted an unfair practice which, had the Plaintiff and

Class Members been aware of, they would have been able to take measures to protect themselves when sending money using Western Union's Money Transfer Services and as a result of which they are entitled to damages pursuant to the *Consumer Protection Act*.

81. The clear result of the Representation or Omission is established by the Plaintiff and Class Members failing to prevent economic injury by demanding and thereby collecting all Uncompleted Transfer Funds, rather than having them remain in Western Union's hands.

(ii) Quality of Services

82. In addition, pursuant to section 9(1) of the *Consumer Protection Act*, by virtue of entering into the service agreement with consumers, the Defendants have impliedly warranted that the Money Transfer Services supplied be of a "reasonably acceptable quality". The Defendants breached the consumer agreement when they failed to discharge their contractual obligation of performance, failing which Defendants should have informed Class Members rather than leave them completely in the dark. The quality of services provided by Defendants was and is therefore deficient in that it is unacceptable to not disclose failed performance and to retain Class Members' Money Transfer Funds for a fee thereby being in breach of contract.

83. Class Members held up their end of the bargain through payment of a sum of money and the Defendants are delinquent and in default as they breached its implied warranty as to service.

84. The Plaintiff states that the breach of contract and the refusal to compensate Class Members constitutes an unfair practice as a result of which they are entitled to damages pursuant to the *Consumer Protection Act*.

85. Pursuant to section 8(1) of the *Consumer Protection Act*, the Plaintiff is entitled to commence a proceeding on behalf of Class Members under the *Class Proceedings Act* and the members of the class are entitled to become a member of the class in respect of the breach of the consumer agreement despite any clause to the contrary purporting to waive these rights.

86. The Plaintiff and Class Members are entitled to recover damages and costs of administering the plan to distribute the recovery of the action in accordance with the *Consumer Protection Act*.

B. Breach of the *Competition Act*

87. At all times relevant to this action, the Defendants' Money Transfer Service was a "business", a "product" and a "service" within the meaning of that term as defined in s.2 of the *Competition Act*.

88. The Defendants' acts are in breach of s. 52 of Part VI of the *Competition Act*, were and are unlawful and render the Defendants jointly and severally liable to pay damages and costs of investigation pursuant to s. 36 of the *Competition Act*.

89. The Defendants knowingly or recklessly made the Representation or Omission to the public and in so doing breached s.52 of the *Competition Act* because the Representation or Omission:

- (a) Was made for the purpose of promoting the business interests of the Defendants;
- (b) Was made to the public;

- (c) Was false and misleading in a material respect; and
- (d) Failed to state material facts.

90. The Plaintiff and Class Members were induced into using Western Union's Money Transfer Services due to the Representation or Omission and therefore suffered damages and loss.

91. Pursuant to s. 36 of the *Competition Act*, the Defendants are liable to pay the damages which resulted from the breach of s. 52.

92. Pursuant to s. 36 of the *Competition Act*, the Plaintiff and Class Members are entitled to recover their full costs of investigation and substantial indemnity costs paid in accordance with the *Competition Act*.

93. The Plaintiff and Class Members are also entitled to recover as damages or costs, in accordance with the *Competition Act*, the costs of administering the plan to distribute the recovery in this action and the costs to determine the damages of each Class Member.

WAIVER OF TORT, UNJUST ENRICHMENT AND CONSTRUCTIVE TRUST

94. The Plaintiff pleads and relies on the doctrine of waiver of tort and states that the Defendant's conduct, including the alleged breaches of the *Consumer Protection Act* constitutes wrongful conduct which can be waived in favour of an election to receive restitutionary or other equitable remedies.

95. The Plaintiff reserves the right to elect at the Trial of the Common Issues to waive the legal wrong and to have damages assessed in an amount equal to (a) the Uncompleted Transfer Funds still retained by the Defendants, the interest earned thereon as well as (b) the interest earned on Uncompleted Transfer Funds that have been refunded to the owner and all administration fees levied on the Uncompleted Transfer Funds.

96. Further, the Defendants have been unjustly enriched as a result of the revenues generated from the retention of the Uncompleted Money Transfers and as such, *inter alia*, that:

- (a) The Defendants have obtained an enrichment through the retention of (a) the Uncompleted Transfer Funds, including the interest earned thereon and/or (b) the interest earned from the Uncompleted Transfer Funds and the administrative fee deducted from the principal amount upon refunding;
- (b) The Plaintiff and other Class Members have suffered a corresponding deprivation including (a) the Uncompleted Transfer Funds, including the foregone interest earnable thereon and/or (b) the foregone interest earnable from the Uncompleted Transfer Funds that were refunded and the administrative fee deducted from the principal amount; and
- (c) The benefit obtained by the Defendants and the corresponding detriment experienced by the Plaintiff and Class Members has occurred without juristic reason. There is and can be no juridical reason justifying the Defendants retaining any portion of such money paid or foregone by the Class.

97. Further, or in the alternative, the Defendants are constituted as constructive trustees in favour of the Class Members for all of the Uncompleted Transfer Funds retained, all interest earned and all fees levied thereon upon refunding because, among other reasons:

- (a) The Defendants were unjustly enriched by receipt of Money Transfer Funds which were never transferred;
- (b) The Class Members were correspondingly deprived of the possession of their property;
- (c) The Uncompleted Transfer Funds were acquired in such circumstances that the Defendants may not in good conscience retain them;
- (d) Equity, justice and good conscience require the imposition of a constructive trust;
- (e) The integrity of the market would be undermined if the court did not impose a constructive trust; and
- (f) There are no factors that would render the imposition of a constructive trust unjust.

98. Further, or in the alternative, the Plaintiff claims an accounting and disgorgement of the benefits which accrued to the Defendants.

COMMON ISSUES

99. Common questions of law and fact exist for the Class Members and predominate over any questions affecting individual members of the Class. The common questions of law and fact include:

- (a) Did the Defendants engage in unfair, civilly fraudulent, misleading, and/or deceptive acts or practices in failing to disclose that they would not return Uncompleted Transfer Funds, that they would use the Uncompleted Transfer Funds to generate income that they would keep for themselves and/or that they would charge a fee to finally refund Uncompleted Transfer Funds even though they reaped profits from unjustly holding onto the Uncompleted Transfer Funds?
- (b) Did the Defendants fail to make reasonable efforts to inform Class Members about the uncompleted status of their Money Transfer Funds?
- (c) Did the Defendants fail to return Uncompleted Transfer Funds?
- (d) Did the Defendants use the Uncompleted Transfer Funds to generate income that they would keep for themselves?
- (e) Did the Defendants charge an administrative fee to finally refund Uncompleted Transfer Funds?
- (f) Did the Defendants reap profits from unjustly holding onto the Uncompleted Transfer Funds?

- (g) Must the Defendants notify, within a reasonable amount of time, Class Members whose uncompleted money transfers they possess?
- (h) Must the Defendants automatically refund all Uncompleted Transfer Funds to Class Members, using all reasonable methods available?
- (i) Are the Defendants in breach of contract?
- (j) Did the Defendants' breach of contract proximately cause loss or injury and damages?
- (k) Did the Defendants breach the express or implied warranties by failing to provide services of a reasonably acceptable quality to Class Members?
- (l) Are the Defendants in breach of the implied covenant of good faith and fair dealing?
- (m) Did the Defendants' breach of the implied covenant of good faith and fair dealing proximately cause loss or injury and damages?
- (n) Do the Defendants owe a fiduciary duty to Class Members?
- (o) Did the Defendants breach their fiduciary duty to Class Members?
- (p) Do the Defendants owe the Class Members a duty to use reasonable care?

- (q) Did the Defendants act negligently in failing to use reasonable care to either perform its legal obligations or to inform Class Members of the status of their Money Transfer Funds?
- (r) Did the Defendants foresee that the Plaintiff or other Class Members would send money using Western Union's Money Transfer Services based on the Representation in failing to state material facts?
- (s) Did the Defendants' conduct constitute conversion?
- (t) Did the Defendants impliedly warrant their services to be of a "reasonably acceptable quality" as per the *Consumer Protection Act*, s. 9(1)?
- (u) Did the Defendants' acts or practices breach the *Consumer Protection Act*, the *Competition Act* or other similar/equivalent legislation?
- (v) Were the Defendants unjustly enriched?
- (w) Are the Defendants liable to the Class Members for reimbursement of the amount of the Uncompleted Transfer Funds, interest thereon and/or the administrative fee deducted against the principal amount of the money transfer that was refunded as a result of the misconduct?
- (x) Have Class Members been damaged by the Defendants' conduct and, if so, what is the proper measure of such damages?

- (y) Should an injunctive remedy be ordered to prohibit the Defendants from continuing to perpetrate the unfair, civilly fraudulent, misleading, and/or deceptive conduct?
- (z) Are the Defendants responsible to pay compensatory and/or punitive damages to class members and in what amount?

EFFICACY OF CLASS PROCEEDINGS

100. The members of the proposed Class potentially number in the hundreds of thousands if not millions. Because of this, joinder into one action is impractical and unmanageable. Conversely, continuing with the Class Members' claim by way of a class proceeding is both practical and manageable.

101. Class counsel proposes to prosecute these claims on behalf of the Class through this Action and through other actions commenced by the offices of Consumer Law Group Professional Corporation. These actions include *Jonathan Dresner v. Western Union Financial Services (Canada), Inc. et alii*, an action commenced before the Quebec Superior Court in Montreal (November 15, 2013).

102. Members of the proposed Class have no material interest in commencing separate actions. In addition, given the costs and risks inherent in an action before the courts, and the small amount being claimed by each person, many people will hesitate to institute an individual action against the Defendants. Even if the class members themselves could afford such individual litigation, the court system could not as it would be overloaded. Further, individual

litigation of the factual and legal issues raised by the conduct of the Defendants would increase delay and expense to all parties and to the court system.

103. Also, a multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province), risks having contradictory and inconsistent judgements on questions of fact and law that are similar or related to all members of the class.

104. In these circumstances, a class action is the only appropriate procedure for all of the members of the class to effectively pursue their respective rights and have access to justice.

105. The Plaintiff has the capacity and interest to fairly and fully protect and represent the interests of the proposed Class and has given the mandate to his counsel to obtain all relevant information with respect to the present action and intends to keep informed of all developments. In addition, class counsel are qualified to prosecute complex class actions.

LEGISLATION

106. The Plaintiff pleads and relies on the *Class Proceedings Act*, the *Courts of Justice Act*, the *Consumer Protection Act*, the *Negligence Act*, the *Competition Act* and other Consumer Protection Legislation.

JURISDICTION AND FORUM

Real and Substantial Connection with Ontario

107. There is a real and substantial connection between the subject matter of this action and the province of Ontario because:

- (a) Defendant Western Union Financial Services (Canada), Inc. has its head office in Ontario;
- (b) The Defendants engages in business with residents of Ontario;
- (c) The Defendants derive substantial revenue from carrying on business in Ontario;
and
- (d) The damages of Class Members were sustained in Ontario.

108. The Plaintiff proposes that this action be tried in the City of Ottawa, in the Province of Ontario as a proceeding under the *Class Proceedings Act*.

Service Outside of Ontario

109. The originating process herein may be served outside Ontario, without court order, pursuant to subparagraphs (a), (c), (g), (h), (o) and (p) of Rule 17.02 of the *Rules of Civil Procedure*. Specifically, the originating process herein may be served without court order outside Ontario, in that the claim is:

- (a) In respect of personal property situated in Ontario (rule 17.02(a));
- (b) For the interpretation and enforcement of a contract or other instrument in respect of personal property in Ontario (rule 17.02 (c));

- (c) In respect of a tort committed in Ontario (rule 17.02(g));
- (d) In respect of damages sustained in Ontario arising from a tort or breach of contract wherever committed (rule 17.02(h));
- (e) The claim is authorized by statute, the *Competition Act* and the *Consumer Protection Act* (rule 17.02(n));
- (f) Against a person outside Ontario who is necessary and/or proper party to a proceeding properly brought against another person served in Ontario; i.e. Western Union Financial Services (Canada), Inc. (rule 17.02(o)); and
- (g) Against a person carrying on business in Ontario (rule 17.02(p)).

Date: November 15, 2013

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**WESTERN UNION FINANCIAL SERVICES (CANADA),
INC. et alii**
Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED IN OTTAWA

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

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