

- (b) by failing to conduct a full and reasonable investigation of the Claim;
- (c) by unduly delaying its evaluation of the Claim;
- (d) by unduly delaying payment of the Claim;
- (e) by failing to timely pay undisputed portions of the Claim while investigating other portions of the Claim;
- (f) by paying less than the amount of the Claim covered by the Bond; and
- (g) by failing to honor the Representations made to the Credit Union in respect of the CUB Program.

~~100-99.~~CUMIS unreasonably failed to perform a timely investigation of the Claim after the Proof of Claim was filed on October 16, 2019. It also unreasonably failed to make a timely assessment of the Claim despite being provided with significant documentation and evidence by the Credit Union in support of the Proof of Claim.

~~101-100.~~ Since filing the Proof of Loss, the Credit Union has continued to supply CUMIS with new evidence that further supports the Claim.

~~102-101.~~ CUMIS understood and repeatedly acknowledged that the Credit Union expected, and was entitled to a timely response on the matters clearly giving rise to coverage under the Bond.

~~403.102.~~ However, CUMIS unreasonably failed to provide a timely response for any of the matters outlined in the Claim, including those that clearly gave rise to coverage under the Bond. CUMIS instead insisted on investigating all matters before it would confirm any coverage. It then delayed its investigation and/or failed to conduct it in a reasonable and timely manner. CUMIS did so in order to delay making a determination on coverage and making payment to the Credit Union for covered losses.

~~404.103.~~ CUMIS' refusal to acknowledge any aspect of the Claim until it investigated and validated all aspects of the Claim is an inappropriate attempt to retain insurance proceeds that CUMIS should have already otherwise paid to the Credit Union.

~~405.104.~~ On October 1, 2021, the Credit Union wrote to CUMIS to express its frustration with the delay, including the failure to investigate and adjust the Claim in a timely fashion. The letter also stated that CUMIS' refusal to state a definitive position regarding the Claim, or any portion of it, and its failure to make any payment for covered losses was causing harm to the Credit Union and was a breach of the insurer's obligations.

~~406.105.~~ In response to the October 1, 2021 letter, on October 28, 2021, CUMIS finally confirmed coverage with respect to portions of the Claim as follows:

- (a) SusGlobal Secret Commissions - \$200,000;
- (b) Lora Bay Secret Commissions - \$180,000;
- (c) Noble House Secret Commissions - \$226,000;

(d) 193 Secret Commissions - \$310,000; and

(e) 172 Secret Commissions - \$140,000.

~~107.106.~~ The total confirmed coverage amount of \$1,056,000 ~~has still not been~~ was only recently paid on March 2, 2022. There ~~is~~ was no basis for CUMIS' failure to timely investigate, assess ~~and~~ make a determination with respect to and pay these covered claims.

~~108.107.~~ CUMIS' failure to perform a timely independent investigation and to make a timely determination regarding the remaining aspects of the Claim is an ongoing breach of its obligations to the Credit Union.

~~109.108.~~ CUMIS' breach of the duty of utmost good faith has caused and continues to cause damages to the Credit Union, including adversely impacting the Credit Union's credit levels and requiring it to seek a variance in order to continue to operate.

109. PACE is entitled to compensatory damages for CUMIS' breach of the duty of good faith.

110. CUMIS' bad faith conduct also warrants an award of punitive damages in favour of the Credit Union.

VI. CONCLUSION

111. The Losses incurred by the Credit Union in connection with the above-discussed transactions are Losses within the terms of the Bond which CUMIS has failed or refused to pay despite repeated demands: (subject to the minor delayed payment noted herein). The Participants,

individually and in collusion with each other, carried out the various dishonest and fraudulent acts set out above with the active and conscious purpose to cause the Credit Union to sustain the Losses totalling approximately \$23,579,008, in order to give benefits to themselves and others.

112. Accordingly, CUMIS is liable to the Credit Union for \$10,000,025,000 under the Bond, and in the alternative, for damages for breach of contract for failure to honour the terms of the Bond, plus punitive damages, pre- and post-Judgment interest and costs.

113. CUMIS is also liable to the Credit Union for damages arising from its bad faith conduct.

114. PACE relies upon the *Credit Union and Caisses Populaires Act, 1994*, S.O. 1994, c. 11, the *Courts of Justice Act*, R.S.O. 1990, c. C.42, as amended, and the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

February 25, 2022

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PAGE SAVINGS & CREDIT UNION LIMITED, by its Administrator,
FINANCIAL SERVICES REGULATORY AUTHORITY OF ONTARIO

-and-

CUMIS GENERAL INSURANCE COMPANY

Plaintiff

Defendant

Court File No. CV-22-00677550-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO

AMENDED STATEMENT OF CLAIM

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Court File No.: CV-22-00677550-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

PACE SAVINGS & CREDIT UNION LIMITED, by its Administrator,
FINANCIAL SERVICES REGULATORY AUTHORITY OF ONTARIO

Plaintiff

- and -

CUMIS GENERAL INSURANCE COMPANY

Defendant

STATEMENT OF DEFENCE

1. The defendant CUMIS General Insurance Company (“CUMIS”) admits the allegations contained in paragraphs 2-9, 20, 28, 44, 74 and 97 of the amended statement of claim.
2. CUMIS denies the allegations contained in the paragraphs 10-12, 14-19, 23-26, 43, 54, 60, 68, 73, 80, 98, 99, 100 – 101 (subject to the comments set out herein), 102-103, 104-105 (subject to the comments set out herein), and 106-113 of the amended statement of claim.
3. CUMIS has no or has insufficient knowledge of the remaining allegations contained in the amended statement of claim and therefore does not admit them.

Overview

4. CUMIS provided certain coverage to the plaintiff PACE Savings & Credit Union Limited (hereafter, “PACE” or “the credit union”) under Bond 01501254 in favour of the plaintiff, for the period January 1, 2018 to January 1, 2019 (“the Bond”). The aggregate limits under the Bond were \$10,000,000, subject to a deductible of \$10,000. The Bond also provided coverage for “Audit Expense” with aggregate limits of \$25,000. The Bond provides for a wide range of different coverages including [Employee] Dishonesty coverage. While its coverages are extensive, the Bond is not intended to cover all losses arising out of fraudulent activity and each claim advanced under

the Bond must be analyzed on its own merits having regard to the specific and specialized language used in the Bond.

5. On or about October 16, 2019, the plaintiff delivered to CUMIS an interim proof of loss (“the POL”) claiming that it had sustained a covered loss of some \$23,579,008, plus various additional amounts to be determined, arising out of the alleged dishonest activities of its former President and CEO, Larry Smith (“Larry”), along with certain other former employees. The POL consists of some nine separate sub-claims, some of which also consist of multiple claims with the sub-claims. All of the sub-claims have as a common element the allegation that their losses were caused by, or as a result of the dishonest activities of Larry. Hereafter, the various separate sub-claims set out in the POL will be collectively referred to as “the Claim”. The separate portions or components of the Claim will be referred to as “sub-claims”.

6. In any bond claim, both the insured and insurer owe one another duties of utmost good faith. The insured is obliged to prove coverage in accordance with the wording in the bond, and to prove the quantum of the claim. The insurer is obliged to take all reasonable steps to investigate and adjust the claim in a timely manner. Where, in the insurer’s opinion, acting in the utmost of good faith, additional documentation and information is required in order to allow the insurer to complete its investigation and coverage assessment, the insurer will make such inquiries and requests to the insured and it will be the insured’s responsibility to fulfil such inquiries and requests in a timely and complete manner.

7. Upon CUMIS’s receipt of the POL, it was anticipated by the parties that the finalizing of the POL by the plaintiff and the investigation and adjustment of the Claim by CUMIS – including the submission of any necessary inquiries and requests by CUMIS to the plaintiff - would be complex and time-consuming. As a result, soon after the delivery of the POL, the parties entered into a tolling agreement so as to allow the parties sufficient time to carry out their respective obligations in this ongoing process.

8. Since receiving the POL, CUMIS and its external claims adjuster (collectively, “CUMIS”) have reviewed it carefully and studied the supporting documentation in detail. Further, from at least January of 2020 to the present, CUMIS has engaged in frequent written and oral communications with the plaintiff. Within the written communications, CUMIS has provided

extensive coverage assessments (some of which have been tentative assessments) of the various sub-claims. Within these communications, CUMIS has clearly set out its concerns as to coverage and quantum in respect of the various sub-claims, and CUMIS has identified the additional information and documentation necessary for CUMIS to complete its investigation and coverage assessment. Unfortunately, the plaintiff has been slow to respond to several of these requests, and to date, the plaintiff has still not provided responses, or complete responses, to several important requests from CUMIS, thereby preventing CUMIS from completing its coverage assessment of the Claim.

9. CUMIS's major coverage concerns in respect of the Claim initially arose mainly out of following issues:

- First, in connection with claims for the "impaired" values of loans and investments, CUMIS was not convinced that the plaintiff had demonstrated that the alleged dishonest employee (i.e., Larry) had the "active and conscious purpose" to cause a loss to PACE in connection with the sub-claims at issue. It is CUMIS's position that under the relevant insuring agreement, for the plaintiff to establish coverage for losses sustained through loans and investments, the plaintiff must demonstrate that the particular dishonest employee (i) dishonestly caused the credit union to advance funds for the investment or loan, and (ii) had the subjective intention that the particular loan or investment should fail and thereby cause a loss to the credit union in the amount of that loan. It is not sufficient for coverage merely to show that a loan (or investment) was made in a manner which was, for example, inconsistent with the credit union's lending procedures, or even with commercial reasonableness.
- Second, with respect to the claims for secret commissions and other "unauthorized" or unjustified payments, CUMIS was not satisfied that all such allegedly secret or unauthorized payments making up this part of the Claim were in fact "secret"; meaning, not disclosed to the credit union, to the credit union's board, or to the Audit Committee, or were not otherwise authorized

pursuant to various consultancy contracts entered into by the plaintiff with various companies controlled by Larry Smith.

- Third, in connection with the Geranium and the False Invoices sub-claims, CUMIS has not been able to identify all of the allegedly fraudulent payments to Larry, or to persons or entities he controlled, and therefore could not satisfy itself as to (i) which payments were and were not authorized, and (ii) which payments pertained to the Geranium sub-claim and which pertained to the False Invoices sub-claim. To this end, CUMIS has requested that the plaintiff provide additional information and particulars of each particular payment so that CUMIS could assess both coverage and quantum.
- Fourth, CUMIS was not satisfied that the sub-claim (within the Geranium sub-claim) pertaining to payments to Frank Klees represented a covered loss, since it was not clear that Klees could satisfy the Bond's definition of "Employee".
- Finally, CUMIS takes the position that under the Recovery condition in the Bond, and so long as covered losses do not exceed the Bond limits of \$10 million, then to the extent that CUMIS makes any indemnity payments in respect of the Claim, CUMIS will be entitled to first right of recovery in respect of any recovery efforts, and in particular, in respect of the plaintiff's recovery action against Larry and others.

All of these coverage concerns and positions were clearly set out by CUMIS, through counsel, in its extensive written communications in 2021 and 2022 to the plaintiff's counsel. Within these communications, CUMIS also set out very clearly the additional information that it required from the plaintiff in order to complete its assessments of coverage and quantum, and/or to justify a reversal by CUMIS on coverage positions CUMIS had taken with respect to those sub-claims which pertained to loan and investment losses. For reasons known only to itself, the plaintiff has been very slow in providing meaningful responses to CUMIS's requests for such additional information, and in some cases, the plaintiff has still not provided the requested information.

10. In spite of the slow progress in obtaining meaningful responses from the plaintiff to its follow-up inquiries, CUMIS has been able to complete its coverage assessments in respect of a majority of the sub-claims. In the course of a mediation between the parties which took place in August and September of 2021, the plaintiff provided to CUMIS certain transcript and affidavit evidence; evidence which had previously been in its hands for several months prior to the mediation. As a result of this new information, and due to its own considerable efforts carried out before the mediation, CUMIS was able to conclude that coverage existed in respect of various sub-claims relating to the payments of secret commissions or other unauthorized or unjustified payments to Larry and his companies and to family members and close associates. These accepted sub-claims, in the total amount of \$1,056,000, are as follows:

• SusGlobal Secret Commissions (item #1 on Schedule A, attached)	\$200,000;
• Lora Bay Secret Commissions (item #3 on Schedule A)	\$180,000;
• Noble House Secret Commissions (item #4 on Schedule A)	\$226,000;
• 193 Ontario, Secret Commissions (item # 6 on Schedule A)	\$310,000;
• 172 Ontario, Secret Commissions (item # 7 on Schedule A)	<u>\$140,000;</u>
 Total	 \$1,056,000

CUMIS advised the plaintiff by letter dated October 28, 2021 (“the October 28 letter”) of its acceptance of coverage for these sub-claims. It held off paying this amount for a short time in anticipation that the plaintiff’s counsel would provide substantive responses to the various outstanding inquiries and requests in the October 28 letter so that CUMIS could provide one final assessment of the Claim and make one indemnity payment. In early 2022, it became clear to CUMIS that the plaintiff was not going to respond to the October 28 letter at which time CUMIS decided to make the partial payment of \$1,056,000.

11. CUMIS has declined coverage in respect of those sub-claims which pertain to the alleged loan and investment losses on the basis that the facts presented by the plaintiff for those sub-claims do not establish that a dishonest Employee had the “active and conscious purpose” to cause a loss

to the credit union. CUMIS has remained receptive to the possibility that the plaintiff might submit additional evidence to support an on-coverage position in respect of the loan and investment loss claims. For reasons known only to itself, the plaintiff has chosen not to do so.

12. Finally, CUMIS has thus far withheld acceptance of coverage in respect of the Geranium and False Invoices parts of the Claim. For these sub-claims, CUMIS has, for well over two years, requested of the plaintiff that it provide additional information to allow CUMIS to identify the specific payments to Larry (and related entities) which make up each sub-claim in order to allow CUMIS:

- to satisfy itself that the payments to Larry (and related entities) in respect of each sub-claim were not disclosed to PACE or otherwise authorised;
- to identify the specific payments which make up the Geranium and False Invoices sub-claims and thereby allow CUMIS to determine coverage in respect of each payment (should they not all share the same nature and characteristic); and
- to satisfy itself that there is no overlap between these two sub-claims (i.e., to confirm that there is no double-counting between the Geranium and the False Invoice sub-claims).

In respect of the “Frank Klees” portion of the Geranium sub-claim, the plaintiff has not yet provided sufficient evidence to demonstrate that Klees was an “Employee” as that term is defined under the Bond.

13. In spite of CUMIS’s frequent written requests for additional information to satisfy its concerns about the Geranium and False Invoices sub-claims, the plaintiff has been unable or unwilling to provide the requested material, or to respond to CUMIS’s concerns about this Klees part of the Geranium sub-claim. As a result, CUMIS (i) has concluded that plaintiff is not able to establish that Klees was an Employee of PACE such that the “Klees” part of the sub-claim is not a covered loss, and (ii) has been unable to complete its assessment of the balance of the Geranium sub-claim, and of False Invoices sub-claim. The defendant states that on numerous occasions, it has suggested to the plaintiff that representatives of the plaintiff and of CUMIS meet in person to

review the Geranium and False Invoices sub-claims, so that the parties might at least try to resolve their “accounting” differences and resolve some of CUMIS’s concerns set out in paragraph 12 above. Unfortunately, the plaintiff has thus far not been willing to allow such a meeting to take place.

14. The plaintiff alleges in paragraph 26 of the amended statement of claim that, as an alternative, it seeks coverage under the Forgery and Extended Forgery coverage in the Bond. In fact, the plaintiff has not advanced in the POL any claim that there is coverage for any losses under this Insuring Agreement. Moreover, within the amended statement of claim, the plaintiff provides no particulars of any allegations in support of such claim.

15. For the reasons set out herein, CUMIS has at all times acted reasonably and in good faith and has made all reasonable efforts to complete its investigation and the adjustment of the Claim in a timely manner. CUMIS remains willing to work with the plaintiff to resolve outstanding issues and concerns and to finalize the adjustment of the Claim.

OVERVIEW OF COVERAGE ISSUES

16. The Claim as set out in the POL is made under the Bond’s [Employee] Dishonesty coverage¹. The majority of the sub-claims fall into three categories: (i) loan (and investment) losses, both actual and anticipated; (ii) secret commissions (including payments for services not provided); and (iii) fraudulent invoices rendered by Larry and related entities. CUMIS states that it is generally difficult to establish coverage under the Dishonesty coverage in the Bond in respect of loan losses. It is a less onerous task to establish coverage under this insuring agreement in respect of “secret commissions”. A brief explanation of the relevant portions of the Bond coverage is set out below.

(i) Bond Wording and General Principles

17. The “Dishonesty” insuring agreement in the Bond, reads as follows:

¹ Other than the claim for Audit/Claims Expense

DISHONESTY

ACTUAL LOSS resulting directly from dishonest or fraudulent acts committed by an EMPLOYEE, DIRECTOR or COMMITTEE MEMBER, acting alone or in collusion with others, with the active and conscious purpose to cause the INSURED to sustain such loss.

However, if some or all of the INSURED's loss results directly or indirectly from a LOAN, then that portion of the loss is not covered unless the EMPLOYEE, DIRECTOR or COMMITTEE MEMBER has received, in connection therewith, a FINANCIAL BENEFIT with a value of at least \$5,000. ...

Under this Insuring Agreement, any conscious or deliberate

- i. Failure to abide by statutes, bylaws, regulations, lending limits, lawful rules or instructions governing or directing the performance of duties; or
- ii. engaging in improper, improvident, unauthorized, illegal or reckless lending; or
- iii. concealment, alteration, manipulation or destruction of records, shall not alone, and without further proof of dishonest or fraudulent intent on the part of the EMPLOYEE, DIRECTOR or COMMITTEE MEMBER, be deemed to be "dishonest or fraudulent acts".

18. The Bond defines the term "Employee" as follows:

EMPLOYEE

Any or all of the following:

- 1. a natural person under the supervision of the INSURED that is:
 - a. employed for wages or salary by the INSURED;
 - b. provided by an employment agency to perform employee duties;
 - c. employed under contract to perform employee duties; or
 - d. who volunteers to perform employee duties, at the direction of the INSURED;

...
- 6. An Officer of the INSURED pursuant to the charter or bylaws of the INSURED or applicable legislation.

19. CUMIS states that it follows from the clear wording of the Bond that, to establish coverage under the [Employee] Dishonesty coverage, an insured must show that (i) it suffered a loss

resulting directly from “dishonest or fraudulent acts” committed by an Employee or Director (acting alone or in collusion with others), (ii) where the Employee was acting “with the active and conscious purpose to cause the Insured to sustain *such* loss” [emphasis added]. The insuring agreement expressly states, among other things, that “any conscious or deliberate ... engaging in improper, improvident, unauthorized, illegal or reckless lending ... shall not alone, and without further proof of dishonest, or fraudulent intent ...” be deemed to be “dishonest or fraudulent acts”.

20. CUMIS states that the “active and conscious purpose” language in the Dishonesty insuring agreement reflects that the “intention” requirement in the coverage is determined by what the Employee’s subjective intention was at the relevant time. To satisfy the intention requirement in the Dishonesty coverage, therefore, an insured must demonstrate that the Employee subjectively intended (i.e., in his own mind) to cause a loss to his employer. This means that the Employee likely must have intended by his actions to steal or to embezzle funds from the employer, either for himself or others. It would not be sufficient (to establish coverage) to show, for example, that the Employee engaged in risky or unauthorized lending behaviour, even if he then dishonestly tried to cover it up.

21. Thus, in a Dishonesty claim under the Bond, the standard of proof is onerous, and it is two-pronged: first, the insured needs to show that a person who satisfies the definition of “Employee” engaged in a “dishonest or fraudulent act”, where that term is defined narrowly, such that, among other things, reckless, improvident, improper, or dishonest lending practices are not, by themselves, sufficient to satisfy the definition; and second, if it can be shown that a “dishonest or fraudulent act” was committed by an Employee, and that the act in question directly caused a loss sustained by the insured, the insured must then also demonstrate that the Employee had the “active and conscious purpose” (i.e., the subjective intention) with that particular dishonest act to cause “such loss”.

(ii) **Coverage for Loan and Investment Losses**

22. CUMIS states therefore that in order to establish coverage for a loan or investment loss, the plaintiff must demonstrate that the Employee in question (Larry Smith in most cases, here) effectively was trying to steal or to embezzle these loaned or invested funds from the credit union

for his benefit, or the benefit of others. This can be difficult to show in respect of loans and investments, even where these were made recklessly, or even illegally. In the case of a loan, the plaintiff insured must also demonstrate that the Employee obtained a financial benefit of at least \$5,000 in respect of the particular loan.

23. Further, CUMIS states that for coverage purposes, the granting of a loan is one activity, while the receipt of a secret commission is another, separate activity. If a scenario were to arise in which a secret commission were paid out of the proceeds of a loan, it is possible that the secret commission might represent a covered loss under the Bond. However, the mere fact that some of the proceeds of the loan may have been used for an illegitimate purpose (paying the secret commission), does not mean that the loan itself represents a covered loss. Rather, for that to be the case, the plaintiff insured would need to demonstrate that the Employee who dishonestly caused the loan to be made did so with the active and conscious purpose to cause “such loss” to the insured; i.e., a loss in the amount of that loan, and that this Employee received a corresponding benefit of at least \$5,000.

24. Investment losses are not specifically referenced in the Dishonesty insuring agreement. However, the coverage requirements discussed above are not limited to loan losses. Thus, to establish coverage, the plaintiff would need to demonstrate that the Employee actively and consciously intended to cause “such loss” to the credit union. In other words, by making the particular investment, the Employee must effectively have intended to steal or embezzle from the insured. This suggests that the Employee must have subjectively intended that investment would fail or would lose money for the credit union while creating a benefit of at least \$5,000 for the Employee.

(iii) Coverage for Secret Commissions and/or Unauthorized Payments

25. CUMIS states that, in the instant case, to the extent that Larry or other “Employees” of the plaintiff credit union, directly or indirectly, received undisclosed payments from persons doing business with the credit union, these would likely be covered losses under the Dishonesty insuring agreement. CUMIS acknowledges that Ontario law provides that in such a case, the employer would have suffered a direct loss in the amount of the payment, and the payment would be deemed

to have been made and received with fraudulent intent, as a result of which it could be inferred that there was an active and conscious intention to cause a loss to the employer. The main issue for determining coverage in respect of payments described as “secret commissions” would likely be whether or not the payments at issue were truly “secret”: if any of the subject payments were disclosed to the credit union, and/or if the credit union was aware of the payments, or if the payments were otherwise authorized, then coverage under the Bond for such payments would or might be difficult to establish.

26. In light of the foregoing, therefore, CUMIS states that in order for an insurer to satisfy itself that there is coverage for any claim relating to secret commissions and/or unauthorized payments, it is necessary that the insured identify for the insurer the precise payments which are alleged to have been secret or unauthorized so that the insurer can satisfy itself that each such payment is indeed a covered loss under the terms of the Bond.

(iv) Recovery Litigation Against Larry et al and Allocation of Recoveries

27. The plaintiff is presently involved in active litigation against Larry, and various other people and related corporations in order to recover losses sustained by the plaintiff as a result of Larry’s (and others’) alleged dishonest activities (“the Recovery Action”). The defendants within this Recovery Action have specifically denied allegations of fact which are relevant to the coverage determinations in the present matter.

28. CUMIS states that depending on the results of the Recovery Action, there may be issues arising out of how such recoveries are to be allocated. The Bond provides under its **Recovery** condition, for the following:

RECOVERY

Any recovery, whether effected by the Insurer or INSURED, shall be applied net of expenses in the following order of priority:

1. To the INSURED, in satisfaction of any direct loss in excess of the applicable limit stated in the Declarations for this Bond; then
2. Subject to the minimum Deductible, if the Deductible is a :

- percentage to the Insurer and INSURED, in proportion to the percentage absorbed in settlement of the loss; or
 - flat amount, to the Insurer, as reimbursement of the amount paid in settlement of the loss; then
3. To the INSURED in satisfaction of any Deductible; then
 4. To the INSURED in satisfaction of any consequential loss or damage, loss of use, loss of interest or earnings or any otherwise uninsured loss.

29. Under the Bond, the deductible is a flat amount. CUMIS states therefore that unless the covered losses exceed the Bond limits of \$10,000,000, to the extent that CUMIS makes any indemnification payments under the Bond, then under this Recovery condition, CUMIS has first right of recovery over any net proceeds of recovery, to the extent of the indemnity payment(s).

(v) **Indirect vs. Direct Losses**

30. The Dishonesty insuring agreement provides coverage for “Actual Loss resulting *directly* from dishonest or fraudulent acts...” [emphasis added]. Some of the sub-claims advanced in the POL appear to be in respect of expenses incurred by the plaintiff in respect of receivership proceedings, or the unwinding of loans, and so on. Even if these can be categorized as “losses”, they are “indirect” in nature because these expenses do not represent funds directly taken or paid out by any dishonest Employee. “Indirect or consequential loss or damages” are specifically excluded from coverage under the terms of the Bond.

THE CLAIMS INVESTIGATION

(i) **CUMIS’s Investigation Approach**

31. As an insurer, CUMIS has an obligation to review all bond claims in the utmost of good faith. CUMIS takes its obligation in this regard very seriously and at all times, it has fulfilled its obligations in connection with the Claim.

32. CUMIS states that in any investigation, it is critical before any coverage determinations are made that it take the necessary time, acting diligently, to review all relevant documentation provided with any POL. To the extent that a POL may be incomplete or may give rise to follow-up questions, inquiries, or requests, it is the obligation of the insurer to pursue these inquiries, in

order to ensure that the full factual matrix is assembled, analysed and understood. In a perfect world, the insurer or the insurer's adjuster would interview all relevant and available witnesses once full documentary production had been made by the insured.

33. CUMIS states that it is best practice to wait for full documentary production and to complete review of the documents *before* conducting interviews in the course of an investigation. One strong reason for this is that the insurer has no means to compel cooperation of individuals no longer in the insured's employ such that the insurer's adjuster typically gets only one opportunity to interview a particular witness. This has been the long-standing practice of the defendant and its adjuster and it is a well-established industry practice.

(ii) Initial Document Requests by CUMIS

34. Attached to this statement of defence as **Schedule B** is a chronology prepared by the defendant's adjuster, Arthur Goguen, which sets out significant activities on the file from the date of delivery of the POL to February 2021. A copy of this chronology was provided to the plaintiff's counsel as an attachment to the letter dated February 11, 2021 from CUMIS's coverage counsel. A review of the history of the parties' dealings in this matter (set out in **Schedule B**) shows that there has been no delay on the part of CUMIS in its adjustment of the Claims. Rather, it has been the delays on the part of the plaintiff in providing the further information requested by the defendant which slowed CUMIS's investigation, and which prevented CUMIS from completing final coverage assessment.

35. The plaintiff provided the POL (with attachments) to CUMIS in October of 2019². Mr. Goguen and others in his office, on behalf of CUMIS, reviewed with great urgency the many thousands of pages of documents, in order to absorb and understand the complex and inter-related facts pertaining to the various sub-claims. Within a couple of months, it was clear to Mr. Goguen that certain necessary information was missing such that follow-up inquiries and requests of the plaintiff were necessary.

² At the plaintiff's request, CUMIS had earlier extended the deadline for delivery of the POL on four separate occasions.

36. As an aside, CUMIS notes that prior to the delivery of the POL, the plaintiff commenced the Recovery Action. As part of the POL materials, the plaintiff has provided some information relating to the legal and factual positions taken by Larry and others in the Recovery Action.

37. On December 19, 2019, Mr. Goguen advised the plaintiff's counsel that he would be submitting to the plaintiff's counsel in early January 2020 a detailed list of follow-up inquiries and requests. On January 7, 2020, he submitted to the plaintiff's counsel a detailed list of inquiries /requests. On January 20, 2020, Mr. Goguen provided brief supplemental requests (adding to the January 7 list of items).

38. On March 6, 2020, the plaintiff through counsel provided certain additional materials to Mr. Goguen but outstanding questions and requests remained. The plaintiff's counsel subsequently gave repeated assurances to Mr. Goguen to the effect that the further requested documentation would be forthcoming shortly. They were not. In respect of these outstanding document requests, Mr. Goguen followed up with the plaintiff's counsel in writing on numerous occasions: on May 6, May 27, June 19, June 23, September 28, and November 24, 2020, and January 11, 2021. Further, there were additional instances where Mr. Goguen spoke to the plaintiff's counsel by telephone while driving, or otherwise out of the office, such that no written record exists of these ongoing efforts.

39. Among other things, some of the materials requested by Mr. Goguen during these frequent communications in 2020 and 2021 were (i) general ledger materials for the Geranium joint ventures (related to the Geranium sub-claim); and (ii) a listing and reconciliation (*vis-à-vis* the dollar amounts claimed) of the specific invoices which constituted the Fraudulent Invoices sub-claim. On this latter point, in the POL, the plaintiff had provided a large number of invoices in support of that sub-claim, but the sum of the invoices did not match the amount claimed in the POL for this particular sub-claim so that it was impossible for CUMIS to determine which invoices formed part of the sub-claim and which did not. Moreover, as set out below, at various times, the amount claimed by the plaintiff in respect of this sub-claim has changed, with no reasonable explanation from the plaintiff as to why this was so.

40. The plaintiff's counsel finally delivered on the plaintiff's behalf a new tranche of documents on February 10, 2021, well over a year after the first requests were made and at or

about the same time that the insured was demanding a written assessment from CUMIS as to its tentative views on coverage. Notably, this new tranche of documents did not include the Geranium general ledger materials, nor any invoice reconciliation pertaining to the Fraudulent Invoices sub-claim.

41. Mr. Goguen made it very clear in his frequent discussions with plaintiff's counsel that he (Mr. Goguen) required the additional information before he could conduct any interviews of persons involved in any parts of the sub-claims, and more generally, in order to be able to complete his factual investigation of the Claim on CUMIS' behalf. He also made it clear to the plaintiff's counsel that because many of the prospective interviewees were involved in more than one of the sub-claims, these sub-claims were in fact interrelated, and it was not practical or advisable for the purposes of the investigation to treat the sub-claims as being separate and discrete.

42. As discussed further below, since the chronology in **Schedule B** was prepared, the plaintiff has produced some additional information. However, the plaintiff still has not produced some of the requested information which CUMIS needs to complete its investigation and coverage assessment. At no time has the plaintiff or its counsel ever provided an explanation to CUMIS as to why there was such an inordinate delay on the plaintiff's part in providing the requested information, nor as to why some information still has not been produced. More on this below.

(iii) Interim Coverage Letters and Responses

43. By way of letter dated February 11, 2021 ("the February 11 letter"), the defendant, through counsel, provided to the plaintiff an interim and comprehensive assessment of coverage in respect of the Claim. Among other things, the February 11 letter advised the plaintiff of the following:

- CUMIS was of the view that it was unlikely that there was coverage under the Bond for the loan and investment losses claimed in the POL;
- Some portions of the sub-claims which claimed for losses arising out of "secret commissions" might be covered under the Bond. However, CUMIS continued to have concerns as to whether all of the impugned payments were truly unauthorized or secret in nature;

- In this regard, CUMIS noted that Larry was the principal of two numbered companies which had, years before, entered into consultancy agreements with PACE and that there was evidence which suggested that at least some of the impugned payments to Larry and related entities (i.e., payments which the plaintiff alleged to have been secret commissions or otherwise unauthorized payments), might in fact have been authorized by the terms of the consultancy agreements, and/or disclosed by Larry to the PACE Board of Directors. If true, this suggested that some or many of the impugned payments did not satisfy the legal definition of “secret commission” or “bribe” and/or were authorized payments, and therefore might not be covered losses;
- CUMIS was not yet satisfied that the plaintiff could demonstrate that Frank Klees met the definition of “Employee” as set out in the Bond, and CUMIS requested that the plaintiff provide additional documentation and information in support of that assertion;
- Under the “Recovery” condition in the Bond, it appeared likely that, to the extent that the Bond were to respond to any parts of the Claim, then so long as this was not an “over-limits” claim, CUMIS would be entitled to first right of recovery to the extent of such indemnity payment(s);
- In order for CUMIS to complete its coverage analysis in respect of the Geranium and False Invoices portions of the Claim, it required that the plaintiff produce, among other things, the Geranium general ledger materials and a reconciliation of the relevant “Fraudulent Invoices” so that the defendant could ensure, among other things, that (i) the payments made to Larry (or to related entities) were not in fact authorized by, or disclosed to the plaintiff credit union, and that (ii) there was no double-counting in respect of these two sub-claims.

44. On February 22, 2021 (“the February 22 letter”), counsel for the plaintiff wrote to CUMIS’s coverage counsel, ostensibly responding to the February 11 letter. Within this letter, and among other things, he complained that:

- the Claim had not yet been paid;
- the insurer was not looking at the evidence “holistically”;
- CUMIS was acting in bad faith; and
- CUMIS had not told the plaintiff what CUMIS required from the plaintiff in order to complete its investigation.

In fact, none of these complaints was meritorious. Curiously, in the February 22 letter, counsel for the plaintiff chose not to respond to any of CUMIS’s concerns about coverage, nor to any of the specific information requests set out in the February 11 letter.

45. By letter dated March 4, 2021 (“the March 4 letter”), counsel for CUMIS again wrote to plaintiff’s counsel to address the various concerns outlined by plaintiff’s counsel in the February 22 letter. In this March 4 letter, among other things, counsel for CUMIS again commented on CUMIS’s coverage concerns, and again made requests for the various information referenced above.

46. In late July, 2021, the plaintiff through counsel finally provided to Mr. Goguen certain general ledger information for the Geranium joint ventures. While this material provided some assistance to CUMIS in adjusting the Geranium sub-claim, it did not resolve all of the defendant’s questions in this regard. Meanwhile, in spite of CUMIS’ frequent requests, by this time in late July 2021, the plaintiff had still not provided a reconciliation of the Fraudulent Invoices, nor any explanation as to why it had not done so.

47. In late August and early September of 2021, and prior to the commencement of the within action, the parties attended at a mediation in an effort to resolve the Claim’s outstanding coverage and quantum issues. The mediation was a so-called “Big Tent” event in that it included two other proceedings which arose of the same allegations of fraud as against Larry: the plaintiff’s Recovery Action (as against Larry and others), and the plaintiff’s action against various former PACE directors. None of these proceedings was settled at the mediation. However, in the course of the Big Tent mediation, the plaintiff provided additional information to CUMIS most or all of which had been in the possession of the plaintiff for several months prior to the mediation (“the new

information”). This included transcripts of the cross-examinations of various former PACE directors and a sworn affidavit from Allison Golanski, Larry’s former common law spouse.

48. During the mediation, the plaintiff advised the defendant for the first time that it was unable or unwilling to provide a reconciliation for the False Invoices sub-claim and that, in fact, this sub-claim was derived from a residual number; the difference between the total dollar figure of “authorized” payments made to Larry (and related entities), as set out in the credit union’s audited annual financial statements, and the plaintiff’s calculation of the total value of *all* payments made to Larry (and related entities). The plaintiff’s counsel explained, therefore, that it was unable to determine exactly which invoices made up the False Invoices sub-claim.

49. The plaintiff has provided no reasonable explanation as to why:

- It did not provide the new information to the insurer as soon as it became available; and
- It did not disclose to CUMIS the nature of the Fraudulent Invoices sub-claim in early 2020, when CUMIS first requested the Invoice reconciliation.

50. During the “Big Tent” mediation, the plaintiff and CUMIS, through counsel, engaged in extensive and helpful discussions about the various aspects of the Claim including the Geranium and False Invoice portions of the Claim. These discussions assisted in (ultimately) resolving some previously unresolved issues, and narrowing the scope of others. In spite of this, at the conclusion of the “Big Tent” mediation in early September, CUMIS continued to request of the plaintiff that it provide additional information in respect of the Geranium and False Invoices sub-claims. It was CUMIS’ understanding, based on discussions with the plaintiff’s counsel during the mediation, that the plaintiff would be able to provide this information in fairly short order after the mediation such that CUMIS’ final coverage assessment could then be completed.

51. To this end, by email dated September 15, 2021 (“the September 15 email”), counsel for CUMIS wrote to plaintiff’s counsel setting out a list of questions pertaining to the Geranium and False Invoices sub-claims. CUMIS had posed these questions during the mediation, but the plaintiff did not provide responses at that time. Defence counsel wrote again to plaintiff’s counsel

on September 27, 2021, to follow up on the September 15 email. CUMIS followed up again in this regard by letters dated October 8 and 28, 2021. In fact, the plaintiff has never provided any substantive response to the September 15 email.

52. On October 1, 2021, counsel for the plaintiff wrote to CUMIS (“the October 1 letter”). This letter contained little or no new information pertaining to the Claim and no responses to any of CUMIS’ outstanding inquiries. Further, the letter repeated many points which had already raised by the plaintiff’s counsel in previous letters, and which had already been discussed by CUMIS’s counsel in the February 11 and March 4 letters. In spite of this, in the October 1 letter, the plaintiff through counsel demanded once again that CUMIS pay out the Bond’s limits of \$10 million and suggested yet again that CUMIS’s failure to complete its coverage assessment amounted to bad faith on CUMIS’s part.

53. Plaintiff’s counsel helpfully attached as Schedule A to the October 1 letter a document setting out “a copy of the claim the [plaintiff] is asserting under the Bond and the amounts being claimed”. An annotated copy of this document is attached herein as **Schedule A**: for ease of reference, the defendant has sequentially numbered the claimed losses set out on this **Schedule A** so that “SusGlobal Secret Commissions” is #1, “SusGlobal Loan Losses” is #2, and so on.

(iv) **October 28 Letter and Coverage Assessment For “Schedule A” Claims**

54. By letter dated October 28, 2021 (“the October 28 letter”), counsel for CUMIS responded to the October 1 letter. Among other things, in the October 28 letter, CUMIS, through counsel:

- Discussed again much of what the defendant had discussed in the February 11 and March 4 letters, responding again to coverage points raised by the plaintiff’s counsel in the October 1 letter and in earlier communications;
- Requested yet again that the plaintiff satisfy CUMIS’s outstanding inquiries and requests, including a request that the plaintiff respond to the September 15 email;
- explained yet again its coverage position on loan and investment losses;

- requested yet again further specific information to support the plaintiff’s contention that Frank Klees met the definition of “Employee” as set out in the Bond; and
- provided coverage determinations for some portions of the Claim as set out below.

55. Within the October 28 letter, CUMIS acknowledged that, upon its review and consideration of the new material (obtained during the mediation), it accepted that the following claimed losses (as set out on **Schedule A**) were covered under the Bond:

• SusGlobal Secret Commissions (item #1 on Schedule A)	\$200,000;
• Lora Bay Secret Commissions (item #3 on Schedule A)	\$180,000;
• Noble House Secret Commissions (item #4)	\$226,000;
• 193 Ontario, Secret Commissions (item # 6)	\$310,000;
• 172 Ontario, Secret Commissions (item # 7)	<u>\$140,000;</u>
Total	\$1,056,000

56. On or about March 2, 2022, CUMIS paid this sum of \$1,056,000 to the plaintiff. While CUMIS advised the plaintiff in the October 28 letter of its acceptance of coverage for these sub-claims, it held off paying this amount for a short time in anticipation that the plaintiff’s counsel would provide a substantive response to the various outstanding inquiries and requests in the October 28 letter so that CUMIS could provide one final assessment of the Claim and make one indemnity payment. In early 2022, it became clear to CUMIS that the plaintiff was not going to respond to the October 28 letter at which time CUMIS decided to make the partial payment of \$1,056,000.

57. The plaintiff did not respond to the October 28 letter until February 23, 2022 (“the February 23 letter”), in a letter written by new counsel for the plaintiff. Once again, there was little that was substantively new in this February 23 letter other than certain information pertaining to the

Geranium sub-claim. Unfortunately, the questions posed in the September 15 email remained unanswered. Within the February 23 letter, the plaintiff once again demanded that CUMIS pay out the Bond's full limits. CUMIS responded by letter dated April 11, 2022 ("the April 11 letter") in which, among other things, CUMIS's ongoing, and unanswered, coverage concerns were laid out again.

58. Prior to the delivery of the April 11 letter, CUMIS's counsel approached plaintiff's counsel with a suggestion as to how the outstanding questions concerning the Geranium and False Invoices sub-claims might be resolved. CUMIS's suggestion was that the plaintiff's forensic accountant could meet in person with CUMIS's adjuster so that together, they could "go through the numbers and the transactions" in an effort to resolve CUMIS's outstanding concerns. While in March 2022, the plaintiff's counsel agreed in principle to the idea of this meeting, in fact, the plaintiff has been unable or unwilling to allow the meeting to take place and no such meeting has yet occurred.

Coverage Assessment for Remaining Sub-Claims

59. The February 11 and October 28 letters provided an assessment of the status of CUMIS' coverage assessments (as they were at the time the letters were written) pertaining to the sub-claims set out **Schedule A**. CUMIS sets out below a summary of all of the sub-claims asserted in the amended statement of claim. For the sake of clarity, and for the purposes of the discussion below, CUMIS will use the same numbering scheme as set out in the amended statement of claim for these sub-claims, and will use the following summary of the relevant persons and companies involved in the various sub-claims:

- Larry Smith ("Larry") owned and operated the following companies:
- 1428245 Ontario ("**142**" or "**142 Ontario**");
- 809755 Ontario ("**809**" or "**809 Ontario**")
- Phillip **Smith** ("Phil"; Larry's son) was CFO of PACE and later became CEO in 2016;

- Malek **Smith** (“Malek”); Larry’s other son) owned 1916761 Ontario (**1916 or 1916 Ontario**) as a holding company. Larry apparently had an interest in **1916**.
- Allison **Golanski** (“Golanski”) is Larry’s common law wife. She owned and ostensibly controlled 1724725 Ontario (**1724 or 1724 Ontario**).
- Frank **Klees** (“Klees”): friend of Larry’s and allegedly an officer of PACE (though the plaintiff has not proven this). Involved in the Geranium matter.
- Joanna **Whitfield** (“Whitfield”): friend of Larry’s (possibly former girlfriend). Ostensible owner of 2340938 Ontario (“**2340**” or “**2340 Ontario**”), though it is possible that Larry controlled 2340. Involved in the CCE sub-claim.
- Ron **Williamson** (“Williamson”): a broker (through his company) and friend of Larry’s.

A. CCE

60. In the POL, the sub-claims made in respect of the CCE investment by PACE are set out as follows:

- \$174,000 for payments by 2340 to Larry, Phil and other employees of PACE;
- 141,000 for payments by 2340 to Whitfield;
- Claims for costs related the 2340 receivership proceedings; and
- Claims for losses arising out of “loan impairment” on PACE’s loan to 2340.

61. The CCE sub-claim is not contained within **Schedule A**. In any event, in the February 11 letter, CUMIS provided its tentative coverage assessment for this sub-claim, stating that, based upon the facts as presented in the POL, CUMIS was not yet satisfied that coverage for any part of the sub-claim had been established yet:

- It was not clear to CUMIS that the payments by 2340 to Larry, Phil and others were undisclosed to, or unauthorized by PACE.
- The payments to Whitfield were not necessarily secret commissions, since Whitfield owned 2340, and at first instance, she was entitled to pay herself money out of that company.
- In respect of the relevant loan, and of PACE's investment in CCE, CUMIS was not satisfied that the plaintiff had shown that Larry intended to cause a loss to the insured. While Larry appears to have circumvented the relevant policies and procedures and concealed his true intentions, it appeared that his intention was to circumvent the ownership restrictions so PACE could invest in a going concern that was apparently a successful business. This in turn suggests that Larry's intention was to make money for PACE, rather than to cause it a loss.
- The costs of the 2340 receivership – whatever they might be – appear to be indirect or consequential in nature such that they are unlikely to be covered losses under the terms of the Bond.

62. The plaintiff has never provided any response to the Feb 11 letter as it pertains to the CCE sub-claim.

B. Geranium

63. In the POL, the Geranium sub-claim is set out as follows:

- \$2.3 million for payments by third parties to Larry Smith;
- \$1,100,000 for payments by PACE to Klees;
- \$3 million for payments by PACE to Larry;
- \$2,187,000 for “impaired value of real estate interests”

64. As noted above, CUMIS has requested that the plaintiff provide certain additional information relating to this sub-claim. As noted above, CUMIS has offered to the plaintiff to have

CUMIS's adjuster meet with the plaintiff's forensic accountant in an effort to resolve CUMIS's various outstanding concerns. Unfortunately, the plaintiff has not provided all the requested information, and the plaintiff has been unwilling to allow such a meeting between adjuster and accountant to take place. In the meantime, in the absence of this additional information, CUMIS is unable at this point to finalize its assessment as to coverage and quantum in respect of the various aspects of this sub-claim. CUMIS has identified in writing for the plaintiff the remaining outstanding coverage issues in respect of this sub-claim:

- CUMIS acknowledges that, to the extent that Larry received secret payments from entities which did business with PACE (JLG Management and Prime R), these might be secret commissions which could be covered losses. Thus far, it is unclear from the materials provided by the plaintiff as to what the quantum is in respect of any such secret payments.
- The payments made from PACE to Larry were made to numbered companies. These payments would not be secret commissions if they were authorized or otherwise disclosed to the Board. CUMIS has requested clarification from the plaintiff as to exactly which payments to Larry and related entities fall within this category.
- CUMIS is not satisfied that yet satisfied that Klees was an "Employee" as that term is defined under the terms of the Bond and the plaintiff has chosen not to respond to CUMIS's requests for additional information to support the plaintiff's allegations on this point. There has been no suggestion or evidence to support the notion that Klees was a director of PACE at any relevant time.
- The claim for \$2,187,000 for the alleged impaired value of the investment would likely not be covered since the plaintiff has presented no evidence that anyone at PACE intended for these investments to fail and to cause a loss to the credit union, or to cause a loss in this amount.
- Some parts of the Geranium sub-claim relate to allegedly fraudulent invoices rendered by Larry to one or other entity (with subsequent unauthorized payments

to Larry). The Fraudulent Invoices sub-claim advances a similar claim such that it is possible that there may be overlap between this sub-claim and the False Invoices sub-claim. As noted above, CUMIS has sought but not yet received from the plaintiff additional information from the plaintiff which is necessary to resolve its concerns on this point.

C. SusGlobal

65. In the POL, the SusGlobal sub-claim is set out as follows:

- \$3,800,000 for a loan loss; and
- \$200,000 in respect of the payment of a secret commission.

66. CUMIS has accepted coverage for the claim for the secret commission part of this sub-claim (item #1 on **Schedule A**). CUMIS has rejected the loan loss claim, for the reasons set out in the February 11 letter. Among other things, in this earlier letter, CUMIS noted the following factual points:

- There was a formal underwriting process in place at PACE which reviewed the loan(s) at issue, and Ron Ghose was the loans officer at PACE in charge of the SusGlobal lending facility;
- The plaintiff had provided no compelling evidence to suggest that Larry “forced” this loan on PACE; and
- Williamson [a third party] and Larry discussed receiving partial payment in shares of the borrower, suggesting that Larry hoped that the business would prosper.

67. On the basis of these facts, as it understood them, CUMIS was not satisfied that (i) Larry caused the loans to be made; or that (ii) if he did, then he did so with the subjective intention of having the loans go into default and cause a loss in the amount of the loans to PACE. At no time has the plaintiff ever responded to the February 11 letter to advise that CUMIS’s understanding of the relevant facts (set out above and in that letter) was incorrect, and/or to provide any evidence to

suggest that CUMIS' understanding of the relevant facts was not correct. As such, CUMIS was obliged to conclude that there was no coverage for this sub-claim.

D. Lora Bay

68. In the POL, the Lora Bay sub-claim is set out as follows:

- \$180,000 representing an unauthorized and unjustified "fee" paid by PACE to 191 Ontario (Malek) for "services" which were allegedly never provided;
- \$4,420,000 in respect of an improvident investment.

69. CUMIS has accepted coverage for the claim relating to the payment by PACE to 191 Ontario (item #3 on **Schedule A**). CUMIS has rejected the claim in respect of the allegedly improvident investment for the reasons set out in the February 11 letter (this part of the sub-claim is not included on **Schedule A**). Among other things, in this earlier letter, CUMIS noted the following factual points:

- The plaintiff has presented no evidence to support the conclusion that Larry or any other Employee had an active and conscious purpose to cause a loss to the credit union.
- There is evidence to suggest that the PACE Board of Directors approved the initial debenture and its conversion into equity.
- In any event, given that there was an ongoing relationship between PACE on the one hand and Lora Bay and its principal, Larry Dunn on the other, in the absence of any additional evidence, there is no reason to believe that an investment in Lora Bay would have been intended to cause a loss to the credit union.

70. On the basis of these facts, as it understood them, CUMIS was not satisfied that Larry, on his own, caused the investment at issue to be made; or that (ii) even if he did, that he did so with the subjective intention of having the investment fail and cause a loss to PACE. At no time has the

plaintiff ever responded to the February 11 letter to advise that CUMIS's understanding of the relevant facts (set out above and in that letter) was incorrect, and/or to provide any evidence to suggest that CUMIS' understanding of the relevant facts was not correct. As such, CUMIS was obliged to conclude that there was no coverage for this sub-claim.

E. Noble House

71. In the POL, the Noble House sub-claim is set out as follows:

- \$226,000 in respect of a payment made by Noble House to 1916 (Malek's company);
- \$226,000 in respect of a payment made by Noble House to Williamson;
- \$4,900,000 being the impaired amount of the loan to Noble House.

72. CUMIS has accepted coverage for the claim in the amount of \$226,000 in respect of a payment made by Noble House to 1916 (item #4 on **Schedule A**). For the reasons set out in the February 11 letter, CUMIS has rejected both the claim in respect of the payment to Williamson (which is not included on **Schedule A**), and the claim for the allegedly loan loss. Among other things, in this earlier letter, CUMIS noted the following factual points:

- Williamson was not an employee of PACE and the payment to him (or his company) was made by a third party;
- There was a formal underwriting process in place at PACE in 2017 for this loan, and PACE approved the loan based on what appears to be a legitimate appraisal which was obtained in June 2017;
- While the plaintiff obtained a less favourable appraisal in 2019, in the absence of any evidence that Larry provided, or caused to be provided a fraudulent 2017 appraisal, CUMIS questioned how the 2019 appraisal could be relevant to the issue of whether Larry had dishonest intent in 2017 when the loan was granted;

- CUMIS saw no compelling evidence to suggest that Larry “forced” this loan on PACE;
- The borrower had a plausible business plan and PACE’s credit committee signed off on this loan.

73. On the basis of these facts, as the insurer understood them, CUMIS was not satisfied that (i) Larry caused the loan to be made; or that (ii) if he did, then he did so with the subjective intention of having the loan go into default. At no time has the plaintiff ever responded to the February 11 letter to advise that CUMIS’s understanding of the relevant facts (set out above and in that letter) was incorrect, and/or to provide any evidence to suggest that CUMIS’ understanding of the relevant facts was not correct. As such, the insurer was obliged to conclude that there was no coverage for the loan loss portion of this sub-claim.

74. CUMIS states that it is not satisfied that the amounts paid to Williamson represent a covered loss since Williamson was not PACE’s employee, so that any such payments to him cannot meet the legal test for a bribe or secret commission *vis-à-vis* PACE.

F. 1934811 Ontario: Secret Commissions Sub-Claim

75. In the POL, the sub-claim relating to payments made by 193 Ontario is set out as follows:

- \$310,750 relating to a payment from 193 Ontario to 172 Ontario (Golanski’s company);
- \$310,000 relating to a payment from 193 to Williamson.

76. CUMIS has accepted coverage for the payment from 193 Ontario to 172 Ontario (item #6 on **Schedule A**). For the reasons set out in the February 11 letter, CUMIS has rejected the claim in respect of the payment from 193 to Ron Williamson (which is not included on **Schedule A**) on the basis that at no time was Williamson an Employee of PACE and therefore a payment to him by a third party cannot be a secret commission *vis-à-vis* PACE.

G. Lagasco

77. In the POL, the sub-claims made in respect of the Lagasco investment by PACE are as follows:

- \$3 million in respect of a loan loss;
- A claim for costs in an amount to be determined allegedly incurred to prevent the advancement of further planned, but improper loans.

78. The Lagasco sub-claim is not contained within **Schedule A**. For the reasons set out in the February 11 letter, CUMIS has rejected this sub-claim. Among other things, in this earlier letter, CUMIS noted the following factual points:

- Jane Lowrie, principal of Legasco, was a corporate CEO with a publicly traded company. She and Larry knew each other from their other respective business dealings;
- Legasco sought to borrow funds from PACE to assist with the purchase of assets of an insolvent entity, under a court proceeding, and PACE did advance funds at first instance to Legasco to pay a deposit on this purchase;
- The plaintiff Administrator chose not to complete Legasco's proposed financing, through PACE, of this purchase;
- Ultimately, Lowrie (through her company Legasco) was able to complete the purchase through funds borrowed from another lender, but the funds so borrowed were not sufficient to pay-out PACE's interest;
- In any event, another financial institution evidently was of the view that the loan to Legasco was a risk worth taking, even if the Administrator was not prepared to lend further funds to Legasco;
- While there appears to be evidence that the loan was not in compliance with the lending requirement set out by the Act and Regulations, there is

no evidence that Larry intended the loan to go into default and cause a loss to the credit union.

- On the contrary, given the pedigree of the borrower's principal, Ms. Lowrie, it can be inferred that Larry believed that this was a good risk.
- The plaintiff has not provided evidence of any personal benefit received by Larry (or any other PACE employee) as a result of the transaction at issue.

79. On the basis of these facts, as the insurer understood them, CUMIS was not satisfied that (i) Larry caused the loan to be made; or that (ii) if he did, then he did so with the subjective intention of having the loan go into default. In any event, there is no evidence of any personal benefit being obtained by Larry here and in order to establish coverage, the plaintiff insured must demonstrate that Larry received a benefit of at least \$5,000. At no time has the plaintiff ever responded to the February 11 letter to advise that CUMIS's understanding of the relevant facts (set out above and in that letter) was incorrect, and/or to provide any evidence to suggest that CUMIS' understanding of the relevant facts was not correct. As such, the insurer was obliged to conclude that there was no coverage for the loan loss portion of this sub-claim.

80. CUMIS also denies coverage for the portion of the sub-claim for expenses involved by the Administrator in setting aside the transaction. Since there is no coverage in respect of the \$3 million loan loss, any incidental expenses involved in unwinding the Lagasco transaction are at best derivative expenses in respect of an uncovered loss, and therefore would be uncovered themselves. In any event, even if there were coverage for the loan loss, these expenses claimed by the plaintiff were indirect in nature and therefore, expressly excluded under the terms of the Bond.

H. Golanski Diversion

81. In the POL, the sub-claim made in respect of the diversion of funds to 172 Ontario was for \$140,000. CUMIS has accepted coverage of this sub-claim (item #7 of **Schedule A**).

I. Fraudulent (False) Invoices

82. In the POL, the sub-claim made in respect of the Fraudulent Invoices sub-claim was \$2,417,903. In **Schedule A** as attached to the October 1, 2021 letter from plaintiff's counsel, the Fraudulent Invoices sub-claim was revised downwards to \$2,062,634. In the amended statement of claim, the amount claimed has been increased to \$2,676,165. In spite of frequent requests made by the defendant CUMIS since early 2020, the plaintiff has been unable or unwilling to provide particulars to CUMIS as to which invoices make up this sub-claim. In the absence of such a listing or reconciliation of the invoices making up this sub-claim, CUMIS has been unable thus far to complete its assessment as to quantum and coverage. Further frustrating CUMIS' review is the fact that the quantum claimed by the plaintiff for this sub-claim is continuously changing. While CUMIS has suggested to the plaintiff that CUMIS's adjuster and the plaintiff's forensic accountant should meet in person in an effort to resolve the defendant's outstanding concerns in respect of this sub-claim, the plaintiff has not yet agreed to this.

J. Audit Expenses

83. CUMIS states that under the Audit Expense insuring agreement, the Bond provides that it will cover "necessary and reasonable expenses... incurred to prepare a Proof of Loss which constitutes a loss under the [Dishonesty] Insuring Agreement". The declaration page for the Bond provides for a \$25,000 limit under Audit Expense coverage. In the circumstances, CUMIS states that no more than \$25,000 in total can be payable under this coverage.

Allegations of Bad Faith

84. CUMIS acknowledges that both it and the plaintiff owe to each other a duty of utmost good faith in the presentation and the adjustment of the Claim. At all times, CUMIS has discharged its duty in the manner in which it has investigated and adjusted the Claim. For all the reasons set out herein, CUMIS denies vehemently that it has failed to investigate, adjust and the pay the Claim in a timely way, and denies that the insurer has at any time acted in bad faith *vis-à-vis* the plaintiff. In this regard, and for example, CUMIS has set out in the February 11, March 10, and October 28 letters the efforts to which CUMIS has gone to adjust and quantify the claim, and the efforts which CUMIS has made to get timely and meaningful responses from the plaintiff to its requests for

information and documentation. In this regard, CUMIS states that the written record shows very clearly the extent to which the plaintiff's slow and incomplete responses to CUMIS's reasonable inquiries have caused – and continue to cause – delay in the final adjustment of this Claim.

Conclusion

85. The defendant remains ready and willing to work with the plaintiff in its adjustment of the Claim. For the purposes of this statement of defence, however, the defendant takes the position that other than as set out herein, the sub-claims asserted by the plaintiff are thus far unsubstantiated and unproven (for all of the reasons set out herein, and for other reasons which may be determined, in due course), and therefore, not payable under the Bond.

86. The defendant pleads and relies on all of the terms of the Bond, and it reserves all of its rights and defences under the terms of the Bond. The defendant also pleads and relies upon the terms of the *Insurance Act*, R.S.O. 1990, as amended.

87. For all of the foregoing reasons, the defendant states that the within claim should be dismissed, with costs.

October 12, 2022

Lester & Associates
Barristers & Solicitors
181 University Avenue, Suite 801
Toronto, ON M5H 3M7

Reid Lester LS#: 31157K
rlester@lesterassociates.ca
Tel: 416.802.9781

Lawyers for the Defendant

TO: LAX O'SULLIVAN LISUS GOTTLIEB LLP
Suite 2750, 145 King Street West
Toronto ON M5H 1J8

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csmith@lolg.ca
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Andrew Winton LS#: 54473I
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Philip Underwood LS#: 73637W
punderwood@lolg.ca
Tel: 416.645.5078

Lawyers for the Plaintiff

Goodmans

SCHEDULE "A" CLAIM AMOUNTS

Claim	Description	Claim Amount	Comments
SusGlobal	Secret Commission (in CDN\$)	\$200,000	• Claims is USD\$150,00 converted to CDN\$
SusGlobal	Loan Losses	\$3,800,000	• Losses on loans for which Smith received secret commission
Lora Bay	Secret Commission	\$180,000	
Noble House	Secret Commission	\$226,000	
Noble House	Loan Loss	\$4,900,000	• Loan losses on loan where Smith received secret commission
193	Secret Commission	\$310,000	
172	Diversion to 172	\$140,000	
Geranium	\$ to Larry Smith	\$5,334,608	• Payments to Smith
Geranium	\$ to Klees	\$1,253,923	• Being amounts paid to Frank Klees less \$1.5 million allegedly disclosed to board
False Invoices	\$ to Larry	\$2,062,634	• Wrongful payments taken by Smith based on invoices he provided to the Credit Union and amounts paid to his accounts his entitlements versus the amount of compensation he was entitled to as detailed in the KSV report.
Total		\$18,407,165	
Costs Claims	\$25,000 per claim	\$225,000	

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PACE Credit Union

Date	Event Description
Oct-17	DICO receives the first whistleblower letter which contains allegations of self-dealing, secret commissions and excessive risk-taking
Oct-17 to Apr-18	DICO receives 5 additional letters from the whistleblower(s) and form the view that they are written by someone inside Pace CU
21-Mar-18	DICO issues letter of concern to Pace
3-Apr-18	DICO places Pace on their Watchlist
19-Apr-18	DICO meets with Pace Board & Larry Smith to discuss concerns, explanations received fail to alleviate DICO's concerns
Apr-18	DICO receives calls from two Pace Directors (Dimakos & Topping) expressing concerns about the "propriety" of various transactions and conduct similar to those expressed by the whistleblower(s)
10-May-18	DICO holds "in-camera" meeting with the Pace Board (excluding Larry Smith) and retains KSV Advisory Group to perform a "special audit"
May-Sept-18	<p>KSV reports findings including:</p> <ul style="list-style-type: none"> - "self-dealing payments" related to "off-market loans" received by employees of Pace and funneled through numbered companies (i.e. SusGlogal, CCE, Geranium, Dunn, 1934811 Ont. Ltd. - Undisclosed ownership interests in member companies that received loans from Pace (i.e. Trayco, Newmarket, Silver Lakes, 142 Ont, 80-9 Ont, Mass, Easyway - Various regulatory & financial statement issues (i.e. understating loan loss provisions, lack of DICO approval when establishing subsidiaries, inaccurate disclosure of annual compensation
28-Sep-18	DICO issued Order placing PACE under Administration
7-Oct-18	DICO places CUMIS on notice of potential D&O and Bond claim(s)
10-Oct-18	CUMIS Assigned BBCG to Investigate
27-Nov-18	BBCG provides DICO/PACE/Wadden blank Proof of Loss forms calling their attention to the time limitations in the Bond
28-Nov-18	BBCG Report #1
30-Nov-18	At DICO's request the time limitations for filing Proof of Loss are tolled to May 31, 2019 (agreed by CUMIS)
25-Feb-19	BBCG Report #2 with expanded Discovery details
23-Apr-19	BBCG Report #3 reporting details of the Asset Preservation Action commenced by PACE
24-Apr-19	At DICO's request the time limitations for filing Proof of Loss tolled to July 31, 2019 (agreed by CUMIS)
18-Jul-19	BBCG Report #4 update on Asset Preservation Action
19-Jul-19	At DICO's request the time limitations for filing Proof of Loss tolled to September 30, 2019 (agreed by CUMIS)
16-Oct-19	DICO/PACE files an Interim Bond Proof of Loss claiming \$23.6M
25-Oct-19	BBCG acknowledges receipt of the POL under a reservation of rights
18-Dec-19	BBCG provides CUMIS Counsel with a detailed Memo regarding PACE POL submission

19-Dec-19	BBCG advises DICO/PACE/Wadden that a detailed question and requests would be submitted in early January 2020
7-Jan-20	BBCG Submits detailed questions/requests to DICO/PACE/Wadden
6-Mar-20	DICO/PACE/Wadden begin uploading documents requested by BBCG
April - May 2020	BBCG submits multiple detailed memos for each category of claim documented by DICO/PACE/Wadden
28-Sep-20	DICO/PACE/Wadden advise that they are working on providing the outstanding documents requested (i.e. False invoice reconciliation & Geranium JV & Loan files)
24-Nov-20	BBCG discusses status of outstanding documents with Wadden and are advised that they are working on it
25-Nov-20	BBCG updates CUMIS Counsel regarding the November 24, 2020 call between BBCG & Wadden
11-Jan-21	BBCG discusses status of outstanding documents with Wadden and are advised that they are working on it. Wadden advises that he has received instructions to start proceedings against CUMIS if CUMIS does not issue some form of positive indication regarding claim potential. BBCG advises that CUMIS has been clear from the outset that a coverage position will not be rendered until the investigation has been completed.
14-Jan-21	BBCG provides CUMIS outside counsel with an update on the January 11, 2021 call between BBCG & Wadden
26-Jan-21	BBCG receives a call from Wadden advising that he has instructions to file a claim against CUMIS including bad faith allegations.
26-Jan-21	BBCG updates CUMIS Counsel regarding the January 26. 2021 call between BBCG & Wadden
27-Jan-21	Wadden emails BBCG advising that they will proceed with suit against CUMIS is he does not receive some form of affirmative communication from CUMIS
10-Feb-21	BBCG receives letter from Wadden regarding the outstanding document requests with instructions for document download from a shared site

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

STATEMENT OF DEFENCE

Lester & Associates
Barristers & Solicitors
181 University Avenue, Suite 801
Toronto, ON M5H 3M7

Reid Lester LS#: 31157K
rl Lester@lesterassociates.ca
Tel: 416.802.9781

Lawyers for the Defendant

TAB L

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT is made as of December 1, 2022, between PACE Savings & Credit Union Limited, by its Liquidator, KPMG Inc. (“**PACE**”) and Brent Bailey, Deborah Baker, Ian Goodfellow, Al Jones, Wendy Mitchell, George Pohle, Peter Rebellati, Jim Tindall, Pauline Wainwright, and Neil Williamson (the “**Former Directors**”) (each individually, a “**Party**”, and collectively, the “**Parties**”).

WHEREAS PACE commenced an action bearing the Court File Number CV-19-00616388-00CL (the “**Action**”) on March 18, 2019;

AND WHEREAS the Former Directors were added as Defendants to the Action by a Fresh as Amended Statement of Claim dated October 11, 2019;

AND WHEREAS CUMIS General Insurance Company (“**CUMIS**”) has issued a Directors’ & Officers’ Liability insurance policy, bearing the policy number 01501254 (the “**Policy**”), to PACE;

AND WHEREAS PACE has brought claims against the Former Directors for negligence and breach of the duty of care they owed to PACE, including any duties owed in managing and supervising the relationship between PACE and Pace Securities Corp. (the “**D&O Claims**”);

AND WHEREAS KPMG Inc. was appointed as Liquidator for PACE Savings & Credit Union Limited by Court order dated August 24, 2022;

AND WHEREAS the Parties have engaged in arm’s-length, good faith negotiations to resolve PACE’s claims as against the Former Directors;

AND WHEREAS PACE intends to pursue its claims against the Defendants in the Action, aside from the Former Directors (the “**Non-Settling Defendants**”), but only in respect of the Non-Settling Defendants’ proportionate share of liability;¹

AND WHEREAS the Former Directors have agreed to co-operate in PACE’s pursuit of its claims against the Non-Settling Defendants in the Action, on the terms specified below;

AND WHEREAS PACE intends to seek an order from the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) approving this Settlement Agreement;

¹ For clarity, the Non-Settling Defendants are: Larry Smith, Phillip Smith, 1428245 Ontario Ltd., 809755 Ontario Ltd. (a.k.a. Elective Benefit Insurance Services), Malek Smith, 1916761 Ontario Ltd., 1724725 Ontario Ltd., Frank Klees, Klees & Associates Ltd., Ron Williamson, R. Williamson Consultants Limited, Ron Williamson Quarter Horses Inc., Brian Hogan, and Joanna Whitfield.

NOW THEREFORE in consideration of the covenants set out below and the representations made in the Recitals above and for other good and valuable consideration, the receipt and sufficiency of which are acknowledged, and subject to the provisions set out herein respecting Court approval of this Settlement Agreement and its material terms, the Parties agree as follows:

1. The Former Directors shall cause CUMIS to pay the sum of _____ (the “**Settlement Funds**”) by wire transfer of immediately available funds to PACE within 30 days following the effective date of this Settlement Agreement. Payment of the Settlement Funds will be the sole responsibility of CUMIS and the Former Directors will have no personal obligation to pay the Settlement Funds personally.
2. On the effective date of this Settlement Agreement, the Parties will enter into a full and final mutual release of the D&O Claims (the “**Release**”), in the form attached hereto as Schedule “A”, or as counsel to the Parties, acting reasonably, shall otherwise agree. The Release shall be held in escrow until PACE’s receipt of the Settlement Funds.
3. PACE will amend the Statement of Claim in the Action to remove the D&O Claims and to clarify that any damages it is seeking from the Non-Settling Defendants do not include any amount apportionable to the fault or negligence of the Former Directors.
4. PACE will obtain orders dismissing the Action as against the Former Directors. The Former Directors will consent to dismissal of their Counterclaim against PACE.
5. If requested by PACE, the Former Directors shall cooperate with counsel for PACE and/or the Liquidator in the prosecution of the Action against the Non-Settling Defendants, including by appearing and giving sworn evidence as witnesses at the trial of the Action as against the Non-Settling Defendants. PACE will pay the reasonable legal fees incurred by the Former Directors in connection with such cooperation.
6. CUMIS will not rely on the inclusion of an obligation to provide evidence in paragraph 5 to allege that it constitutes a basis for denial of coverage. Should PACE exercise any rights to obtain such evidence, CUMIS may allege that it constitutes a basis for denial of coverage and PACE will be free to allege it does not constitute such a breach.
7. The Liquidator will, at its expense, seek an order from the Court approving the terms of this Settlement Agreement (the “**Approval Order**”) on notice to all of the parties to the Action and CUMIS. The Former Directors and CUMIS will consent to the Approval Order in a form that is acceptable to counsel, acting reasonably.
8. PACE will disclose the existence and terms of this Settlement Agreement to the Non-Settling Defendants as required by law and as necessary to obtain the Approval Order. The Parties shall otherwise keep the existence and terms of this Settlement Agreement

confidential, and shall not reveal its existence and terms except to their respective legal and financial advisors and insurers, or as otherwise required by law.

9. This Settlement Agreement and the documents referred to herein together constitute the entire agreement between the Parties with respect to the matter herein. The execution of this Settlement Agreement has not been induced by, nor do any of the Parties rely upon or regard as material, any representations, promises, agreements or statements whatsoever not incorporated herein and made a part hereof.
10. This Settlement Agreement shall be governed by, and will be construed and interpreted in accordance with, the laws of the Province of Ontario and the laws of Canada applicable in the Province of Ontario. The Parties hereby attorn to the jurisdiction of the Court in respect of any dispute arising from this Settlement Agreement.
11. No amendment, supplement, modification or waiver or termination of this Settlement Agreement and, unless otherwise specified, no consent or approval by any Party, is binding unless executed in writing by the party to be bound thereby.
12. Any failure by any Party to insist upon the strict performance by the other Party of any of the provisions of this Agreement shall not be deemed a waiver of any of the provisions hereof, and such Party, notwithstanding such failure, shall have the right thereafter to insist upon strict performance of any and all of the provisions of this Agreement to be performed by such other Party.
13. Except as specified herein, each of the Parties (and in the case of the Former Directors, CUMIS) shall pay their respective legal, accounting, and other professional advisory fees, costs and expenses incurred in connection with this Settlement Agreement and its implementation.
14. This Settlement Agreement may be executed in counterparts, each of which shall be deemed to be an original and which together shall constitute one and the same agreement. Delivery of an executed original counterpart of a signature page of this Settlement Agreement by facsimile or electronic transmission shall be as effective as delivery of a manually executed original counterpart of this Settlement Agreement.
15. The Settlement Agreement has been the subject of negotiations and discussions among the Parties. Each of the Parties has been represented and advised by competent counsel, so that any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafters of the Settlement Agreement shall have no force and effect.

IN WITNESS OF WHICH the Parties have executed this Settlement Agreement.

[signature pages follow]

PACE Savings & Credit Union Limited, by its liquidator, KPMG Inc.

DocuSigned by:
Anamika Gadia

ANAMIKA GADIA

Title: Vice President

I have the authority to bind the Corporation

CUMIS General Insurance Company

DocuSigned by:
Bob Hague

BOB HAGUE

Title: EVP/President of Credit Union

Distribution, CUMIS Group Ltd.

I have the authority to bind the Corporation

DATED AT , this day of December, 2022

DocuSigned by:
Brent Bailey

Witness

Brent Bailey

12/1/2022

DATED AT , this day of December, 2022

Witness

DocuSigned by:

Deborah Baker

79B4996F6C374C5...

Deborah Baker

12/1/2022

DATED AT , this day of December, 2022

Witness

DocuSigned by:

Ian Goodfellow

A45FA51BAC8D47A...

Ian Goodfellow

12/2/2022

DATED AT , this day of December, 2022

Witness

DocuSigned by:

Al Jones

D762FD03C77C483...

Al Jones

12/1/2022

DATED AT , this day of December, 2022

Witness

DocuSigned by:

Wendy Mitchell

705419AC9B4740A...

Wendy Mitchell

12/1/2022

DATED AT , this day of December, 2022

Witness

DocuSigned by:

George Pohle

F4517DA6BF864B6...

George Pohle

12/2/2022

DATED AT , this day of December, 2022

Witness

DocuSigned by:
Peter Rebellati
319C2CD0CACE44E...

Peter Rebellati

DATED AT , this day of December, 2022

Witness

Jim Tindall

12/2/2022

DATED AT , this day of December, 2022

Witness

DocuSigned by:
Pauline Wainwright
B7F4E217AB2440B...

Pauline Wainwright

12/1/2022

DATED AT , this day of December, 2022

Witness

DocuSigned by:
Neil Williamson
01912537E4AC44C...

Neil Williamson

Witness

Wendy Mitchell

Witness

Neil Williamson

Witness

Pauline Wainwright

Witness

Deborah Baker

Witness

Brent Bailey

Witness

DocuSigned by:
Jim Tindall
31D3BFACCE004AA

Jim Tindall

Witness

Peter Rebellati

Witness

Al Jones

Witness

George Pohle

Schedule "A"

MUTUAL RELEASE

The undersigned, **PACE SAVINGS & CREDIT UNION LIMITED, by its liquidator, KPMG Inc. ("PACE"), CUMIS GENERAL INSURANCE COMPANY ("CUMIS"), IAN GOODFELLOW, WENDY MITCHELL, NEIL WILLIAMSON, PAULINE WAINWRIGHT, DEBORAH BAKER, BRENT BAILEY, JIM TINDALL, PETER REBELLATI, AL JONES, AND GEORGE POHLE** (which term includes their associated and related companies, and their respective officers, directors, employees, shareholders, partners, administrators, agents, assigns, executors, successors, subcontractors, insurers and heirs), for and in consideration of the execution of this Mutual Release and the promises made in the Settlement Agreement dated December 1, 2022 (the "**Settlement Agreement**"), the receipt and sufficiency of which is hereby acknowledged, do hereby remise, release and forever discharge each other from claims, actions, demands, manner of actions, causes of actions, suits, debts, duties, accounts, bonds, warranties, claims over, indemnities, contracts, losses, injuries, undertakings, covenants and liabilities of whatever nature and kind whether past, present and future, known or unknown, and whether in equity or at law, jointly or severally, one against the other, for or by reason or cause of any matter or thing, known or unknown, existing up to the present time, including, without limiting the generality of the foregoing, those arising out of, connected with or in any way related to the matters raised in the action (claim and counterclaim) bearing Court File No. CV-19-00616388-00CL (the "**Action**"), except as excluded herein.

AND IT IS HEREBY DECLARED, CONFIRMED AND ACKNOWLEDGED that the undersigned have not been induced to execute this Mutual Release by reason of any representation or warranty of any nature or kind whatsoever, and that there is no condition, express or implied or collateral agreement affecting the said Mutual Release, except as provided for herein and in the Settlement Agreement.

AND IT IS UNDERSTOOD that this Mutual Release excludes claims against CUMIS arising out of, connected with or in any way related to any claims by PACE against the Non-Settling Defendants, as that term is defined in the Settlement Agreement.

AND FOR THE SAID CONSIDERATION the undersigned covenant and agree not to make any claim or demand or commence, maintain or prosecute any action, cause or proceeding for damages, compensation, loss or any relief whatsoever against each other in respect of the claims subject to this Mutual Release. The undersigned further agree that this Mutual Release shall operate conclusively as an estoppel in the event of any such claim, action or proceeding and may be pleaded accordingly.

AND FOR THE SAID CONSIDERATION the undersigned covenant and agree not to continue, to make claim, to commence or to take proceedings against any other person, firm, partnership, business or corporation who or which might claim contribution from, or be indemnified by, the other parties, under the provisions of any statute or otherwise in respect of those matters to which this Mutual Release applies.

AND IT IS HEREBY DECLARED, CONFIRMED AND ACKNOWLEDGED that the undersigned have not assigned and will not assign to any other person or entity any of the

actions, causes of action, suits, demands, debts, accounts, contracts, damages, or other claims which are the subject of this Mutual Release.

AND IT IS UNDERSTOOD that upon providing this Mutual Release the undersigned, and each of them, do not admit any liability to the other or others and that such liability is specifically and expressly denied.

THIS MUTUAL RELEASE shall be deemed to have been made in and shall be construed in accordance with the laws of the Province of Ontario.

THIS MUTUAL RELEASE shall inure to the benefit of and be binding upon the undersigned and their respective heirs, executors, administrators, legal personal representatives, successors and assigns.

AND IT IS AGREED that this Mutual Release can be signed in counterparts and facsimile or scanned copies of the signatures sent by email are deemed to be and count as originals in all respects.

THE PARTIES have executed this Mutual Release, this 1st day of December, 2022.

PACE SAVINGS & CREDIT UNION LIMITED, by its liquidator, KPMG Inc.

DocuSigned by:
Anamika Gadia
Per: _____
FAAA9124527848C
Anamika Gadia
(I have authority to bind the corporation)

CUMIS General Insurance Company

DocuSigned by:
[Signature]
Per: _____
438E07A50123403...
(I have authority to bind the corporation)

Witness

DocuSigned by:
Ian Goodfellow

AASFAS1DA60D47A...
Ian Goodfellow

Witness

DocuSigned by:
Wendy Mitchell
705419AC9B4740A...

Wendy Mitchell

Witness

DocuSigned by:
Neil Williamson
01912537E4AC44C...

Neil Williamson

Witness

DocuSigned by:
Pauline Wainwright
97F4E247A82440B...

Pauline Wainwright

Witness

DocuSigned by:
Deborah Baker
79B4996F6C374C5...

Deborah Baker

Witness

DocuSigned by:
Brent Bailey
9A363A512351446...

Brent Bailey

Witness

Jim Tindall

Witness

DocuSigned by:
Peter Rebellati
340C2CD0CACE44F...

Peter Rebellati

Witness

DocuSigned by:
Al Jones
D762ED03C77C483...

Al Jones

Witness

DocuSigned by:
George Pohle
F4517BA0DFB04B8...

George Pohle

Witness

Wendy Mitchell

Witness

Neil Williamson

Witness

Pauline Wainwright

Witness

Deborah Baker

Witness

Brent Bailey

Witness

DocuSigned by:
Jim Tindall
31D3BFACCE004AA

Jim Tindall

Witness

Peter Rebellati

Witness

Al Jones

Witness

George Pohle

TAB M

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT is made as of December 1, 2022, between PACE Savings & Credit Union Limited, by its Liquidator, KPMG Inc. (“**PACE**”) and CUMIS General Insurance Company (“**CUMIS**”) (each individually, a “**Party**”, and collectively, the “**Parties**”).

WHEREAS PACE commenced an action against CUMIS bearing the Court File Number CV-22-00677550-0000 (the “**Action**”) on February 28, 2022;

AND WHEREAS CUMIS issued a Bond (the “**Bond**”) and an Employment Practices Liability insurance policy (the “**EPL Policy**”) under policy number 01501254 to PACE;

AND WHEREAS the Parties have engaged in arm’s-length, good faith negotiations to resolve PACE’s claims against CUMIS;

AND WHEREAS PACE intends to seek an order from the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) approving this Settlement Agreement;

NOW THEREFORE in consideration of the covenants set out below and the representations made in the Recitals above and for other good and valuable consideration, the receipt and sufficiency of which are acknowledged, and subject to the provisions set out herein respecting Court approval of this Settlement Agreement and its material terms, the Parties agree as follows:

1. CUMIS shall pay _____ (the “**Settlement Funds**”) by wire transfer of immediately available funds to PACE within 30 days following the effective date of this Settlement Agreement.
2. On the effective date of this Settlement Agreement, the Parties will enter into a full and final release of PACE’s claims against CUMIS in the Action and in connection with the Bond and the EPL Policy (the “**Release**”), in the form attached hereto as Schedule “A”, or as counsel to the Parties, acting reasonably, shall otherwise agree. The Release shall be held in escrow until PACE’s receipt of the Settlement Funds.
3. CUMIS agrees that it has waived or will waive any subrogation and/or recovery rights which arose or may otherwise arise under the terms of the Bond or the EPL Policy.
4. PACE will obtain an order dismissing the Action on a with-prejudice and without-costs basis.
5. PACE will, at its expense, seek an order from the Court approving the terms of this Settlement Agreement (the “**Approval Order**”). CUMIS will consent to the Approval

Order. The receipt of an Approval Order is a condition in favour of PACE that can be waived at the election of KPMG Inc., in its capacity as Liquidator of PACE.

6. This Settlement Agreement and the documents referred to herein together constitute the entire agreement between the Parties with respect to the matter herein. The execution of this Settlement Agreement has not been induced by, nor do any of the Parties rely upon or regard as material, any representations, promises, agreements or statements whatsoever not incorporated herein and made a part hereof.
7. This Settlement Agreement shall be governed by, and will be construed and interpreted in accordance with, the laws of the Province of Ontario and the laws of Canada applicable in the Province of Ontario. The Parties hereby attorn to the jurisdiction of the Court in respect of any dispute arising from this Settlement Agreement.
8. No amendment, supplement, modification or waiver or termination of this Settlement Agreement and, unless otherwise specified, no consent or approval by any Party, is binding unless executed in writing by the party to be bound thereby.
9. Any failure by any Party to insist upon the strict performance by the other Party of any of the provisions of this Agreement shall not be deemed a waiver of any of the provisions hereof, and such Party, notwithstanding such failure, shall have the right thereafter to insist upon strict performance of any and all of the provisions of this Agreement to be performed by such other Party.
10. Except as specified herein, each of the Parties shall pay their respective legal, accounting, and other professional advisory fees, costs and expenses incurred in connection with this Settlement Agreement and its implementation.
11. This Settlement Agreement may be executed in counterparts, each of which shall be deemed to be an original and which together shall constitute one and the same agreement. Delivery of an executed original counterpart of a signature page of this Settlement Agreement by facsimile or electronic transmission shall be as effective as delivery of a manually executed original counterpart of this Settlement Agreement.
12. The Settlement Agreement has been the subject of negotiations and discussions among the Parties. Each of the Parties has been represented and advised by competent counsel, so that any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafters of the Settlement Agreement shall have no force and effect.

IN WITNESS OF WHICH the Parties have executed this Settlement Agreement.

**PACE Savings & Credit Union Limited, by
its liquidator, KPMG Inc.**

DocuSigned by:
Anamika Gadia

EAAB9124527848C...
ANAMIKA GADIA
Title: Vice President
I have the authority to bind the Corporation

CUMIS General Insurance Company

DocuSigned by:
Bob Hague

438E07A50123483...
BOB HAGUE
Title: EVP/President of Credit Union
Distribution, CUMIS Group Ltd.
I have the authority to bind the Corporation

Schedule "A"**MUTUAL RELEASE**

The undersigned, **PACE SAVINGS & CREDIT UNION LIMITED, by its liquidator, KPMG INC. ("PACE") and CUMIS GENERAL INSURANCE COMPANY ("CUMIS")** (which term includes their associated and related companies, and their respective officers, directors, employees, shareholders, partners, administrators, agents, assigns, executors, successors, subcontractor and heirs), for and in consideration of the execution of this Mutual Release and the promises made in the Settlement Agreement dated December 1, 2022 (the "**Settlement Agreement**"), the receipt and sufficiency of which is hereby acknowledged, do hereby remise, release and forever discharge each other from claims, actions, demands, manner of actions, causes of actions, suits, debts, duties, accounts, bonds, warranties, claims over, indemnities, contracts, losses, injuries, undertakings, covenants and liabilities of whatever nature and kind whether past, present and future, known or unknown, and whether in equity or at law, jointly or severally, one against the other, for or by reason or cause of any matter or thing existing up to the present time, including, without limiting the generality of the foregoing, arising out of, connected with or in any way related to the allegations made in the Statement of Claim in the action bearing the Court File Number CV-22-00677550-0000, or to claims made under the Bond and Employment Practices Liability insurance policy issued by CUMIS under the policy number 01501254, except as excluded herein.

AND IT IS HEREBY DECLARED, CONFIRMED AND ACKNOWLEDGED that this Mutual Release does not apply to claims arising in relation to a directors' and officers' liability insurance policy issued by CUMIS to PACE under the policy number 01501254.

AND IT IS HEREBY DECLARED, CONFIRMED AND ACKNOWLEDGED that the undersigned have not been induced to execute this Mutual Release by reason of any representation or warranty of any nature or kind whatsoever, and that there is no condition, express or implied or collateral agreement affecting the said Mutual Release, except as provided for herein and in the Settlement Agreement.

AND FOR THE SAID CONSIDERATION the undersigned covenant and agree not to make any claim or demand or commence, maintain or prosecute any action, cause or proceeding for damages, compensation, loss or any relief whatsoever against each other in respect of the claims subject to this Mutual Release. The undersigned further agree that this Mutual Release shall operate conclusively as an estoppel in the event of any such claim, action or proceeding and may be pleaded accordingly.

AND FOR THE SAID CONSIDERATION the undersigned covenant and agree not to continue, to make claim, to commence or to take proceedings against any other person, firm, partnership, business or corporation who or which might claim contribution from, or be indemnified by, the other undersigned, under the provisions of any statute or otherwise in respect of those matters to which this Mutual Release applies.

AND IT IS HEREBY DECLARED, CONFIRMED AND ACKNOWLEDGED that the undersigned have not assigned and will not assign to any other person or entity any of the actions, causes of action, suits, demands, debts, accounts, contracts, damages, or other claims which are the subject of this Mutual Release.

AND IT IS UNDERSTOOD that upon providing this Mutual Release the undersigned, and each of them, do not admit any liability to the other or others and that such liability is specifically and expressly denied.

THIS MUTUAL RELEASE shall be deemed to have been made in and shall be construed in accordance with the laws of the Province of Ontario.

THIS MUTUAL RELEASE shall inure to the benefit of and be binding upon the undersigned and their respective heirs, executors, administrators, legal personal representatives, successors and assigns.

THIS MUTUAL RELEASE may be executed by facsimile or scan sent by email and, if so executed, shall be considered an original Release.

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SERVICE

1. **THIS COURT ORDERS** that the time for service and filing of the Notice of Motion and the Motion Record be and is hereby abridged, if necessary, and validated so that this motion is properly returnable today, and hereby dispenses with further service thereof.

APPROVAL OF SETTLEMENTS

2. **THIS COURT ORDERS** that the Former Directors Settlement Agreement (as defined in the First Report) is hereby approved.

3. **THIS COURT ORDERS** that the CUMIS Settlement Agreement (as defined in the First Report) is hereby approved.

SEALING

4. **THIS COURT ORDERS** that Confidential Appendix “A” to the First Report shall be sealed and kept confidential subject to further order of this Court.

GENERAL

5. **THIS COURT ORDERS** that this Order is effective from today’s date and is enforceable without the need for entry or filing.

IN THE MATTER OF THE *CREDIT UNIONS AND CAISSES POPULAIRES ACT, 2020*, S.O 2020, C.36, SCHED. 7, AS AMENDED
AND IN THE MATTER OF PACE SAVINGS & CREDIT UNION LIMITED

Court File No. CV-22-00685736-00CL

ONTARIO

**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT TORONTO

ORDER

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**Lawyers for KPMG INC. in its capacity as
Court-Appointed Liquidator of Pace Savings &
Credit Union Limited**

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

MOTION RECORD

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Limited**