

**ONTARIO
SUPERIOR COURT OF JUSTICE
(PROCEEDINGS BROUGHT UNDER THE *CLASS PROCEEDINGS ACT, 1992*)**

B E T W E E N :

RIZWAN JUMA and NASRIN JUMA

Plaintiffs

- and -

WESTERN UNION FINANCIAL SERVICES (CANADA) INC.
O/A WESTERN UNION

Defendant

STATEMENT OF DEFENCE

1. The Defendant, Western Union Financial Services (Canada) Inc. o/a Western Union (“Western Union”) is an Ontario corporation carrying on business in Ontario and elsewhere in Canada.
 2. Western Union admits the allegations contained in the first sentence of paragraph 3 of the Statement of Claim.
 3. Except as hereinafter expressly admitted, Western Union denies the allegations contained in the remainder of paragraph 3, the first sentence of paragraph 4, the last sentence of paragraph 15, and paragraphs 17-47 of the Statement of Claim, and specifically denies the relief sought in paragraph 1 of the Statement of Claim.
 4. Except as hereinafter expressly admitted, Western Union has no knowledge in respect of the allegations contained in paragraph 2, the last sentence of paragraph 4, the first sentence of paragraph 15, and paragraphs 5-14 and 16 of the Statement of Claim.
- Western Union**
5. Among other businesses, Western Union is engaged in money transfer and payment services through a network of agent locations in more than 200 countries and territories. Western Union offers money transfer services on a world-wide basis.

6. Western Union agents include networks such as post offices, banks, retailers and other established organizations that provide other consumer products and services. Western Union has relationships with thousands of businesses through which its consumers can make payments. These businesses represent Western Union only with respect to authorized Western Union money transfers.

7. In addition to consumer-to-consumer payments, Western Union also provides global business payments for consumers or businesses to other businesses. These business payments are available through a variety of products which give consumers choices as to the payment channel and method of payment.

Cash Plus

8. On or about November 2, 1994, 1096166 Ontario Ltd., then operating as Cash A Check and subsequently as Cash Plus Services, ("Cash Plus") entered into an agreement with Western Union to provide Western Union's money transfer services to the public (the "Agreement"). At all material times, Cash Plus' primary business or businesses was not acting as Western Union's agent.

9. Pursuant to the Agreement, Cash Plus agreed to offer and provide Western Union services on the applicable terms and conditions set out in Western Union's Agency Reference Guide, operations manuals, user guides, customer forms, record retention schedules, rate schedules and applicable tariffs, policies, rules and regulations. In particular, Cash Plus agreed not to accept any payment for money transfers other than cash or bank cashiers' cheques verified with the issuing bank.

10. If Cash Plus did what the Plaintiffs allege in their Statement of Claim concerning the deposit and use of cheques or bank drafts by Salim Damji ("Damji"), Western Union states that: (a) it was without Western Union's knowledge; (b) such activity was not authorized or condoned by Western Union; and (c) Cash Plus is in breach of the Agreement.

11. From time to time, and in accordance with the terms of the Agreement, Cash Plus executed forms authorizing its bank to honour Western Union Depository Transfer Cheques

and/or electronic transfer with respect to Western Union funds relating to money transfers that had been implemented by Cash Plus.

12. By facsimile dated April 13, 1998, Cash Plus authorized Western Union to debit the following Bank of Montreal bank account for Western Union activity: account 1034998 in the name of 1096166 Ontario Ltd. at the Browns Line & Evans Branch (the "Authorized Account").

13. Western Union admits that, between September 8, 2000 and January 23, 2002, Cash Plus initiated Western Union money transfers to Olympic Sports Data in Montego Bay, Jamaica. Western Union also admits that, between December 11, 2000 and July 6, 2001, Cash Plus initiated Western Union money transfers to individuals in Montego Bay, Jamaica; Etobicoke, Ontario; Panama; Manglea; Cartaga; Saint Johns, Newfoundland; Pickering, Ontario; and San Jose. Western Union states that payments for the above-mentioned money transfers were duly made from the Authorized Account.

The Plaintiffs' Claim is Statute-Barred and Barred by the Doctrine of Laches

14. The Plaintiffs' cause of action, if any, first arose prior to October 31, 2001, the date their cheque to Damji referred to in paragraph 16 of the Statement of Claim was allegedly deposited into a bank account operated by Cash Plus. Accordingly, the applicable limitation period expired on October 31, 2007. As the Statement of Claim was issued on April 25, 2008, the Plaintiffs' action is barred by section 45 of the *Limitations Act*, R.S.O. 1990, c. L.15. Alternatively, Western Union states that the Plaintiffs and the other investors described as the Plaintiff Class knew or ought to have known of Damji's fraud prior to April 25, 2002. Accordingly, their cause of action, if any, is similarly barred.

15. Western Union further pleads and relies on the equitable defence of laches. The Plaintiffs delayed in bringing this action despite knowledge of their claim. This delay resulted in prejudice to Western Union.

Western Union Did Not Breach Any Trust

16. Western Union has no liability in respect of any funds deposited by the Plaintiffs or Plaintiff Class into the bank account(s) of Cash Plus with the Bank of Montreal (the "Cash Plus Account(s)") or thereafter transferred by Cash Plus. Payment for money transfers paid by Western Union was from the Authorized Account. Western Union also denies that any funds received by Damji from the Plaintiffs or Plaintiff Class were subject to a trust or that such funds were deposited into the Authorized Account.

17. In the alternative, even if the funds of the Plaintiffs and Plaintiff Class were held by Damji in trust, Western Union denies that it breached or assisted in the breach of trust as a result of (i) the acceptance and deposit by Cash Plus of such funds into the Cash Plus Account(s) and/or (ii) the disbursement or transfer by Cash Plus of the proceeds of the subject cheques or bank drafts to Jamaica, Costa Rica or elsewhere.

18. Even if the funds delivered to Damji were subject to a trust, which is denied, Western Union denies that it knowingly or otherwise assisted in any breach of trust as pleaded in the Statement of Claim and denies any liability to the Plaintiffs or Plaintiff Class under the doctrines of either "knowing assistance" or "knowing receipt". Western Union denies that it was on notice of any fraud from Damji or Cash Plus. Moreover, Western Union had no actual or constructive knowledge or notice of any trust or the terms of any trust, and had no actual or constructive knowledge that any trust was being breached by Damji or Cash Plus.

19. Further, Western Union had no duty to make any inquiries in respect of a trust, if any, nor was it required to determine (i) whether the cheques and bank drafts deposited by Cash Plus into the Cash Plus Account(s) were trust monies or (ii) whether the proceeds of the aforementioned cheques and bank drafts that were transferred by Cash Plus to Jamaica, Costa Rica or elsewhere were applied in accordance with the terms of any trust.

20. If there was a trust, which is denied, at the time the Plaintiffs' and Plaintiff Class' monies were deposited into the Cash Plus Account(s) or thereafter transferred, Western Union had no notice of any suspicious circumstances and therefore had no duty of inquiry.

21. In any event, Western Union did not receive any payment or benefit from the alleged breach of trust, other than nominal money transfer fees in the ordinary course of business. As such, Western Union cannot be liable under the doctrine of “knowing receipt”.

Western Union Owed No Duty of Care to the Plaintiffs

22. Western Union denies any liability to the Plaintiffs or Plaintiff Class in negligence. Western Union owed no duty of care to the Plaintiffs or Plaintiff Class. Western Union denies that there was sufficient proximity between Western Union and the Plaintiffs or Plaintiff Class and further denies that any losses of the Plaintiffs or Plaintiff Class were a reasonably foreseeable consequence of any conduct by Western Union to give rise to such duty. There was no relationship between Western Union and the Plaintiffs or Plaintiff Class. More particularly, there was no duty owed by Western Union to the Plaintiffs or Plaintiff Class to monitor (i) the cheques and bank drafts that were given to Cash Plus by Damji and allegedly deposited into the Cash Plus Account(s) and/or (ii) the alleged dispersal of the proceeds of the aforementioned cheques and bank drafts by Cash Plus.

23. Alternatively, even if there could be sufficient proximity between Western Union and the Plaintiffs or Plaintiff Class and sufficient foreseeability of harm to give rise to a potential duty of care owed by Western Union to the Plaintiffs or Plaintiff Class, there are overriding broad policy considerations to negate and exclude any such duty or liability upon Western Union in these circumstances, as follows:

- (a) The imposition of such a duty of care on a financial services company such as Western Union in these circumstances is unnecessary to protect investors such as the Plaintiffs or Plaintiff Class from investment fraud or scams. The police are charged with the protection of the public from crime and the Ontario Securities Commission is charged with the duty of protecting the public from investment schemes contrary to the *Securities Act*, R.S.O. 1990, c. S-5; and
- (b) The imposition of such a duty of care upon Western Union would impose an onerous, impractical and expensive burden.

Western Union Did Not Cause the Plaintiffs' Loss and Could Not Have Prevented It

24. Western Union denies that it is responsible for any losses sustained by the Plaintiffs or Plaintiff Class. Such loss, if any, was caused by the conduct of Damji and others, but was not caused or contributed to by any conduct on the part of Western Union.

25. Western Union could not have prevented the Plaintiffs' or Plaintiff Class' loss, if any. Western Union could not have taken reasonable steps to prevent (i) Damji from cashing cheques and bank drafts through Cash Plus and allegedly defrauding the Plaintiffs or Plaintiff Class and/or (ii) Cash Plus from its receipt and dispersal of the proceeds of the aforesaid cheques and bank drafts.

No Breach of Statutory Duty

26. Western Union did not violate or breach its statutory obligations under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, as pleaded at paragraph 46 of the Statement of Claim.

27. In any event, even if there was a violation or breach, which is denied, a statutory breach cannot create a cause of action unless the statute gives civil relief. As the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* does not provide for civil relief, Western Union cannot be liable to the Plaintiffs or Plaintiff Class for such a breach of statute.

Agency Relationship with Cash Plus and No Vicarious Liability

28. Notwithstanding Cash Plus' Agreement with Western Union, Cash Plus' actions and activities in respect of the alleged fraud scheme perpetuated by Damji were beyond the scope of the agency relationship between Cash Plus and Western Union. As such, Western Union cannot be vicariously liable to the Plaintiffs or Plaintiff Class for the actions and liability, if any, of Cash Plus. In particular, Cash Plus was acting in its own right rather than on Western Union's business.

The Plaintiffs' Contributory Negligence

29. The Plaintiffs and Plaintiff Class were contributorily negligent in respect of their loss. The Plaintiffs and Plaintiff Class failed to take reasonable and sufficient steps to protect themselves from such loss. More particularly, the Plaintiffs and Plaintiff Class failed to make any sufficient inquiries or to undertake proper due diligence investigations prior to delivering funds to Damji or his agents, and failed to seek any proper legal and/or financial advice in that regard.

30. Western Union further pleads that the Plaintiffs and Plaintiff Class failed to take any steps, or sufficient steps, to mitigate their losses, if any.

31. Western Union respectfully submits that this action should be dismissed against it with costs on a substantial indemnity basis.

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Court File No: 08-CV-353663-CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

STATEMENT OF DEFENCE

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