Court File No. CV-17-586063-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

MARCY DAVID, BRENDA BROOKS and ANDREW BALODIS

Plaintiffs

- and -

LOBLAW COMPANIES LIMITED, GEORGE WESTON LIMITED, WESTON FOODS (CANADA) INC., WESTON BAKERIES LIMITED, CANADA BREAD COMPANY, LIMITED, GRUPO BIMBO, S.A.B. DE C.V., MAPLE LEAF FOODS INC., EMPIRE COMPANY LIMITED, SOBEYS INC., METRO INC., WAL-MART CANADA CORP., WAL-MART STORES, INC. and GIANT TIGER STORES LIMITED

Defendants

Proceeding under the *Class Proceedings Act, 1992*

REPLY FACTUM OF MAPLE LEAF FOODS INC.
(Reply in Support of Motions to Strike and Exclude Evidence)

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PART I - OVERVIEW

1. MLF delivers this consolidated factum in reply to the responding factums of the Plaintiffs and Canada Bread in respect of MLF's motions to strike the Fourth and Fifth Claims and to exclude the Challenged Exhibits as inadmissible hearsay. Capitalized terms not otherwise defined herein have the meaning set out in MLF's responding factum dated August 9, 2024 (the "**MLF Responding Factum**").

PART II - THE PLAINTIFFS' UNACCEPTABLE TACTICS ON THIS MOTION

2. On August 30, 2024, in spite of this Court's prior direction to deliver **succinct submissions** for a one-day hearing, the Plaintiffs and Canada Bread delivered a combined **70 pages** of additional submissions in respect of the pending motions. MLF will address the substance of these new submissions in this brief reply pursuant to the agreed timetable for these motions, but respectfully submits that the Plaintiffs and Canada Bread have, through their joint conduct, failed to comply with many of the most basic procedural rules and accepted practices governing motions for certification and class proceedings:

(a) The Plaintiffs did not appeal the Certification Decision as it relates to MLF and then delayed for over a **year and a half** before bringing their Second Certification Motion in August 2023. During that time, MLF relied on the finality of the Certification Order in dismissing the Certification Motion against it, and as a result did not participate in the Plaintiffs' or Defendants' appeals of other aspects of the Certification Decision;

(b) Despite the fact that **prior** to the Original Certification Motion in October 2021 Canada Bread had already collected and produced the Challenged Exhibits in the separate *Govan* action in Quebec, the Plaintiffs did not seek to introduce, and

Canada Bread did not disclose, the Challenged Exhibits at the time of the Original Certification Motion and waited a further **two years** before disclosing them;

(c) The Plaintiffs received the bulk of the Challenged Exhibits from Canada Bread in November 2023, with a single additional email disclosed in January 2024. Nonetheless, the Plaintiffs failed to produce them to MLF, or to serve their Fifth Claim, in advance of the deadline for MLF's responding materials on the Second Certification Motion on February 16, 2024;

(d) The Plaintiffs allege, without evidence, that they advised counsel for MLF of the "imminent delivery of the plaintiffs' Supplemental Modi Affidavit and Fifth Claim" on February 14, 2024. Indeed, they even accuse counsel for MLF of "sharp practice" for serving MLF's motion to strike the Fourth Claim on February 16, 2024.[1] They make this baseless allegation even though MLF was under a Court approved timetable to deliver its responding materials by February 16, 2024, and complied assiduously with that timetable. There was no term in that timetable that provided for the delivery of a Supplemental Modi Affidavit or Fifth Claim, and no request by the Plaintiffs to revisit that timetable;

(e) The Plaintiffs still have not tendered any affidavit from anyone with personal knowledge either of the contents of the Challenged Exhibits or, crucially, of how, when and why they were curated;

(f) The Plaintiffs and Canada Bread rely on the hearsay Challenged Exhibits as allegedly creating some basis in fact justifying markedly belated certification as

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[1] Plaintiffs' Strike Response and Certification Reply Factum dated August 30, 2024 ("**Plaintiffs' Reply Factum**"), at paras. 26-29, A11181- A11182.

against MLF. However, it is trite that even the "some basis in fact" standard must be satisfied by properly admissible, non-hearsay evidence;

(g) Contrary to both class action procedure and the mandatory disclosure rule in *Handley Estate*,[2] the Plaintiffs and Canada Bread still have not disclosed or even acknowledged their obvious cooperation agreement. Instead, they would have this Court believe that Canada Bread produced the Challenged Exhibits to the Plaintiffs out of spontaneous generosity without receiving any consideration, assurances or protection. That position strains credulity;

(h) On this motion, the Plaintiffs continue to rely on purported evidence – the Second ITO and the MLF Annual Reports – that Justice Morgan **struck** from the record some three years ago, in **October 2021**.[3] Even though His Honour's evidentiary decision was not appealed and is *res judicata*, the Plaintiffs simply ignore this clear ruling in their reply submissions;

(i) The Plaintiffs also rely on the ASF and other related sentencing documents of Canada Bread. But MLF had no role or input into any of these sentencing submissions. The statements in these documents are out of court statements by Canada Bread, and are not supported by any witness and inadmissible as relates to MLF. In any event, the supposedly "new" facts in these documents relating to MLF's role and status as a former shareholder are not new and were raised before the Court at the Original Certification Motion;[4]

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2 *Handley Estate v. DTE Industries Limited*, 2018 ONCA 324.

3 Exhibit M to MT Affidavit at pp. 170-173, Responding Motion Record of MLF dated February 16, 2024 ("**RMR**"), Tab 2-M pp. 279-282, B-1-5446 - B-1-5449

4 MLF Factum Responding to Second Certification Motion and in Support of Motions to Strike and Exclude Evidence dated August 9, 2024 ("**MLF Responding Factum**"), at para. 85, B-1-6784.

(j) The Plaintiffs have the audacity to threaten that if this Court does not grant their requested relief, but rather concludes that their claim is barred by the doctrines of *res judicata*, issue estoppel and abuse of process, that they will simply start another class action against MLF alone, on the identical record, and seek to consolidate that action with the existing proceeding.[5] They make that meritless threat without acknowledging that any such action would, itself, constitute an abuse of process; and

(k) After initially delivering a combined 52 pages of primary submissions, the Plaintiffs and Canada Bread have now **replied** with a combined **70 pages** of submissions.

3. Although the Plaintiffs and Canada Bread are represented by experienced counsel, in their zeal to advance Canada Bread's corporate agenda against a former shareholder, they have deluged this Court with **a total of 122 pages of submissions for a one-day motion**, and ask this Court to reverse its prior ruling through improper reply evidence and in the absence of a proper or timely appeal, all in breach of their obligations to MLF and the Court under the rule in *Hadley Estate*. This practice is not acceptable or fair to MLF or this Court.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

A. MLF REPLY ON THE MOTION TO STRIKE

(i) MLF's Direct Participation in Conspiracy Already Rejected at Original Certification Motion

4. The Plaintiffs claim incorrectly that MLF has taken the position that the Fourth and Fifth Claims are limited to piercing the corporate veil between Canada Bread and MLF.[6] In reality,

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5 Plaintiffs' Reply Factum, at para. 10, A11177.

6 Plaintiffs' Reply Factum, at para. 32, A11183. As set out in the MLF Responding Factum at para. 120 and footnote 95, B-1-6799, MLF's position remains that the rule in *Bruce v. John Northway & Son Ltd*., [1962] O.W.N. 150

MLF's position is that the Fourth and Fifth Claims repeat the same allegations about MLF's direct participation in the conspiracy made in the Third Claim.[7] These very allegations have already been rejected decisively by Justice Morgan, who found that the Plaintiffs' claim of MLF's direct participation in the conspiracy "**makes no sense**".[8] There is nothing in the Fourth and Fifth Claims that justifies revisiting or departing from that judicial finding.

5. First, the Plaintiffs pleaded expressly in their Third Claim that MLF was a direct participant in the alleged conspiracy:

(a) MLF was included as a "Defendant", and was alleged at all times during the Class Period to have:

(i) "conspired, agreed or arranged, whether expressly, tacitly or by signaling, to act in contravention of s. 45(1) of the [*Competition Act*] with [other Defendants with] the predominate intent of causing harm to the Class…and/or the actual or constructive intent and with the natural result of causing harm to the Class";[9] and

(ii) "voluntarily entered into agreements with [the other Defendants] to use unlawful means… causing loss and damages to the Plaintiffs and the other Class [members]…The Conspiracy was directed towards and the predominate purpose was to cause harm to the Plaintiffs and the other Class [members]…Furthermore, and alternatively, the actual or constructive intent and the natural result of the Conspiracy was to cause harm to the Plaintiffs and the other Class [members]".[10]

(b) The Plaintiffs further alleged that MLF was "aware of and **participated in the Conspiracy**".[11]

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applies to these motions, such that it is not open to the Plaintiffs to amend their claim when its sustainability is being challenged by MLF, and the Fourth Claim remains the applicable form of pleading.

7 See schedule "C" to this Factum, comparing the causes of action alleged by the Plaintiffs as against MLF in each of the Third, Fourth and Fifth Claims.

8 Reasons for Decision of Justice Morgan dated December 31, 2021 ("**Certification Decision**") at para 35, Motion Record of the Plaintiffs' dated August 4, 2023 ("**MR**") Vol 1, Tab D p. 66, A9161. Emphasis added.

9 Third Claim, at para. 73, Exhibit A to MT Affidavit, RMR, Tab 2-A p. 30, B-1-5216.

10 Third Claim, at paras. 78-80, Exhibit A to MT Affidavit, RMR, Tab 2-A pp. 31-32, B-1-5217 - B-1-5218.

11 Third Claim, at para. 15, Exhibit A to MT Affidavit, RMR, Tab 2-A p. 19, B-1-5205. Emphasis added.

6. Second, counsel for the Plaintiffs confirmed during the hearing of the Original Certification Motion that allegations of direct participation in the conspiracy extended to the Parents, and specifically to MLF:

> "During my friends' submissions it was noted that in our pleading we defined parties in such a way that meant that the parents were alleged to have directly participated in both the Section 45 and common law conspiracies and it was speculated that that was an error. It wasn't an error; it was done deliberately and the reason we did it is because when we were drafting the pleading we had some evidence that certain parents were directly involved in the conspiracy…we had the evidence about Richard Lan and Maple Leaf that was in the ITOs that we had previously discussed. So, this means that all of the conspiracy facts are pleaded against all the parents."[12]

7. Third, the Plaintiffs attempted unsuccessfully to tender the Second ITO during the Original Certification Motion. Plaintiffs' counsel took the position that the purpose of tendering the Second ITO was to show MLF was more than merely a "a repository of documents"[13] – in other words, made an attempt to implicate MLF as a direct participant in the conspiracy. Justice Morgan struck the Second ITO from the record.

8. As expressly found at the Original Certification Motion, it remains the case that MLF was never a producer, retailer or competitor of packaged bread, and the Plaintiffs do not allege otherwise in their Fourth or Fifth Claims. Justice Morgan concluded that the allegation that MLF "set the retail price of packaged bread in accordance with a "7/10 convention" makes no sense". [14] The Plaintiffs' allegations concerning MLF's supposed direct participation in the conspiracy have already been dismissed. The Plaintiffs made the deliberate choice **not** to appeal from His Honour's decision in favour of MLF. As set out in MLF's Responding Factum, it is not now open to them to relitigate this issue.

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12 Transcript of October 29, 2021, at pp. 25.25-26.9.
13 Transcript of October 28, 2021, at pp. 167.31-168.2.
14 Certification Decision, at para. 35, MR Vol 1, Tab D p. 66, A9161.

(ii) No Plausible Basis to Pierce the Corporate Veil

9. The Plaintiffs' alternative theory of corporate veil piercing was also emphatically rejected by Justice Morgan as untenable at the conclusion of the Original Certification Motion. No new legal theory of veil piercing is asserted in the Fourth or Fifth Claims. It is well established that the Plaintiffs must plead extraordinary facts to satisfy the very high threshold for piercing the corporate veil affirmed by the Ontario Court of Appeal in *Chevron*.[15] As was the case at the Original Certification Motion, none of the "new" particulars (which are not new) relied on by the Plaintiffs "could in any way suggest" Canada Bread was a "mere puppet of [MLF]…incorporated for the purpose of deflecting responsibility for misconduct from [MLF]".[16] It likewise remains the fact that Canada Bread's incorporation "pre-date[s] the alleged conspiracy", that it has "significant independent functioning" of its own, and that it is certainly more than a "shel[l] or empty vesse[l] used to avoid liability."[17]

10. In an attempt to overcome Justice Morgan's binding conclusions, the Plaintiffs rely on purported "new" particulars about the MLF-Canada Bread relationship as justifying a different outcome.[18] All of these so-called "new" particulars were either already known at the time of the Original Certification Motion, or were easily discoverable with reasonable diligence:

(a) Although in their Fourth and Fifth Claims the Plaintiffs plead the existence of cross-appointments as between MLF and Canada Bread, including specifically of Mr. Lan and Mr. McCain, this fact was both known and explicitly argued at the Original Certification Motion, and addressed in His Honour's Certification Decision; and

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15 *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472, leave to appeal to SCC ref'd 2019 CanLII 25908.
16 Certification Decision, paras. 38-39, MR Vol 1, Tab D pp. 66-67, A9161.
17 Certification Decision, para. 39, MR Vol 1, Tab D pp. 66-67, A9161 - A9162.
18 Plaintiffs' Reply Factum, at para. 47, A11187.

(b) In their Fourth and Fifth Claims, the Plaintiffs plead MLF provided various services (including legal and compliance) to Canada Bread. However, this fact was disclosed in the Original Certification Record. Additionally, the MLF/Canada Bread intercompany agreement is itself a publicly available document that the Plaintiffs could easily have obtained with reasonable diligence.

11. In any event, even if these were new particulars, they concern commonplace and entirely benign corporate arrangements among affiliated corporations that could not possibly satisfy the rigorous test for piercing the corporate veil separating MLF from Canada Bread. Although the Plaintiffs cite *FNF Enterprises*, in that case the Court of Appeal upheld the decision of the lower Court striking a claim to pierce the corporate veil, reaffirming that, "The first element of the *Transamerica* test requires not just ownership or control of a corporation, but **complete domination or abuse of the corporate form**."[19] As with the claimant in *FNF Enterprises*, the Plaintiffs in this case cannot possibly satisfy this required element, with the result that even if they were permitted to assert it, their claim to pierce the corporate veil remains bound to fail. The allegation that MLF used Canada Bread as a shield for unlawful conduct is a complete fabrication.

(iii) No New Particulars Justifying Certification

12. The Plaintiffs claim that these motions raise a "question of mere particulars" and that they "now have these further particulars" with the result that the action should be certified against MLF.[20] This is plainly wrong. The Court at the Original Certification Motion found the underlying causes of actions asserted against MLF **unviable at law**, not simply wanting for particularity.

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19 *FNF Enterprises Inc. v. Wag and Train Inc*., 2023 ONCA 92, at para. 20. Emphasis added.
20 Plaintiffs' Reply Factum, at paras. 7, 9, A11176, A11177.

13. The Plaintiffs also assert that Justice Morgan's Certification Order was not a final order. But Justice Morgan's refusal to certify any causes of action against MLF under Section 5(1)(a) of the *CPA* was equivalent to finding that those causes of action are "doomed to fail" as against MLF. This principle was recently confirmed by the Court of Appeal in *Obodo*. The Court affirmed that by refusing to certify a cause of action under Section 5(1)(a) of the *CPA*: "the motion judge effectively determined that the claim could not go forward. **The order was a final order**. Mr. Obodo cannot pursue the intrusion upon seclusion claim against Trans Union in any forum, absent a successful appeal".[21]

14. Justice Morgan's conclusion that the Original Certification Motion should be dismissed as against MLF was a determination that the causes of action asserted against MLF are not viable at law. For example, Justice Morgan held the claim of constructive trust was "**bound to fail** where the Plaintiffs' claims are strictly monetary in nature".[22] Yet the Plaintiffs continue to assert monetary constructive trust claims in an indistinguishable manner in the Fourth and Fifth Claims. Likewise, Justice Morgan held that the claims of knowing receipt/assistance were both "plainly and obviously **doomed to fail**".[23] Notably, none of these claims were included as "certified claims" under paragraph 1(a) of the Certification Order. The Plaintiffs have not sought to appeal this paragraph, and yet unaccountably continue to assert these causes of action against MLF in their Fourth and Fifth Claims.

15. The Plaintiffs have neither sought nor received leave to deliver new particulars. In any event, as addressed above and in the MLF Responding Factum, the reality is that these "new" particulars are not new at all. Instead, they were easily discoverable with reasonable diligence in

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21 *Obodo v. Trans Union of Canada, Inc*., 2022 ONCA 814, leave to appeal to SCC ref'd 2023 CanLII 62026, at para. 16. Emphasis added.
22 Certification Decision, at para. 43, MR Vol 1, Tab D pp. 67, A9162. Emphasis added.
23 Certification Decision, at para. 49 quoting Justice Belobaba, MR Vol 1, Tab D pp. 68, A9163. Emphasis added.

advance of the Original Certification Motion. In fact, the Plaintiffs actually **did** discover a number of them, but the Court refused to admit them in the exercise of His Honour's discretion in October 2021. As stated above, no appeal was taken from Justice Morgan's decision in that regard.

B. MLF REPLY ON THE HEARSAY MOTION

(i) Sequencing

16. The Court should decide the Hearsay Motion prior to the Second Certification Motion. The Plaintiffs' suggestion to the contrary is incorrect, unfair and unworkable.[24] Conceptually, the Court needs to decide whether the Challenged Exhibits are admissible before considering if the case can be certified as against MLF on the basis of these Exhibits. For this very reason, it is commonplace for our Courts to consider the admissibility of, and where appropriate strike, hearsay evidence in advance of certification.[25]

(ii) The Plaintiffs Misunderstand the Law of Evidence on Certification

17. In a misguided attempt to rely on this hearsay evidence, the Plaintiffs repeat continuously the mantra of "some basis in fact".[26] Some basis in fact is unquestionably the standard for one or more of the certification criteria, and is a lower standard than a determination on the merits. Nonetheless, as set out in the MLF Responding Factum, our Courts have made clear that "while the evidentiary burden on a certification motion is the low, some basis in fact test, **that burden must be discharged by admissible evidence**".[27] As stated succinctly by the Manitoba Court of

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24 Plaintiffs' Reply Factum, at paras. 68-69, A11195.

25 See, e.g., *Shick v. Boehringer Ingelheim (Canada) Ltd.*, 2011 ONSC 63, at para. 29, where Justice Strathy (as he was then) struck the impugned hearsay affidavits in advance of certification, on the basis that "To do otherwise would encumber the certification motion with patently inadmissible evidence which can only serve to prejudice the defendant and lead the court into time-consuming evidentiary diversions."

26 Plaintiffs' Reply Factum, paras. 73-75, A11196 - A11197; see also Reply Factum of Canada Bread Company Limited, dated August 30, 2024 ("**Canada Bread Reply Factum**"), at paras. 39-40, 45, B-2-2508 - B-2-2509, B-2-2510.

27 *Gutierrez v. The Watchtower Bible and Tract Society of Canada*, 2023 ONSC 650, at para. 16. Emphasis added.

Appeal in *Weremy*, "If the evidence is inadmissible hearsay, then it cannot be used to establish some basis in fact".[28]

18. The law of evidence on certification is perhaps best exemplified by *Harris*. After confirming that evidentiary rulings must be made on the pleadings and facts of each case, Justice Perell ruled that the proffered evidence should be excluded as inadmissible hearsay, notwithstanding the plaintiff's argument that the evidence was merely intended "to show that there is some basis in fact for the proposed common issue" and that it was put before the Court "for the limited purpose that the statements were made at a particular time".[29] Justice Perell noted correctly that even if the "evidence was submitted simply as proof that complaints were made, it remains inadmissible hearsay evidence at some multiple levels of hearsay that complaints were made".[30]

19. The Plaintiffs' attempt to distinguish *Harris* on the basis that the "original complaints themselves…would have been admissible"[31] is clearly wrong. The evidence struck by Justice Perell incorporated verbatim the original complaints, having been compiled by "copy-typing and cutting and pasting the information in the complaint section" and "copying the information directly from the NHTSA website."[32]

(iii) The ASF and Related Sentencing Documents are Inadmissible Hearsay

20. The Plaintiffs' argument that the ASF and other related sentencing documents of **Canada Bread** are admissible **as against MLF** under Section 22.1 of the Ontario *Evidence Act* is without merit.[33] Section 22.1 is merely a rule of evidence that declares that evidence that "a person" has been convicted of a crime can be offered as proof, in the absence of evidence to the contrary, that

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28 *Weremy v. The Government of Manitoba*, 2021 MBCA 34, at para. 40.
29 *Harris v. Bayerische Motoren Werke Aktiengesellschaft*, 2019 ONCS 5697, at para. 43.
30 *Ibid*, at para. 46.
31 Plaintiffs' Reply Factum, at para. 106, A11207.
32 *Harris*, *supra* note 29, at paras. 29-30.
33 Plaintiffs' Reply Factum, at paras. 84-86, A11199 - A11200.

"the crime was committed **by the person**".[34] The Plaintiffs' reliance on Section 22.1 to seek to admit these documents against MLF fails for all the following reasons:

(a) The "convicted person" in this case is **Canada Bread**, rather than MLF. On the face of the statute, Section 22.1 cannot be used to admit evidence against MLF, which has not been charged, let alone convicted, of any crime; and

(b) Section 22.1 is limited to the evidentiary implications of the fact of a conviction. It does not speak to the admissibility of statements made in sentencing submissions. The Plaintiffs cite no authority that this rule of evidence could possibly extend to imply proof of statements within an ASF, particularly in the absence of any witness prepared to speak to the statements.[35]

21. Despite their reliance on Section 22.1, the Plaintiffs concede that the admissibility of an ASF is "case specific". Based on the binding guidance of the Supreme Court of Canada in *Youvarajah*, the ASF of Canada Bread is too unreliable to be admitted into evidence against MLF. Contrary to the Plaintiffs' argument, *Youvarajah* did not turn on the co-accused's prior inconsistent statement,[36] but rather on the unreliability of the ASF – an out-of-court hearsay statement – as against a third party. Justice Karakatsanis concluded that the circumstances surrounding the preparation and presentation of an ASF establish threshold reliability for "statements admitting [the co-accused's] own culpability", but **not** for statements by which the co-accused sought "to minimize his involvement…and shift responsibility to the appellant".[37] The fact that **Canada Bread** admitted to the matter contained in its ASF "does not provide any reassurance of reliability" **with respect to MLF**. To the contrary, statements by an accused against another third party for

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[34] *Intact Insurance Co v. Federated Insurance Co. of Canada*, 2017 ONCA 73, leave to appeal to SCC ref'd 2017 CarswellOnt 13025, at para. 17. Emphasis added.
[35] See, *e.g.*, *Andreadis v. Pinto*, (2009), 98 O.R. (3d) 701 (ONSC), at para. 42(iii).
[36] Plaintiffs' Reply Factum, at paras. 88-89, A11201.
[37] *R. v. Youvarajah*, 2013 SCC 41, at paras. 57 ("*Youvarajah*").

the purpose of securing a more lenient sentence – as occurred here – are recognized as "inherently unreliable".[38] Here, Canada Bread had (and has) a clear ulterior motive in attempting to implicate MLF and embroil it in controversy. Given the palpable reliability concerns, it is irrelevant that Canada Bread has not recanted its statements in the ASF. In any event, Canada Bread has unquestionably resiled from its position at the Original Certification Motion.

22. Finally, the Plaintiffs' argument that the sentencing judgment is admissible under the common law applicable to findings in prior judgments also fails.[39] The Plaintiffs purport to rely on the Supreme Court of Canada's decision in *Malik* even though the general rule set out in *Malik* only applies "provided the parties are the same or were themselves participants in the prior proceedings on similar or related issues".[40] *Malik* and the related case-law relied upon by the Plaintiffs has no relevance or applicability to MLF.

(iv) Challenged Exhibits are Inadmissible Hearsay

23. Despite their assertion to the contrary, it is obvious that the Plaintiffs seek to rely on the Challenged Exhibits for their truth, making them inadmissible hearsay. The reality is that this case is indistinguishable from *Airia Brands*. The plaintiffs in *Airia Brands* advanced unsuccessfully arguments that were almost identical to those now made by the Plaintiffs in these motions, arguing that: "the e-mails are being presented to establish the fact that communication was made, and…to establish that statements were made to non-defendant airlines located around the world."[41] Justice Leitch rejected the superficial argument that this represented a non-hearsay use of the e-mails: "The plaintiffs seek to have the e-mail attachments themselves stand as evidence that there were communications or discussions amongst the parties named in the e-mails about prices and fuel

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38 *Ibid*, at paras. 59, 62.
39 Plaintiffs' Reply Factum, at para. 85, A11200.
40 *British Columbia (Attorney General) v. Malik*, 2011 SCC 18, at para. 7.
41 *Airia Brands Inc. v. Air Canada*, 2011 ONSC 4003, at para. 15.

surcharges. With such a use, hearsay dangers are engaged".[42] The **exact same** dangers are engaged here by the Plaintiffs' proposed use of the Challenged Exhibits to attempt to demonstrate that MLF was involved with, or its employees drafted or were copied on, "emails with respect to bread".[43]

24. It is the Plaintiffs' burden to establish the admissibility of the Challenged Exhibits, including their authenticity.[44] They have not even attempted to meet this burden, having provided no evidence whatsoever from anyone with personal knowledge of the Challenged Exhibits. The Court cannot simply assume authenticity – and the Plaintiffs ignore that the Challenged Exhibits include attachments and even handwritten notes from unknown authors created in unknown circumstances for unknown reasons. Equally importantly, the Plaintiffs and Canada Bread have provided no evidence about the curation of the Challenged Exhibits, which were selectively disclosed from a doubtlessly much larger Canada Bread production in *Govan*, based on unknown criteria and undisclosed discussions and arrangements between the Plaintiffs and Canada Bread.

25. The Plaintiffs also rely on a grab-bag of hearsay exceptions in an effort to secure the admission of these Exhibits.[45] But none of these exceptions are applicable to justify the admission of the Challenged Exhibits against MLF. These are all documents that originated from Canada Bread and are not admissions by MLF. Moreover, any argument in respect of admissibility is predicated on some legal finding of parental liability or corporate attribution, and the Court rejected those contentions at the Original Certification Motion. More specifically, MLF submits:

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42 *Ibid*, at para. 19.
43 Plaintiffs' Reply Factum, at para. 96, A11204.
44 *Grain Workers' Union (International Longshoreman's Warehousemen's Union, Local 333) v. Viterra Inc*., 2021 FC 292, at paras. 32.
45 Plaintiffs' Reply Factum, at paras. 103-113, A11207 - A11209.

(a) **Admissions of a party**: This exception is entirely inapplicable, give that "the underlying rationale for the admissibility of admissions as against the party making them falls away when they are sought to be used **against a third party**";[46]

(b) **Statements by a co-conspirator**: The Plaintiffs completely misunderstand this exception, which depends on **a prior finding** on the merits that MLF was, in fact, a co-conspirator. Rather than being a co-conspirator with Canada Bread, MLF is a former shareholder and corporate parent. The law is clear that "the guilty plea of one alleged co-conspirator cannot be used to establish the guilt of another";[47]

(c) **State of mind**: For this exception to have any applicability, the declarant's state of mind must be relevant to an issue before the Court.[48] The states of mind of the declarants are not relevant to the issues for the Court; and

(d) **The Principled Approach**: The Plaintiffs claim it would be too time consuming to file affidavits from a multitude of employees. Such concerns do not suffice to establish necessity, and the Plaintiffs' reliance on a case concerning "business records…largely clerical in nature" does not demonstrate otherwise.[49] In any event, the Plaintiffs failed to deliver even a **single affidavit** from anyone with any knowledge of the Challenged Exhibits. Further, the Challenged Exhibits do not exhibit any of the indicia of reliability required to fall within the principled exception, and in fact raise unique reliability concerns even when compared to other

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46 *Youvarajah*, *supra* note 37, at para. 59. Emphasis added.
47 *ICBC v. Atwal*, 2012 BCCA 12 at para. 30; *R. v. Dawkins*, 2021 ONCA 113 at paras. 13-15.
48 *R. v. Griffin*, 2009 SCC 28 at para. 59.
49 Plaintiffs' Reply Factum at para. 114, A11210 citing *Cabral v. Canada (Citizen and Immigration)*, 2018 FCA 4, at para. 27.

hearsay documents, given their unknown selection and curation and the fact that many of the Challenged Exhibits contains multiple levels of hearsay.

C. MLF SURREPLY ON SECOND CERTIFICATION MOTION

26. The Plaintiffs' and Canada Bread's lengthy reply submissions have irredeemably jumbled and conflated the issues at play on the three motions. For example, the Plaintiffs have included submissions on the *Sagaz* test as part of their reply on the Second Certification Motion.[50] However, should the Challenged Exhibits not be inadmissible hearsay (which is denied), the *Sagaz* test is nonetheless also dispositive of their inadmissibility.[51] Similarly, the Plaintiffs deal with the Court's jurisdiction under the *CPA* as part of their reply on the Second Certification Motion,[52] but this issue is also intimately connected to MLF's motion to strike the claim respecting it.

27. Accordingly, subject to approval of the Court, MLF seeks to deliver the following brief surreply points respecting the Second Certification Motion.

28. First and foremost, the Divisional Court has already decided in *Risorto* that if a plaintiff seeks to file new evidence on a certification motion after the close of evidence but before the court has issued a final order, the *Sagaz* test applies. That decision is binding. The Plaintiffs' attempt to distinguish *Risorto* on the basis that the entirety of the certification motion was dismissed at first instance is unconvincing. Here the entirety of the certification motion **as concerns MLF** was dismissed at first instance, following a lengthy and hard-fought certification hearing. Further, the continuing applicability of *Risorto* and the concept of finality it endorses was recently confirmed by Justice Morgan in *Navartnarajah v. FSB Group Ltd*., a class action concerning the distinction

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50 Plaintiffs' Reply Factum, at paras. 130-140, A11216 - A11219.
51 See, *e.g*., paras. 111-116 of the MLF Responding Factum B-1-6793 - B-1-6798.
52 Plaintiffs' Reply Factum, at paras. 141-145, A11220 - A11221.

between employees and independent contractors. As set out by Justice Morgan in refusing to allow the defendants to bring a late objection to the class list:

> The Division Court recognized in *Risorto*…that "it is difficult to conceive of an interlocutory proceeding in which the parties would better understand the need to put their best foot forward . . . [than] in certification proceedings". Given the late, and meritless, objections to the class list provided by the Defendants, there are no grounds to re-open it. The parties have put their best foot forward, and I can consider the record as it presently stands.[53]

29. Second, the Plaintiffs continue to wrongly insist that the Certification Order is not a final order. As noted above, the Court of Appeal confirmed in *Obodo* that an order refusing to certify a cause of action under Section 5(1)(a) of the *CPA* is indeed a final order. This point of law was also recently confirmed by the Federal Court of Appeal in *Greenwood*, reversing the certification judge's conclusion that the doctrine of *functus officio* does not apply to certification: "This conclusion stems from the certification judge's same misunderstanding regarding the meaning of "final" in the context of the doctrine of issue estoppel. As explained in these reasons, **certification orders can be considered final orders for the purpose of class proceedings, and it follows that the doctrine of *functus officio* can accordingly be applied to certification orders**".[54]

30. Third, the Court's jurisdiction to amend certification orders under Sections 8(3) and 12 of the *CPA* does not displace its status as a final order. This limited power of amendment is intended for case management purposes, not to overturn the principle of finality and disregard the appeal routes provided for in the *CPA*. None of the cases cited by the Plaintiffs suggest in any way that Sections 8(3) and 12 can override detailed appeal routes the Legislature intended and specifically provided for in the *CPA*. As recognized by our Courts, these provisions are procedural and provide

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53 *Navartnarajah v. FSB Group Ltd*., 2023 ONSC 2574, at para. 29.
54 *Canada v. Greenwood*, 2024 FCA 22, at para. 45. Emphasis added.

"**no legal basis**" for a motion judge to "ignore or override" the *CPA*'s "mandatory provisions", including its appeal routes.[55]

D. CANADA BREAD

31. Finally, MLF reiterates and underscores its comments from the MLF Responding Factum regarding Canada Bread's motivations on these motions and its threatened corporate dispute with MLF.[56] In its submissions, Canada Bread has declined to even address MLF's allegations regarding its motives. Canada Bread's silence speaks volumes.

32. Canada Bread has provided no explanation as to why it failed to disclose or produce the Challenged Exhibits at the time of the Original Certification Motion. Canada Bread was a full participant during the Original Certification Motion and its counsel made lengthy submissions at the hearing of that Motion. Canada Bread had all the Challenged Exhibits before the Original Certification Motion, since they date from 2007 and 2010, and it identified and produced all of these documents in the *Govan* action years ago, in September 2021.

33. Canada Bread maintains that its position is unchanged, but that is plainly untrue.[57] At the Original Certification Motion, Canada Bread opposed class certification as against any defendant, and Canada Bread and Grupo Bimbo (which filed a separate factum) opposed the certification of any cause of action against any of the corporate parents on grounds of parental liability. Grupo Bimbo asserted that "Canada Bread is not a mere 'shell', but a sophisticated operated bakery."[58] Canada Bread has now completely reversed its position and submits that this action should be

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55 *Martin v. Wright Medical Technology Canada Ltd.*, 2024 ONCA 1, at para. 29; *Endean v. British Columbia*, 2016 SCC 42, at para. 38; *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572, at para. 68.

56 See, *e.g.*, paras. 117-119 of the MLF Responding Factum B-1-6798 - B-1-6799.

57 Canada Bread Reply Factum, at paras. 50-53, B-2-2513 - B-2-2514.

58 Factum of Grupo Bimbo S.A.B. de C.V. for Certification motion returnable October 25-29, 2021, dated September 10, 2021, at para. 3.

certified against MLF as a former shareholder and corporate parent of Canada Bread. In the same breath, Canada Bread maintains that there is no cause of action against its current parent Grupo Bimbo, despite the fact that Grupo Bimbo has had 100% ownership of Canada Bread since May 2014, and the Plaintiffs' allegations extend into 2017.

34. Canada Bread also refuses to disclose when it reached a cooperation agreement with the Plaintiffs, and what consideration was promised under that agreement. It defies credulity that Canada Bread would unilaterally produce documents that allegedly undermine its prior positions without consideration or assurance from the Plaintiffs. The Plaintiffs are subject to the rule in *Hadley Estate*, and have clearly breached their disclosure obligations under that rule. While Canada Bread may not be subject to that rule as a co-defendant, they clearly owe this Court disclosure of their arrangements when asking this Court to accept reversal of positions that they advanced before this Court in October 2021.

35. This Court can and should easily infer what has motivated Canada Bread's change in position. Canada Bread, or its parent Grupo Bimbo, is asking this Court to reverse its prior ruling so that it can obtain an advantage in pursuing a corporate claim against a former shareholder. Canada Bread has sought to co-opt class counsel in that endeavor even though the class members have no interest in that corporate dispute. This Court should not permit Canada Bread and the Plaintiffs to abuse the Court's processes in this way, particularly after this Court has issued a final ruling that was never appealed.

PART IV - ORDER REQUESTED

36. MLF respectfully requests an order in the form proposed in the MLF Responding Factum, at paragraph 124.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of September, 2024.

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Maple Leaf Foods Inc.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Airia Brands Inc. v. Air Canada*, 2011 ONSC 4003
2. *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572
3. *Andreadis v. Pinto*, (2009), 98 O.R. (3d) 701 (ONSC)
4. *British Columbia (Attorney General) v. Malik*, 2011 SCC 18
5. *Bruce v. John Northway & Son Ltd.*, [1962] O.W.N. 150
6. *Cabral v. Canada (Citizen and Immigration)*, 2018 FCA 4
7. *Canada v. Greenwood*, 2024 FCA 22
8. *Endean v. British Columbia*, 2016 SCC 42
9. *FNF Enterprises Inc. v. Wag and Train Inc.*, 2023 ONCA 92
10. *Grain Workers' Union (International Longshoreman's Warehousemen's Union, Local 333) v. Viterra Inc.*, 2021 FC 292
11. *Gutierrez v. The Watchtower Bible and Tract Society of Canada*, 2023 ONSC 650
12. *Harris v. Bayerische Motoren Werke Aktiengesellschaft*, 2019 ONSC 5967
13. *Handley Estate v. DTE Industries Limited*, 2018 ONCA 324
14. *ICBC v. Atwal*, 2012 BCCA 12
15. *Intact Insurance Co v. Federated Insurance Co. of Canada*, 2017 ONCA 73, leave to appeal to SCC ref'd 2017 CarswellOnt 13025
16. *Martin v. Wright Medical Technology Canada Ltd.*, 2024 ONCA 1
17. *Navartnarajah v. FSB Group Ltd.*, 2023 ONSC 2574
18. *Obodo v. Trans Union of Canada, Inc.*, 2022 ONCA 814
19. *R. v. Dawkins*, 2021 ONCA 113
20. *R. v. Griffin*, 2009 SCC 28
21. *R. v. Youvarajah*, 2013 SCC 41
22. *Risorto v. State Farm Mutual Automobile Insurance Co.*, [2009] O.J. No. 820 (Div. Ct.)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Evidence Act, R.S.O. 1990, c. E.23

Proof of conviction or discharge

22.1 (1) Proof that a person has been convicted or discharged anywhere in Canada of a crime is proof, in the absence of evidence to the contrary, that the crime was committed by the person, if,

(a) no appeal of the conviction or discharge was taken and the time for an appeal has expired; or

(b) an appeal of the conviction or discharge was taken but was dismissed or abandoned and no further appeal is available. 1995, c. 6, s. 6 (3).

Same

(2) Subsection (1) applies whether or not the convicted or discharged person is a party to the proceeding. 1995, c. 6, s. 6 (3).

Same

(3) For the purposes of subsection (1), a certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction or discharge, purporting to be signed by the officer having the custody of the records of the court at which the offender was convicted or discharged, or by the deputy of the officer, is, on proof of the identity of the person named as convicted or discharged person in the certificate, sufficient evidence of the conviction or discharge of that person, without proof of the signature or of the official character of the person appearing to have signed the certificate. 1995, c. 6, s. 6 (3).

SCHEDULE "C"

DAVID V. LOBLAW COMPANIES LIMITED
(Court File #CV-17-586063-00CP)

Underlying Causes of Action Pleaded by Plaintiffs against MLF in The Third, Fourth And Fifth Amended Claims

Cause of Action Pleaded by Plaintiffs against MLF	Third Amended Claim (dated January 31, 2020)	Fourth Amended Claim (dated August 4, 2023)	Fifth Amended Claim (February 20, 2024)
MLF is liable as a direct participant in the alleged conspiracy	MLF as a Defendant conspired with the other Defendants (Para. 3 of Third Claim) and "Maple Leaf was aware of and participated in the Conspiracy" (Para. 14 of Third Claim)	MLF as a Defendant conspired with the other Defendants (Para. 3 of Fourth Claim) and "Maple Leaf was aware of and participated in the Conspiracy" (Para. 15 of Fourth Claim)	MLF as a Defendant conspired with the other Defendants (Para. 3 of Fifth Claim) and "Maple Leaf was aware of and participated in the Conspiracy" (Para. 15 of Fifth Claim)
MLF is liable as a former parent of Canada Bread	MLF as a Parent exercised complete domination and control over Canada Bread, used Canada Bread as a shield for its involvement in the conspiracy and Canada Bread was an agent of MLF (Paras. 15-17 of Third Claim)	MLF as a Parent exercised complete domination and control over Canada Bread, used Canada Bread as a shield for its involvement in the conspiracy, and Canada Bread was an agent of MLF (Paras. 17-20 of Fourth Claim)	MLF as a Parent exercised complete domination and control over Canada Bread, used Canada Bread as a shield for its involvement in the conspiracy, and Canada Bread was an agent of MLF (Paras. 17-20 of Fifth Claim)
MLF is liable under s. 45 of the *Competition Act*	MLF as a Defendant conspired with the other Defendants in violation of s. 45 of the Competition Act (Paras. 71-74 of Third Claim)	MLF as a Defendant conspired with the other Defendants in violation of s. 45 of the Competition Act (Paras. 80-83 of Fourth Claim)	MLF as a Defendant conspired with the other Defendants in violation of s. 45 of the Competition Act (Paras. 95-98 of Fifth Claim)
MLF is liable under s. 46 of the *Competition Act*	MLF as a Defendant conspired with the other Defendants who had foreign affiliates in violation of s. 46 of the Competition Act (Paras. 75-76 of Third Claim)	MLF as a Defendant conspired with the other Defendants who had foreign affiliates in violation of s. 46 of the Competition Act (Paras. 84-85 of Fourth Claim)	MLF as a Defendant conspired with the other Defendants who had foreign affiliates in violation of s. 46 of the Competition Act (Paras. 99-100 of Fifth Claim)

Cause of Action Pleaded by Plaintiffs against MLF	Third Amended Claim (dated January 31, 2020)	Fourth Amended Claim (dated August 4, 2023)	Fifth Amended Claim (February 20, 2024)
MLF is liable for common law conspiracy	MLF as a Defendant engaged in conspiracy using unlawful means and with the predominate purpose of harming class members (Paras. 77-82 of Third Claim)	MLF as a Defendant engaged in conspiracy using unlawful means and with the predominate purpose of harming class members (Paras. 86-91 of Fourth Claim)	MLF as a Defendant engaged in conspiracy using unlawful means and with the predominate purpose of harming class members (Paras. 101-106 of Fifth Claim)
MLF is liable for unjust enrichment	MLF as a Defendant was unjustly enriched by participating in the conspiracy (Paras. 83-85 of Third Claim)	MLF as a Defendant was unjustly enriched by participating in the conspiracy and by retaining Canada Bread dividends (Paras. 92-8 of Fourth Clam)	MLF as a Defendant was unjustly enriched by participating in the conspiracy and by retaining Canada Bread dividends (Paras. 107-113 of Fifth Clam)
MLF is liable for constructive trust	MLF as a Defendant received revenues that are subject to a constructive trust (Paras. 89-96 of Third Claim)	MLF as a Defendant received revenues that are subject to a constructive trust (Paras. 99-106 of Fourth Claim)	MLF as a Defendant received revenues that are subject to a constructive trust (Paras. 114-121 of Fifth Claim)
MLF is liable for knowing receipt	MLF as a Parent knowingly received property that was impressed with a trust (Paras. 97-108 of Third Claim)	MLF as a Parent knowingly received property that was impressed with a trust (Paras. 107-119 of Fourth Claim)	MLF as a Parent knowingly received property that was impressed with a trust (Paras. 122-134 of Fifth Claim)
MLF is liable for knowing assistance	MLF as a Parent knowingly assisted Canada Bread as its former subsidiary in furtherance of the conspiracy (Paras. 109-115 of Third Claim)	MLF as a Parent knowingly assisted Canada Bread as its former subsidiary in furtherance of the conspiracy (Paras. 120-127 of Fourth Claim)	MLF as a Parent knowingly assisted Canada Bread as its former subsidiary in furtherance of the conspiracy (Paras. 135-142 of Fifth Claim)
MLF is liable for waiver of tort	MLF as a Defendant is liable for waiver of tort for engaging in a tortious conspiracy (Paras. 116-119 of Third Claim)	N.A.	N.A.

MARCY DAVID ET AL. Plaintiffs	and	**LOBLAW COMPANIES LIMITED ET AL.** Defendants	Court File No: CV-17-586063-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

REPLY FACTUM OF MAPLE LEAF FOODS INC. (REPLY IN SUPPORT OF MOTIONS TO STRIKE AND EXCLUDE EVIDENCE)

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