

AMENDED THIS June 9, 2004 PURSUANT TO
MODIFIÉ CE CONFORMÉMENT A

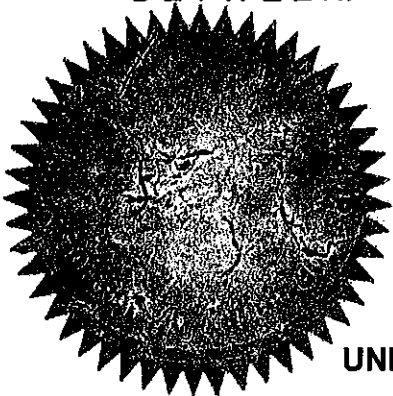
RULE/LA REGLE 26.02 ()

IN THE ORDER OF THE Hon. MR. Justice Wittler
L'ORDONNANCE DU May 26, 2004
D'FAIT LE

Court File No. 03-CV-257364 CP

[Signature] ONTARIO
REGISTRAR GREFFIER
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE
SUPERIOR COURT OF JUSTICE

BETWEEN:



KENNETH D. MORTILLARO

Plaintiff

- and -

**UNICASH FRANCHISING INC. carrying on business as
UNICASH FINANCIAL CENTRES, and
PLANINVEST CONSULTING LIMITED, carrying on business as UNICASH**

Defendants

PROCEEDING UNDER THE CLASS PROCEEDINGS ACT, 1992

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT:

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

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

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

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

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

Date Oct. 21, 2003

Issued by 
Local Registrar

Address of
court office: 393 University Ave., 10th Floor
Toronto, Ontario M5G 1E6

TO: UNICASH FRANCHISING INC.
5100 – 1 First Canadian Place
Toronto, Ontario
M5X 1K2

PLANINVEST CONSULTING LIMITED
5075 Yonge Street
Suite 401
Toronto, Ontario
M2N 6C6

Attn. Eduardo Stivelman

CLAIM

1. The Plaintiff claims:

- (a) An order pursuant to the *Class Proceedings Act, 1992*, certifying this action as a class proceeding, and appointing the Plaintiff as representative plaintiff for the Class (defined below);
- (b) A declaration that the interest rate charged by the Defendants _ to the Class (as defined below) on "payday" loans ("Payday Loans" as defined below) made by the Defendants, since their inception, to the Class violates section 347 of the *Criminal Code* and is illegal and void, and does not have to be paid by the Class;
- (c) A declaration that the Payday Loans are therefore void and unenforceable, or in the alternative that the interest provisions of the Payday Loan agreements between the Defendants and the Class members are void and unenforceable and that the Class Members are not required to repay to the Defendants any amounts outstanding on any Payday Loans in whole or in part;
- (d) An accounting of all Interest Charges (defined below) paid by the Class to the Defendants on the Payday Loans, a declaration that those funds are held for the benefit of the Class pursuant to a constructive or resulting trust, and an order that the Defendants pay corresponding restitutionary damages forthwith to the Class;
- (e) Exemplary or punitive damages in the amount of \$10,000,000.00 or such other sum as this Honourable Court deems fit;
- (f) The costs of administering a plan of distribution of the damages awarded in this action in the amount of \$5,000,000.00 or such other amount as this Honourable Court deems fit;

- (g) An interim, interlocutory, and permanent injunction restraining the Defendants from charging interest in a manner that violates the *Criminal Code*;
- (h) Prejudgment interest in accordance with the *Courts of Justice Act*;
- (i) Postjudgment interest in accordance with the *Courts of Justice Act*; and,
- (j) Costs of this proceeding on a full indemnity basis.

OVERVIEW

2. This is a proposed class proceeding for damages and other relief arising from interest charges applied to Payday Loans made by the Defendants to the Class. The rate of interest charged by the Defendants, including interest described as a "cheque cashing fee," and a "handling fee", contravenes the criminal interest rate provisions of the Criminal Code. Consequently, members of the proposed Class are entitled to restitution for illegal interest they have paid and will pay, and other relief.

THE PARTIES

3. Unicash Franchising Inc. ("Unicash Franchising") is a corporation incorporated pursuant to the laws of Ontario that carries on business as a franchisor of business operations in the alternative financial sector which carry on business under the name "Unicash". Unicash Franchising enters into franchise agreements with its franchisees according to which the franchisees are required to pay to Unicash Franchising royalty fees, advertising fees, franchise fees and other charges which are payable from the Interest Charges (as defined below) paid to Unicash by the Class Members.

4. Planinvest Consulting Limited ("Planinvest") is a corporation incorporated pursuant to the laws of Ontario, and carries on business under the business name Unicash Financial Centres. It owns and operates several retail outlets in Metropolitan Toronto and the surrounding area, under the name "Unicash".

5. Planinvest, along with any franchisees of Unicash Franchising (who are unknown to the plaintiff, but are known to Unicash Franchising) (collectively, "Unicash") carry on

business in the alternative financial sector, providing financial services such as cheque cashing and "payday loans" and charging fees for those services. Customers of Unicash are, predominantly, and to the knowledge of the Defendants, economically vulnerable consumers.

6. The Plaintiff resides in Toronto, Ontario. From time to time he has been a customer of Unicash, entering into "payday" loans with the Defendant, Planinvest.

THE CLASS

7. The Plaintiff brings this action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 on behalf of a class consisting of all persons in Canada who (i) have taken or will take Payday Loans from Unicash, and (ii) have paid or have been charged, or will pay or will be charged interest on a Payday Loan, at any time up to the date of judgment in this matter (the "Class").

UNICASH "PAYDAY LOANS"

8. One of the services offered by Unicash is to provide short-term loans to gainfully employed consumers. Unicash provides loans of up to \$172.00 to be paid to the consumer (the "borrower") and repaid from the borrower's next pay cheque (the "Payday Loans").

9. Unicash uses a standard form "Payday Advance Agreement" for all Payday Loans. Unicash Franchising requires all its franchisees and Planinvest to use the standard form Payday Advance Agreement for all Payday Loans. The terms of the Payday Advance Agreements are not negotiable by the Class Members. The effective annual rate of interest on the Payday Loans is not disclosed on the Payday Advance Agreements.

10. The Payday Loans are subject to the following terms and conditions:

- (a) Unicash lends to the consumer an agreed upon sum of up to \$172.00 (the "principal") up to two weeks ahead of the borrower's next pay day;
- (b) The principal, together with all accrued "fees" are due on the borrower's next pay day (the "due date");
- (c) On execution of the loan agreement, the borrower endorses and provides to Unicash a post-dated personal cheque dated for the due date in the total

amount of the loan, inclusive of principal, a cheque cashing fee of 2.5% of the amount of the loan plus \$1.99, and a "handling fee" of \$14.99;

- (d) If the principal and all "fees" are not repaid by the due date, then the borrower is deemed to have opted to repay the loan by way of the post-dated cheque;
- (e) Unicash then deposits the endorsed personal cheque to its own credit at its bank, as a holder in due course; and,
- (f) A Late payment fee of \$2.00 per day is charged if the Payday Loan is not repaid on the due date.

INTEREST CHARGES

11. Unicash has charged and it continues to charge interest on each Payday Loan comprised of the following elements (hereinafter collectively referred to as the "Interest Charge"):

- (a) interest described as a "cheque cashing fee" of 2.5% of the principal amount of the loan plus \$1.99;
- (b) interest described as a "handling fee" in the amount of \$14.99; and,
- (c) interest described as a "Late Payment fee" in the amount of \$2.00 per day if the Payday Loan is not repaid on the due date.

In the event that the post-dated cheque is dishonoured, Unicash charges a further \$25.00 fee.

THE DEFENDANTS CHARGE INTEREST AT A CRIMINAL RATE ON PAYDAY LOANS

12. Section 347 of the *Criminal Code* makes it an offence to charge interest at a "criminal rate". "Criminal rate" is defined in section 347(2) as "an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds 60% on the credit advanced under an agreement or arrangement."

13. The Interest Charge is "interest" within the meaning of section 347 of the *Criminal Code*.

14. The effective annual rate of interest charged to the Class by way of the Interest Charge vastly exceeds the criminal rate of 60%. Therefore, the Defendants have been charging an illegal rate of interest, and have taken illegal profits by way of the Payday Loans.

15. Unicash Franchising receives a portion of the illegal Interest Charges paid by the Class to Unicash as franchise fees, royalty fees, advertising fees, and other charges (collectively, "the Interest Fees"). Unicash Franchising has received the Interest Fees knowing that these monies were obtained or derived, directly or indirectly, as a result of a breach of s. 347 of the Criminal Code. Unicash Franchising has received the Interest Fees with the intent to conceal or convert the illegal Interest Charges to its own use.

16. In paying the Interest Fees to Unicash Franchising, Unicash has breached s. 462.31 of the Criminal Code, which states:

462.31(1) Every one commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds, knowing or believing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of

(a) the commission in Canada of an enterprise crime offence ...

17. Unicash knew that the Interest Charges are at a criminal interest rate, or was willfully blind with respect thereto. The Defendants knew that the Interest Fees paid to Unicash Franchising were proceeds obtained or derived directly or indirectly from a breach of s. 347 of the Criminal Code, and that the payment of the Interest Fees to Unicash Franchising were made with the intent to conceal or convert the illegal Interest Charges.

18. During the class period, the Defendants have illegally profited by charging and receiving the Interest Charges and Interest Fees, at the expense of the Class Members, and the Defendants have been unjustly enriched thereby.

THE PLAINTIFF'S PAYDAY LOANS

19. In June 2003, the Plaintiff entered into the first of several Payday Loan agreements with Planinvest. Each Payday Loan agreement was in substantially the same form and includes the terms for repayment set forth above in paragraph 10.

20. In accordance with the terms of the Payday Loan agreements, the Plaintiff delivered post-dated personal cheques to Planinvest and received Payday Loans as follows:

ADVANCE DATE	CHEQUE DATE	AMOUNT	PRINCIPAL	INTEREST
	June 19, 2003	120.00	100.00	20.00
<u>July 9, 2003</u>	July 17, 2003	120.00	100.00	20.00
<u>July 18, 2003</u>	August 1, 2003	120.00	100.00	20.00

21. Full particulars of the dates of the advances and the total Interest Charges charged by Planinvest to the Plaintiff are not known to the Plaintiff, but are within the knowledge of the Planinvest.

22. Each of the aforesaid cheques included the principal amount of the Payday Loan, and the Interest Charge with respect thereto, exclusive of the "Late Payment fee", calculated in accordance with the terms set forth in paragraph 13, above.

23. None of the Plaintiff's Payday Loans were repaid by the Plaintiff before the due date. In each instance, Planinvest deposited the Plaintiff's personal cheque to its own account. Planinvest has been paid for the first two advances it made to the Plaintiff, including principal and the interest charge.

24. The third cheque was dishonoured by the Plaintiff's bank. Planinvest has charged, and continues to charge the "Late Payment fee" of \$2.00 per day since August 1, 2003, with respect to this Payday Loan.

25. The Interest Charges charged by Planinvest to the Plaintiff on each of the aforesaid Payday Loans exceeds the maximum legal rate of interest permissible under the *Criminal*

Code, and are, therefore, illegal and void. The Payday Loans made by the Plaintiff are therefore illegal and void and unenforceable.

THE PAYDAY LOANS CONTRAVENE THE CRIMINAL CODE

26. Unicash has received by way of Interest Charges payments of interest at rates in excess of 60% per year from members of the Class since it commenced carrying on business in Canada. The receipt of all such payments contravenes section 347(1)(b) of the *Criminal Code*. All such payments are therefore void.

27. As the Interest Charges received by the Defendants are void, the Class is entitled to restitution of all Interest Charges paid by them to the Defendants. The Defendants hold the Interest Charges in favour of the Class pursuant to a resulting or constructive trust.

28. The Interest Fees are part of the Interest Charges, and the Class is entitled to a tracing order with respect to the Interest Fees paid by Unicash to Unicash Franchising, and a declaration that the Interest Fees are held by Unicash Franchising pursuant to a resulting or constructive trust.

29. As trustees of the total Interest Charges paid by the Class Members to Unicash and Unicash Franchising, the Defendants should disgorge the total Interest Charges to the Class, and if the total Interest Charges are no longer in their possession, or cannot be traced, then the Defendants should be ordered to pay an equivalent amount in damages to the Class.

30. The Interest Charges charged by Unicash to each of the Class Members exceeds the maximum legal rate of interest permissible under the *Criminal Code*, and are, therefore, illegal and void. All Payday Loans entered into with Unicash by the Class Members are, therefore, illegal and void and unenforceable, and any amounts that remain outstanding on Payday Loans entered into by the Class need not be paid to Unicash.

UNJUST ENRICHMENT

31. The total amount collected by Unicash as Interest Charges from the Class is not known by the Plaintiff but is known to the Defendants. The Defendants have been unjustly enriched by the receipt of the Interest Charges and Interest Fees from the Class.

32. The Class has suffered a corresponding deprivation.

33. There is no juristic reason for the Defendants to retain the Interest Charges and Interest Fees, which are illegal interest. The Defendants have, therefore, been unjustly enriched, and hold the Interest Charges and Interest Fees pursuant to a resulting or constructive trust for the benefit of the Class.

34. The Class is therefore entitled to an accounting and restitution of all of the Interest Charges they have paid to Unicash.

PUNITIVE OR EXEMPLARY DAMAGES

35. The Payday Loan agreements are intentionally misleading, and worded in such a way as to deceive the Class with respect to the actual cost of borrowing that they incur when entering into a Payday Loan.

36. The conduct of the Defendants in advancing the Payday Loans to the Class on terms which contravene the *Criminal Code*, pursuant to a contract that was materially misleading in nature, and which was intended to and did exploit the economic vulnerability of the Class, including the Plaintiff, is conduct of such wanton and high-handed character that it is deserving of the condemnation of this Honourable Court by way of an award of punitive and/or exemplary damages in the amount of \$10,000,000.00, or such other sum as this Honourable Court deems fit.

GENERAL

37. The Plaintiff, on behalf of the Class, pleads and relies on the *Class Proceedings Act*, 1992, R.S.O. 1992, c. 6, the *Criminal Code of Canada*, R.S.C. 1985, c. C-46, and the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

38. The Plaintiff proposes that this action be tried at Toronto, Ontario.

April 26, 2004

**PALIARE ROLAND ROSENBERG
ROTHSTEIN LLP**
Barristers
250 University Avenue
Suite 501
Toronto, ON M5H 3E5

Ian Roland - LSUC No.: 14512K
Tel: (416) 646-4304
Fax: (416) 646-4305

Martin Doane - LSUC No.: 31819C
Tel: (416) 646-4302
Fax: (416) 646-4303

Odette Soriano - LSUC No.: 37326J
Tel: (416) 646-4306
Fax: (416) 646-4307

Margaret Waddell - LSUC No. 29860U
Tel: (416) 646-4329
Fax: (416) 646-4301

And

KOSKIE MINSKY
20 Queen Street West
Suite 900
Toronto, ON M5H 3R3

Kirk Baert – LSUC No.: 30942O
Tel: 416-977-8343
Fax: 416-204-2889

Solicitors for the Plaintiff

KENNETH D. MORTILLARO

- and -

**UNICASH FRANCHISING INC. carrying on
business as UNICASH FINANCIAL CENTRES**

Plaintiff

Defendant

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

AMENDED STATEMENT OF CLAIM

**PALIARE ROLAND ROSENBERG
ROTHSTEIN LLP**

Barristers & Solicitors
250 University Avenue, Suite 501
Toronto, ON M5H 3E5

Martin Doane – LSUC #31819C

Margaret L. Waddell - LSUC #29860U
Tel: (416) 646-4302/4329
Fax: (416) 646-4303/4301

KOSKIE MINSKY

20 Queen Street West
Suite 900
Toronto, ON M5H 3R3

Kirk Baert – LSUC #309420

Tel: (416) 977-8353
Fax: (416) 204-2889
Solicitors for the Plaintiff