

*ONTARIO*  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN**

**KENNETH D. MORTILLARO**

Plaintiff

- and -

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

Defendants

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

**DEFENDANTS' RESPONDING RECORD**

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PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

**AFFIDAVIT OF EDUARDO STIVELMAN**  
(sworn September 14, 2004)

**I, EDUARDO STIVELMAN**, of the City of Thornhill, in the Regional Municipality of York, **MAKE OATH AND SAY** as follows:

**A/ Personal Background**

1. I am the President of the Defendant Unicash Franchising Inc. ("UFI") and I am the President of the Defendant Planinvest Consulting Limited ("Planinvest"). I have been President of Planinvest since it was originally incorporated in 1990, and have held that position with respect to UFI since its incorporation in 1996. As such I have personal knowledge with respect to the matters to which I hereinafter depose. To the extent any of my affidavit is based upon information which I have obtained from others, I have identified them and do hereby state my belief in the veracity of such information.

2. I have a Bachelor's degree in Civil Engineering and a Post-University degree in Computer System Analysis from the Catholic University of Rio de Janeiro.
3. In 1999, I was honoured by the Ontario Ministry of Economic Development, Trade and Tourism with a special recognition award for promoting business immigration into Ontario.
4. For the purposes of this affidavit, I am limiting my statements, except where explicitly stated to the contrary, to the procedures and practices in place at Planinvest owned Unicash branches. While franchised stores are supposed to follow the same procedures, I have no direct knowledge (except as otherwise stated herein) relating to their operations.

**B/ Planinvest**

5. Planinvest has been engaged in the cheque cashing business through its Unicash Division, which was set up on August 22, 1992. Its first "Unicash" store opened for business in December 1992.
6. Planinvest has its head office located at 5075 Yonge Street, Toronto. It operates eight "Unicash Financial Centres" ("Unicash stores"). These operate at the following locations, all of them in the Metropolitan Toronto Area:  
  
2628 Eglinton Avenue East  
4453 Kingston Road  
2666 Danforth Avenue  
3201 Dufferin Street  
1474 Queen Street West  
31 Tapscott Road, Unit B9  
1052 Pape Avenue  
45 Overlea Blvd., Unit 1-34B
7. The Unicash store at 2628 Eglinton Avenue East (the "Eglinton Branch"), the branch at which the plaintiff Mr. Mortillaro cashed his cheques, is owned and operated by Planinvest.
8. In general, the following financial services are offered at all Planinvest owned Unicash stores:

(a) **Cheque Cashing:** A variety of cheques are cashed, including U.S. dollar, personal and payroll cheques, most for a fee of 2½ cents per dollar, plus a transaction fee. There are no holds on cheques.

(b) **Payday Advance:** Customers are offered the opportunity to cash personal post-dated cheques and to put cash in their pockets when they need it, up to two weeks ahead of their next paycheque.

(c) **Money Wire Transfers:** Unicash stores are authorized agents of either Western Union or Moneygram. This a very popular service.

(d) **Money Orders:** Money orders (Canadian or U.S. funds) are offered to allow customers to pay bills, or for any other goods or services.

(e) **Currency Exchange:** Unicash stores buy and sell U.S.\$ funds with no commission.

(f) **Bill Payment:** Unicash stores accept payment of all types of bills, including: utilities, credit cards, charge cards, cable companies, ISP's and many more.

(g) **Mail Boxes:** Unicash stores rent mailboxes monthly or yearly at very competitive rates on either a temporary or long term basis.

(h) **Other:** Some Unicash stores offer prepaid phone cards, photo ID's, faxing, photocopying, TTC tickets, ABM's, and/or courier service.

C/ UFI

9. UFI was incorporated in the Province of Ontario under the *Ontario Business Corporations Act* as 1170711 Ontario Inc. on February 23, 1996. Its name was changed to "Unicash Franchising Inc." on October 1, 1996.

10. UFI has offered "Unicash" franchises in Toronto and across Ontario since June 22, 1998.

11. UFI is strictly a franchisor. It does not have any stores, and does not provide cheque cashing, Payday Advances or any other services to the public.

**D/ Payday Advances**

12. A "Payday Advance" is a service in which instant cash is offered for post-dated cheques. The customer makes the cheque payable to himself or herself, then endorses it. The cheque, which includes a fee, is then presented by Planinvest to the bank for payment on the day of its date.

13. Planinvest offers Payday Advances up to a *maximum* amount of \$175.00 per post-dated cheque, as part of its extensive basket of services.

14. Payday Advances are simple personal post-dated cheque cashing transactions. No "loan agreement", "payday advance agreement" or any other contract of a similar nature is signed.

15. Such transactions are not considered by Planinvest to be loans – they are simply another cheque cashing service. The additional fees charged (as discussed below) reflect the additional cost and risks associated with handling these services. There are no interest charges.

16. Extensive signage is posted in each Planinvest owned Unicash store explaining the requirements and fees for a Payday Advance service. Attached hereto and marked as Exhibit "A" to this my affidavit is a true copy of a poster which is placed prominently within those Unicash stores which offer Payday Advances. The cheque cashing fee is 2.5% of the face value of the cheque, plus a \$1.99 transaction fee (increased to \$2.99 in March, 2004) and, in addition, there is a \$14.99 handling fee. Accordingly, the total fees and charges for a Payday Advance of \$175.00 would be \$21.35.

17. A customer who seeks a Payday Advance, or any other cheque cashing service, is required to fill out a "Unicash" application form. This allows the first transaction to be processed. The application form, used in part as a signature card, is retained at the store and not given to the customer. A true copy of a blank application form is attached hereto and marked as Exhibit "B". While we have been unable to locate the application form signed by Mr. Montillaro, I can state with certainty that he would have been required to sign one before his first cheque cashing transaction.

18. No further application is required. Subsequent transactions simply require the customer to sign or endorse the cheque to be cashed, and to produce proper identification.

**E/ Mr. Mortillaro**

19. Mr. Mortillaro has been a customer of the Eglinton Branch which, as noted above, is owned and operated by Planinvest. As far as I am aware, he has never dealt with any other Unicash store. He has taken a total of four Payday Advances as follows:

Date	Cheque Number	Face Amount of Cheque	Amount Paid to Client when Cheque Cleared	Cheque Cashing Fee (2.5% (- \$3.00) (- \$1.99 - \$1.99))	Amount Actually Received by Planinvest	Net Losses of Planinvest
Apr 24, 2003	142	\$120.00	\$100.02	\$19.98	\$120.00	
June 19, 2003	159	\$120.00	\$100.02	\$19.98	\$120.00	
July 17, 2003	28	\$120.00	\$100.02	\$19.98	\$120.00	
August 1, 2003	30	\$120.00	\$100.02	\$19.98	\$ 0.00	
<b>TOTAL</b>		<b>\$480.00</b>	<b>\$400.08</b>	<b>\$79.92</b>	<b>\$360.00</b>	<b>(\$40.08)</b>

20. As set out above, Mr. Mortillaro has had four cheques cashed and has received the proceeds of each of those cashed cheques, less the standard commission, handling fee and transaction fee.

21. Because one of his cheques bounced, Mr. Mortillaro has received \$400.08 cash from Planinvest's Eglinton Branch by way of Payday Advances but has, to date, paid only \$360.00 to Planinvest.

22. If, as Mr. Mortillaro claims, these are loans and not merely a specific form of cheque cashing, he has not even paid back the total "principal", let alone "interest".

**F/ Incorrect Assertions in Mortillaro Affidavit**

23. In paragraph 11 of his Affidavit sworn July 14, 2004, Mr. Mortillaro states that "Unicash charges \$20.00 for every \$100.00 of credit advanced". This is incorrect. The fees and charges are clearly displayed in each Planinvest store, and are as set out above.

24. In paragraph 13 of his Affidavit sworn July 14, 2004, Mr. Mortillaro states that "each time" he obtained a Payday "loan" from Unicash, Unicash "directed" him to sign "a loan agreement which it called a 'Payday Advance Agreement'".

25. This allegation is completely untrue.

26. The Eglinton Branch – the only Unicash store Mr. Mortillaro dealt with, has:

- (a) never used any "Payday Advance Agreement"; and
- (b) never required nor asked for "loan agreements" to be signed by any customer in respect of Payday Advances.

27. Mr. Mortillaro includes as Exhibit "A" to his affidavit a document entitled "Payday Advance Agreement" which apparently comes from a Unicash store located at 575 Yonge Street. No signature is discernible on the document. The Unicash store at 575 Yonge Street is not a Planinvest operation – it is operated by a franchisee who is not a party to this action. I do not know whether the franchisee that operates that Unicash store does or does not use such a document. Whether the franchisee has used such a document or not is in any event completely irrelevant because:

- (a) it has no connection with Planinvest;
- (b) it has no connection with Mr. Mortillaro; and
- (c) it has no connection with UFI, which never authorized, suggested or permitted the creation or execution of such a document.

28. Mr. Mortillaro never signed any document in the form of his Exhibit "A", nor did he ever sign any document other than the application form and the cheques referred to above.

29. In paragraph 14 of his affidavit, Mr. Mortillaro correctly states that his counsel requested that counsel for the defendant provide "copies of the Payday Loan Agreements" that Mr. Mortillaro claims to have signed. Paragraph 15, however, misquotes counsel's response.

30. Counsel's actual words, contained in Exhibit "C" to Mr. Mortillaro's affidavit, were: "We cannot provide you with copies of 'Pay-Day Loan Agreements' entered into between Mr. Mortillaro and Planinvest Consulting Limited, because no such documents exist". As noted above, no such documents now exist, because they never existed. Mr. Mortillaro insinuates wrongdoing by saying in paragraph 15: "No explanation was given as to why [the non-existent documents] do not exist." He is clearly overreaching.

**G/ Patti Shedden Affidavit**

31. The plaintiff relies on an affidavit from Patti Shedden, a member of the law firm of Paliare Roland, counsel to Mr. Mortillaro.

32. Ms. Shedden, like Mr. Mortillaro, includes a copy of an alleged Payday Advance Agreement as her Exhibit "F". The agreement provided by Ms. Shedden appears to be the same one provided in Mr. Mortillaro's affidavit as his Exhibit "A". As Ms. Shedden has never dealt with either of the defendants, she has no basis to rely on such a document. As noted above, the document has never been used by the Eglinton Branch, and was not signed by Mr. Mortillaro. It therefore cannot be the foundation for any action, let alone a class action.

**H/ The Actuarial Certificate is Incorrect**

33. As I understand it, James E. Jeffrey is the actuary who provides the figures included in Ms. Shedden's affidavit by way of his certificate attached as Exhibit "H" to her affidavit.

34. In his Certificate (at pages 81-84 of the Motion Record), Mr. Jeffrey claims that, in accordance with accepted actuarial practice he has determined that Unicash charged Mr.

Mortillaro an effective interest rate of "409,769.0%" per annum in relation to a "loan" made on July 9, 2003, and "11,497.6%" per annum in relation to a "loan" made on July 18, 2003.

35. Set out below is a table showing the amount of interest that would be charged on a hypothetical \$100 loan on both an annual basis and on a daily basis based on specified interest rates. It is a fairly straightforward calculation based on simple interest.

Amount of Loan	Interest Rate	Annual Interest	Daily Interest
\$100.00	10.00%	\$10.00	\$ 0.03
\$100.00	20.00%	\$20.00	\$ 0.05
\$100.00	100.00%	\$100.00	\$ 0.27
\$100.00	1000.00%	\$1,000.00	\$ 2.74
\$100.00	10000.00%	\$10,000.00	\$ 27.40
\$100.00	200000.00%	\$200,000.00	\$ 547.95
\$100.00	409769.00%	\$409,769.00	\$ 1,122.65

36. As can be seen, an "interest rate" of "409,769%", would have required Mr. Montillaro to "repay" a total of \$8,981.12 "interest" over the 8 days of the July 9<sup>th</sup> "loan". This is patently absurd.

37. I am unable to ascertain on what basis Mr. Jeffrey arrives at his conclusions. In any event, as noted above, Mr. Jeffrey's assumptions are incorrect, since Mr. Mortillaro's transactions with Planinvest were not "loans" and he was not charged "interest".

**I/ No Claim Against UFI**

38. Mr. Mortillaro states in paragraph 4 of his affidavit sworn July 14, 2004, that the statement of claim alleges that Planinvest and the franchisees of UFI pay fees to UFI "that are made up of part of the illegal interest".

39. Mr. Mortillaro never dealt with any franchisee. He therefore cannot "bootstrap" himself into any claim against UFI based on any fees paid by franchisees to UFI.

40. With respect to Planinvest, Planinvest has never paid any royalties or other fees to UFI. Whatever charges or fees Mr. Mortillaro claims to have paid to the Eglinton Branch, none of those amounts were paid to UFI, as alleged in the statement of claim. There is no connection, direct or indirect, between the proposed class representative and UFI. There is no cause of action against UFI, which neither advanced funds to Mr. Mortillaro, nor received funds, directly or indirectly, from him.

**J/ Class Proceeding Not Appropriate Approach**

41. As stated above, the additional fees charged in relation to Payday Advances are to cover the higher administrative, handling costs and risks associated with these kinds of cheque cashing services. There is a relatively high percentage of "bounced cheques, and therefore higher administration and collection costs.

42. From December 1, 1992, to September 8, 2004, Planinvest has provided Payday Advances to a total of 4,638 customers. Planinvest has engaged in a total of 38,168 Payday Advance transactions since it started operations. The average, as can be seen, is therefore approximately eight transactions per customer over a period of almost 12 years.

43. The total gross revenue from Payday Advances over this period was \$725,427.78. However, almost half of this amount, or \$334,463.51, was lost to unrecovered bounced cheques. The total net revenue to Planinvest from Payday Advances during this period was therefore only \$390,964.27. Attached hereto and marked Exhibit "C" is a computer printout illustrating the above figures.

44. The plaintiffs are asking for an amount about seven times Planinvest's total gross revenues from Payday Advances, just to *administer* their proposed plan of distribution.

45. The plaintiff's litigation plan, as set out in Exhibit "I" to Ms. Shedden's affidavit, assumes that "Unicash has an address for each customer who has taken a Payday Loan". That assumption is not realistic.

46. Given the proposed class and its span of time ranging over almost 12 years, it is highly likely that many, if not most, of Planinvest's customers have moved. If the records are not current with respect to a given customer, the cost of locating that customer (assuming Planinvest has any means of doing so), could prove prohibitive. In any event, the multitude of customers who have given us bounced cheques are unlikely to respond to any contact.

47. I have read the affidavit of David Hews in the companion action against Cash Money Cheque Cashing Inc. A copy of it (without exhibits) is attached as Exhibit "D". I agree with David Hews that regulation of the CFS industry is inevitable and imminent. Regulation is a much more reasonable approach, and certainly more balanced than the sledgehammer of this class action, which seeks damages far in excess of the **total** revenues ever made by Planinvest.

**K/ Limitation Period**

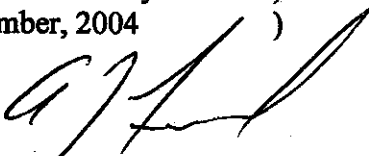
48. I am advised by counsel, and verily believe, that a *Limitations Act* defence may be available that would encompass a large number of the claims of the proposed class.

**L/ Montillaro is Not a Proper Class Representative, and the Proposed Class is Overbroad and Conflicted**


49. Planinvest is an Ontario corporation that has not dealt with anyone in any other province. Moreover, a large number of the proposed class members, including Mr. Mortillaro himself, have signed cheques which were dishonoured when presented for payment by Planinvest. I am advised by my counsel that if such action was deliberate, it may be a criminal offence under subsection 362(1)(a) of the *Criminal Code*. Accordingly, Mr. Mortillaro is not a proper representative plaintiff. He should not be able to make any claim for "recovery" of money he never paid, nor should the court assist him, in view of his conduct. Any others in a similar

position should also not be able to make any claim, and they are therefore in conflict with those members of the proposed class whose cheques have all cleared.

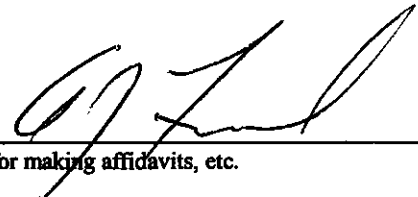
SWORN BEFORE ME at )  
Toronto this 14<sup>th</sup> day )  
of September, 2004 )



Commissioner for taking Oaths, etc.

  
\_\_\_\_\_  
Eduardo Stivelman

**This is Exhibit "A"**  
**to the Affidavit of Eduardo Stivelman**  
**sworn this 14<sup>th</sup> day of September, 2004.**



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A Commissioner for making affidavits, etc.

# PAYDAY ADVANCE GET CASH IN A FLASH!

## How does it work?

We'll cash your post-dated cheque up to 2 weeks before your next payday, and give you cash on the spot, quickly!

## How do I qualify?

You must have an active bank account and a minimum gross income of \$280 per week. A quick credit check will be done before you're approved.

## What do I need to bring?

- 2 pieces of government identification
- recent bank statement or passbook
- proof of income (last 3 pay stubs)
- proof of address (last hydro, cable or phone bill)
- personal cheque, with name and address printed.

## How much does it cost?

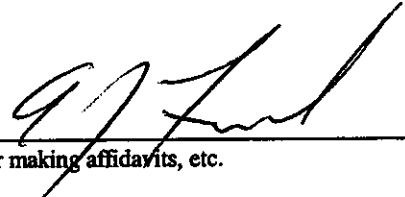
Only the regular cheque cashing fee of 2.5% plus a \$14.99 handling fee.

UNICASH



14

This is **Exhibit "B"**  
to the Affidavit of Eduardo Stivelman  
sworn this 14<sup>th</sup> day of September, 2004.



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A Commissioner for making affidavits, etc.

# UNICASH Application Form #:



EMPLOYEE INITIAL

## About Yourself

FIRST NAME \_\_\_\_\_ MIDDLE NAME \_\_\_\_\_ LAST NAME \_\_\_\_\_

ADDRESS \_\_\_\_\_

CITY \_\_\_\_\_ POSTAL CODE \_\_\_\_\_ HOW LONG? \_\_\_\_\_  RENT MONTHLY RENT OR MORTGAGE \_\_\_\_\_  
 OWN

HOME PHONE \_\_\_\_\_ LISTED AS: \_\_\_\_\_

15  
photo

DATE OF BIRTH: month \_\_\_\_\_ day \_\_\_\_\_ year \_\_\_\_\_ S.I.N. \_\_\_\_\_ D.L. \_\_\_\_\_

O.H.I.P. \_\_\_\_\_ OTHER \_\_\_\_\_

SEX:  M  F HEIGHT \_\_\_\_\_ WEIGHT \_\_\_\_\_ HAIR \_\_\_\_\_ EYES \_\_\_\_\_ INTERNAL USE: A  B  H  I  D  W OTHER

NOTES: \_\_\_\_\_

## About Your Job

EMPLOYER \_\_\_\_\_

ADDRESS \_\_\_\_\_

CITY \_\_\_\_\_ POSTAL CODE \_\_\_\_\_ HOW LONG? \_\_\_\_\_ MONTHLY SALARY \_\_\_\_\_ OTHER MONTHLY INCOME \_\_\_\_\_

PHONE \_\_\_\_\_ DEPARTMENT \_\_\_\_\_ SUPERVISOR \_\_\_\_\_

NOTES: \_\_\_\_\_

## References

RELATIVE OR FRIEND NAME \_\_\_\_\_

ADDRESS \_\_\_\_\_

RELATIONSHIP \_\_\_\_\_ PHONE \_\_\_\_\_

LOANS	AMOUNT OWING	MONTHLY PAYMENT	INTERNAL USE
BANK			
CAR			
CREDIT CARD			
OTHER			

NOTES: \_\_\_\_\_

## Declaration Terms

**PLEASE READ WITH ATTENTION**

*By signing below, I authorize you (UNICASH) to obtain information about me, verify and exchange any information I have given to you with any credit bureau, financial institution, employers, other organizations or persons in connection with the relationship between you and me at any time. I agree to pay, as a deduction from the proceeds due from my cheque, any fees or charges uniformly imposed on cheques. In the event any cheque which I cash is returned, I will pay a surcharge of \$25.00 plus collection and legal expenses incurred. Interest will be charged on all returned items at a rate of 2% per month until paid in full.*

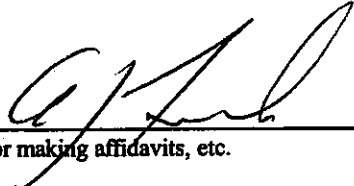
Now Just Sign Here

X \_\_\_\_\_

DATE \_\_\_\_\_



**This is Exhibit "C"**  
**to the Affidavit of Eduardo Stivelman**  
**sworn this 14<sup>th</sup> day of September, 2004.**



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A Commissioner for making affidavits, etc.

18

# UNICASH - PAYDAY CHQS (P1) STATISTICS REPORT

Store(s): DF-DU-EY-EG-KS-MV-PP-QU

Period: from 01/Dec/92 to 08/Sep/04

Printed on 08/Sep/04

*12 yrs = 3,180/yr = 265/mo = 8.8/day*

*must be annual*

## REVENUE:

Total # of Customers:	4638
Total # of Transactions:	38168
Total Amount:	\$5,856,899.09
Total Revenue:	\$725,427.78
Average Amount of Chq:	\$153.45
Average Income per Chq:	\$19.01
Revenue as % of Chq:	12.39%

*8.8/day*

*5,035/mo*

*income*

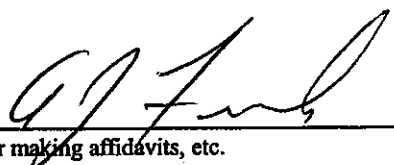
## LOSSES:

Bad Customers on Default:	2214
Bad Customers % of Total:	47.74%
Amount Outstanding Chqs:	\$334,463.51
Losses as % of Revenue:	46.11%

## NET INCOME

Revenue Net of Losses:	\$390,964.27
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This is Exhibit "D"  
to the Affidavit of Eduardo Stivelman  
sworn this 14<sup>th</sup> day of September, 2004.



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A Commissioner for making affidavits, etc.

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**KENNETH D. MORTILLARO**

Plaintiff

- and -

**CASH MONEY CHEQUE CASHING INC.**

Defendant

Proceeding under the *Class Proceedings Act*, 1992

**AFFIDAVIT OF DAVID HEWS  
(Sworn: May 26, 2004)**

**I, David Hews, of the City of Brampton, in the Province of Ontario, MAKE OATH AND SAY:**

**PERSONAL BACKGROUND**

1. I am the President of Cash Money Cheque Cashing Inc. ("Cash Money", or the "Company"). I have held that position since I joined the Company in 2000. As such I have knowledge, information, and belief of matters depose to.
2. I have worked in the community financial services ("CFS") sector since 1969, when I began working for Household Finance Corporation ("HFC"). By the time of my departure from HFC in 1988, I held the position of Regional Processing Manager, and had undertaken a variety of different tasks within the organization, such as setting up the real estate loan division, developing training and marketing tools, processing collections, and administering private label credit card operations.
3. In 1989, I began working for a "Money Mart" franchisee. Subsequently, I worked for National Money Mart Corporation ("Money Mart").

4. While working for Cash Money, I have been actively involved in developing, promoting, and refining delivery of CFS, both as part of my job, and through industry organizations.

#### **CASH MONEY BACKGROUND INFORMATION**

5. Cash Money was started in 1992 by two brothers, Joseph and Vincent Genova, who are majority owners of the Company and who are both active in its operation.

6. Today, Cash Money has 76 locations in Canada. Of those, only 50 stores provide payday advances. 40 of those stores are owned by Cash Money, and 10 are independently owned by franchisees.

7. Cash Money stores are located primarily in Ontario, but there are 2 branches in Nova Scotia and 1 in New Brunswick. Currently, Cash Money is the fourth largest chain in the CFS sector, based upon the number of its stores.

8. Most Cash Money stores offer a wide range of services, including cheque cashing, payday advances, money transfers, money orders, foreign currency exchange, bill payment services, and reselling telecommunication products.

9. Cash Money strives to offer customers in the CFS sector a wide range of products and services, at convenient locations and hours of operation, in a friendly and professional environment. Stores are typically 1500 to 1800 square feet, with a clean, modern design and layout that is largely consistent from store to store. A picture of a typical store interior is attached as Exhibit "A". The stores are normally open 7 days a week, until 9 on weekdays, and 6 on weekends, although some stores are open around the clock.

10. At present, the Company has 294 employees, and the franchises employ an additional 127 people.

11. Cash Money has consistently reinvested in its organization by carrying out leasehold developments, advertising, and development of software designed to ensure more efficient service.

12. In its existing stores, Cash Money processes about 24,000 to 30,000 payday advances per month.

13. Cash Money is a responsible industry leader in the CFS sector. It has been instrumental in advocating creation of an industry association, as described below, and working with the federal and provincial governments to develop a regulatory regime for CFS. Cash Money is helping to formulate a Best Practices code for the industry organization (as well as developing an internal Best Practices code).

14. The Company meets, and indeed exceeds, most requirements under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* of 2001. In fact, Cash Money's Compliance Officer, Debbie Phillips, has made numerous presentations, both to national and international audiences, on how to implement a compliance regime in a CFS business.

#### **PAYDAY ADVANCES**

15. Different companies provide payday advances under different terms, but the essential features are usually the same. A payday advance is a small, unsecured, short-term cash advance until the customer's next payday.

16. To obtain a payday advance, a customer usually needs to provide a recent pay stub, a bank statement, and some identification. The customer then completes a simple application form and writes a personal cheque for the amount of the advance plus fees. If he or she qualifies, the customer immediately receives the cash requested, and the company holds the cheque until the customer's next payday (usually about 2 weeks). If the customer returns to repay the advance, the cheque is returned. Otherwise the cheque is cashed.

17. Cash Money's payday advances are provided generally under the terms described above. In Ontario, Cash Money charges \$20 for each \$100 advanced. If a customer's cheque is returned "NSF", an additional charge of approximately \$30 will apply.

18. In the eastern provinces, Cash Money charges 59% interest if the advance is repaid on or before its due date, failing which Cash Money cashes the customer's cheque, which contains fees that are equivalent to the fees paid in Ontario. Approximately 15% of these customers repay their advances before they are due.

19. To my knowledge, Cash Money's charges and fees are consistent with North American standards for payday advances. While it may be true that the cost of these advances is more expensive than other sources of funds, non-payment rates on payday advances are high. Moreover, approximately 16% of cheques provided to Cash Money in exchange for payday advances are returned NSF. Significant administrative efforts and cost are then required to recover NSF funds. Cash Money loses about 20% of revenue to unrecovered advances, which is significant compared to my previous experience with HFC, where about 3% of revenue was lost in this manner.

20. Moreover, while the amounts of payday advances tend to be relatively small (usually between \$200 - \$1000), Cash Money must still complete an application and due diligence process for each advance, which includes:

- (a) confirming the identity of the applicant, which may include making telephone calls to personal references if the person does not have suitable identification;
- (b) reviewing and sometimes confirming via telephone accuracy of employment and banking information presented; and
- (c) completing on-line personal information confirmations, if necessary.

21. Customers are limited on the size of the advance they can obtain. Cash Money's policy is to limit it to a maximum of \$1000, or 50% of the person's net pay, whichever is less.

22. Appended to the affidavit of Kenneth Mortillaro as Exhibit "A" the Cash Money agreement in use in Ontario. Cash Money developed a new form for use in the stores in the eastern provinces. That form was developed in consultation with Nova Scotia provincial regulators, and approved by them as compliant with provincial requirements. Cash Money may implement that form in all of its operations. A copy of that form is attached as Exhibit "B".

23. Cash Money does have procedures for collection of unpaid amounts that arise when a customer's personal cheque is returned "NSF". In such cases, Cash Money contacts the customer and seeks to make arrangements for repayment. Efforts to recover these funds are managed by Cash Money directly, in a professional manner, and are consistent with Cash Money's philosophy to work with, and, to value, its customers.

#### **DEVELOPMENT OF THE PAYDAY ADVANCE INDUSTRY**

24. The payday advance industry has experienced significant growth in the last decade, both in the United States and Canada. At present, industry estimates for the number of payday advance stores in the U.S. range from 15,000 to 22,000. In Canada, there are about 1200 locations.

25. The CFS industry in the U.S. is more mature than Canada. Over the last 5 years, there has been debate in the U.S. as to the appropriate response to payday advances, including whether and how they should be regulated. That debate appears now to be largely concluded. Approximately 36 states now regulate payday advances.

26. As set out below, the CFS industry in Canada is still growing and the regulatory response to this growth is developing.

#### **CFS INDUSTRY SELF REGULATION**

##### **USA**

27. Two prominent U.S. industry organizations: Community Financial Services Association of America ("CFSA") and Financial Service Centres of America ("FiSCA")

have worked to develop appropriate standards and ethics for the CFS sector, and have engaged in a dialogue with legislators to ensure a fair and constructive regulatory response. CFSA conducts and commissions industry research, which is available on its website, and has developed model legislation for implementation at the state level. It also sets the industry's "Best Practices", which is a self-regulating code of conduct to which all members adhere. A copy of the CFSA Best Practices code is attached as Exhibit "C".

### **Canada**

28. In Canada, I have been instrumental in starting our own industry association called Canadian Association of Community Financial Service Providers ("CACFS"), of which I am a director and treasurer. CACFS was formed in February of this year, and has already met on a number of occasions. Founding members include representatives from Money Mart, Instaloans, The Cash Store, and Cash Money. We are actively seeking new members with a view to obtaining the fullest possible industry participation. Currently, approximately 80% of the members of the industry in Canada have joined CACFS.

29. CACFS has recently hired a president and CEO, Bob Whitelaw, who was formerly head of the Better Business Bureau of Canada. He is responsible for leading several key CACFS initiatives. These include dealing with federal and provincial officials, developing a code of Best Practices, and communicating with the public and media through the development of a website (currently in the beginning stages, at [www.cacfs.com](http://www.cacfs.com)).

30. CACFS seeks to become a self-regulating industry organization, setting standards and best practices for the CFS industry in Canada, similar to the CFSA in the United States. The CACFS Best Practices code is being developed with reference to the individual Best Practices codes of industry members and the CFSA in the United States, and consultation with government. The essential elements to be contained in the Best Practices code include:

- (a) full disclosure to customers;
- (b) strict compliance with all legislation;
- (c) truth in advertising;
- (d) promoting customer responsibility; and
- (e) respecting and ensuring customer privacy.

31. The CACFS also seeks to facilitate development and implementation of statutory regulation of the CFS industry in Canada, by engaging in a dialogue with legislators – federal and provincial - in a unified industry voice.

#### **STUDIES OF THE PAYDAY ADVANCE INDUSTRY**

##### **USA**

32. A large number of reports and studies on the CFS sector have been generated and circulated in the United States. Of those, I consider the following to be most helpful to understanding the industry:

- (a) *Payday Advance Credit in America: An analysis of customer demand*, April 2001, by Gregory Elliehausen, Ph.D and Edward Lawrence, Ph.D, Credit Research Center, McDonough School of Business, Georgetown University (the "Georgetown Study"). This report sets out the authors' investigation into consumers' demand for payday advances; and
- (b) *Analysis of the Payday Advance Industry*, 2001, Community Financial Services Association of America (the "CFSA Report") This report sets out the CFSA's perspective and understanding of the CFS industry.

33. I have reviewed these studies in the course of my work, and, in particular, in order to keep current on industry literature to understand all issues framing the debate on industry regulation. While I do not agree with all statements in these reports, I believe that they provide valuable information. Copies of the reports are attached as Exhibits "D" and "E".

34. I would also add that I have reviewed countless other U.S. publications, most notably those connected with the Consumer Federation of America and the US

Public Interest Research Group, which clearly advocate for abolition of payday advances. For reasons described later, I do not agree with this approach.

**Canada**

35. There are also Canadian reports on the CFS sector, including:
- (a) *Access to Credit in the Alternative Consumer Credit Market*, by Iain Ramsay, Professor of Law, Osgoode Hall Law School, February 1, 2000, prepared for the Office of Consumer Affairs, Industry Canada and the Ministry of the Attorney General, British Columbia (the "Ramsay Report"). The report examines the growth of consumer vulnerability to credit markets and growth of the alternative financial sector. It evaluates the existing legal framework and suggests some directions for future research and policymaking;
  - (b) *Fringe Lending and "Alternative" Banking: The Consumer Experience*, by Sue Lott and Michael Grant, Public Interest Advocacy Centre ("PIAC"), November 2002, with funding from Industry Canada (the "First PIAC Report"). This report also examines the recent growth of the alternative financial sector, and the payday advance industry is a specific focus of this report. Appended to the report is another report of focus group activity related to the same topic, which was carried out by Michael Grant of Grant Insights ; and
  - (c) *Pragmatic Solutions to Payday Lending: Regulating Fringe Lending and "Alternative" Banking*, by John Lawford, PIAC, November 2003, with funding from Industry Canada (the "Second PIAC Report"). This report is a follow up to the First PIAC Report, intended to outline several possible options for regulation of the payday advance industry.

Copies of those reports are attached as Exhibits "F" to "H".

36. In these reports, many assumptions about the CFS industry and its users are critically examined. Generally speaking, the authors of the reports recognize that payday advances have become a necessary service that is simply not provided by traditional banks. They acknowledge the merits of the CFS industry, and accept its importance to consumers and the economy. As a result, the essential conclusion reached is that the industry needs to be regulated, not eliminated.

### ***The Rise of CFS sector***

37. According to the First PIAC Report, there has been strong growth in the CFS sector (page 14). There were approximately 300 payday lending companies in the United States in 1992. That rose to approximately 8,000 by 1999 (First PIAC Report, page 14). The CFSA website currently reports that there are approximately 15,000 CFS operations in the United States (a copy of that web page is attached as Exhibit "I"). As I indicated above, I believe that number to be conservative since the industry has been growing quickly.

38. CFS and, in particular, payday advance operations are well established in the approximately 36 states that currently regulate the industry. Regulation typically addresses licencing, maximum interest rates and fees, collection practices, cooling off periods, and limiting rollovers.

39. Although there are no "firm" statistics on the number of CFS locations in Canada, as part of our effort to develop a self-regulating industry association, and to secure maximum participation, I have studied available information and believe there are approximately 1200 locations.

### ***Why Payday Advances are Chosen***

40. The CFS sector has many advantages over other providers of financial services. Cash Money, for example, strives to provide fast, friendly, respectful service, at convenient locations and convenient hours, with minimal difficulty to the consumer.

41. The First PIAC Report surveyed CFS customers on criteria important to them in choosing to use CFS. Key factors, in order of descending significance, were confidentiality, welcoming atmosphere, friendly staff, best prices, only cash option, and best location (page 46).

42. Another key finding from the First PIAC Report is that payday advance customers are likely to be dissatisfied with mainstream financial services. Only 21% indicated that they were very satisfied with banks and trusts (page 47).

43. The First PIAC Report indicates that consumers have options and they choose payday advances. It states

Based on the self-assessment of credit ratings, it would appear that there are relatively few institutional constraints on [CFS] users accessing credit. (page 42)

44. Evidence from various U.S. surveys of customers' experience using payday advances has been summarized by CFSA. In their fact sheet "Customer Experience and Satisfaction", available from their website [www.cfsa.net](http://www.cfsa.net), (attached as Exhibit "J") CFSA states:

- (a) 70% of customers choose payday advances for convenience (quick and easy process, fast approval, less paperwork, convenient location), and only 6% choose these advances because they have no other alternative;
- (b) Payday advance customers appreciate the availability of the service – over 75% of those surveyed were satisfied with their most recent transaction, while only 12% were dissatisfied; and
- (c) Out of the millions of transactions processed annually, very few complaints are registered.

#### ***Who Uses Payday Advances?***

45. According to the First PIAC Report survey results, almost 5% of Canadians have used CFS in the last 3 years, which means 1.0 to 1.4 million people (page 37). Of those, approximately 550,000 have used cheque-cashing and payday advance services specifically, and of that number, the authors believe the vast majority were payday advance users (page 37).

46. The First PIAC Report also considered the demographics of the CFS sector clientele and determined:

- (a) "In most respects, the market does not differ greatly from the overall Canadian population";
- (b) "...one must reject the hypothesis that the [CFS] is primarily a market of society's most disadvantaged.";

- (c) The authors estimate approximately 15% of CFS clients would fall under Statistics Canada's before-tax low income cut off, compared to 16.4% of the population as a whole;
- (d) The average income for CFS clients is roughly in line with Canadian average household income;
- (e) Specific vulnerable groups are not heavily represented in CFS clientele – less than 1% of the entire market are single mothers, less than 1% are seniors, and about 4% are youth under 21 years of age;
- (f) The employment rate for CFS customers is higher than the Canadian average;
- (g) The educational and occupational profiles lean slightly more toward blue and grey collar workers; and
- (h) The average age of a payday advance customer is 42.

(First PIAC Report, pages 38-39)

47. Survey results from U.S. sources provide similar data. According to the Georgetown Report:

- (a) 23% of payday advance customers have a family income of less than \$25,000; 51.5% are between \$25,000 to \$49,999, and 25.4% earn above \$50,000. The authors note that the majority of customers who use payday advances fall into the middle income category, compared to only about 40% of the population as a whole;
- (b) 36.4% of payday advance customers are under 35, 31.9% are 35-44, 21.7% are 45-54, 6.5% are 55-64 and 3.5% are over 65;
- (c) 57.9% are married or living with a partner;
- (d) the majority have children; and
- (e) 6.2% have no highschool diploma; 38.3% have a high school diploma; 36.1% have some college education and 19.4% have a college degree.

(Georgetown Report, pages 29-33)

48. The First PIAC Report looked at other characteristics of CFS users, such as their financial position, and came up with a "surprising" conclusion:

"A surprising result is that the self-assessed financial position of these respondents is reasonably good. Only 9 per cent have a poor credit rating and well over half are carrying less debt than they normally have. The main constraint is not so much the existing debt position as the fact that money is tight, as over half indicated that they either had a shortfall from their pay period or just barely enough to cover expenses." (page 40)

49. While payday customers have bank accounts, the First PIAC Report found that CFS customers are much less likely than the average Canadian to use credit cards (page 7)

50. Based upon the above information, it seems that payday advance customers defy specific demographic categorization. As the First PIAC Report noted, the demographic profile of payday advance customers is consistent with the Canadian population generally. As such, it is a diverse group making their own financial decisions based upon their own unique interests and priorities, and seeking funds for their own reasons.

51. I have been informed by many of our front line staff who deal with customers, and believe, that some Cash Money customers are aware of this class action, and, more specifically, that the plaintiff is claiming that fees charged for a payday advance constitute illegal interest. These customers have mentioned this action when attending at Cash Money facilities to initiate payday advance transactions. Notwithstanding this knowledge, they have chosen to obtain advances.

#### ***Uses of Payday Advances***

52. The Ramsey Report refers to a survey conducted by Money Mart (apparently disclosed in correspondence to the author) in which payday advance users were asked about the purpose for their advances. 42% indicated there was no particular reason for the advance, they simply wanted the extra cash for a few days. 29% indicated that the funds would be used to pay off overdue bills, and 17% cited an unexpected emergency. (Ramsey Report, pages 8 and 45).

53. The First PIAC Report canvassed consumers' uses of funds obtained through CFS and found that approximately 34% used the funds for day to day expenses, 23% for emergencies; 16% for recreation, 15% to pay other bills, 7% to avoid bouncing a cheque, 5% for a major purchase and 4% for each of paying the rent and paying utilities. While these statistics covered all CFS, the authors indicate that the same breakdown is essentially accurate for payday advances in particular.

#### ***Summary of Concerns with Payday Advances***

54. In summary, the main concerns (not facts) appear to be:

- (a) the cost of borrowing is great, and low income earners are being targeted for expensive advances;
- (b) consumers fall into a cycle of debt; and
- (c) debt recovery practices can be excessive.

55. Cash Money responds to those concerns as follows:

- (a) the cost of borrowing is reasonable, and commensurate with the risk and costs associated with the service;
- (b) most consumers do not have difficulty meeting their payday advance obligations, and do not become dependent upon the service. That said, Cash Money recognizes that advances are short, not long term solutions for clients and that "rollovers" of advances should be limited. At present, Cash Money does not permit rollovers in its Eastern Canada operations, or any of its Ottawa area stores. Cash Money may phase in that policy at the rest of Cash Money's stores; and
- (c) Cash Money does not use abusive or humiliating debt recovery practices.

#### **REGULATION OF THE CFS SECTOR IN CANADA**

56. At present, there is no legislation specific to the CFS sector, or payday advances. While the CFS sector may be subject to the *Criminal Code*, as well as Ontario's *Consumer Protection Act*, these statutes do not specifically address the particular issues related to payday advances.

57. Regulation of the CFS sector in Canada is anticipated. There has been considerable debate about all aspects of the CFS sector, but most particularly about payday advances. The topic has been discussed in the media, and is on the agenda of various government and public interest organizations, and it has been the subject of various reports. The launching of class action proceedings in British Columbia, Ontario, and Newfoundland has added an urgency to that debate, and the need for a regulatory response.

58. As I understand it, based upon discussions I have had with those in the industry and materials which I have read, including the reports above, and the discussions outlined below, the difficulty with regulating the CFS industry is that the jurisdiction is shared by the federal and provincial governments. Many provinces have consumer protection legislation (which may or may not touch upon payday advances), but as long as the federal government prescribes a maximum interest rate, the provinces cannot act without the federal government.

#### *The CMC*

59. The Consumer Measures Committee ("CMC") was started in 1992 with a view to harmonizing consumer protection legislation across Canada. The CMC consists of representatives from each of the provinces and territories, as well as Industry Canada. A description of the make-up and mandate of this committee can be found on the federal government's "strategis" website, the relevant page from which is attached as Exhibit "K".

60. About 5 years ago, the CMC created the Alternative Consumer Credit Marketplace subcommittee ("ACCM") to examine alternative consumer credit, and in particular, payday advances. This committee includes members from Industry Canada, British Columbia, Alberta, Saskatchewan, Manitoba, Quebec, and Nova Scotia.

61. The ACCM is actively preparing its position on the regulation of the payday advance industry in Canada, and has at its disposal the recommendations of a number of key reports, as set out below.

34

62. As I understand the current legislative situation, s.347 of the *Criminal Code* will likely be amended. I am aware that the section has been the subject of considerable commentary and critique.

***The Uniform Law Conference Recommendations***

63. The Uniform Law Conference of Canada ("ULCC") has been addressing concerns with respect to s.347 of the *Criminal Code* in the last few years. Mary Anne Waldron, Associate Vice-President Legal Affairs and Professor of Law at University of Victoria, has researched and written on this topic. According to the website of the Uniform Law Conference of Canada, Waldron presented a paper at the organization's annual conference in August 2003, entitled "Proposed Amendments to Section 347 of the *Criminal Code*", a copy of which is attached as Exhibit "L".

64. In the above-noted paper, Waldron makes the following observations:

- (a) the essential problem with the section is breadth of the definition of "interest" such that loans which are not problematic from a policy standpoint are captured by the section;
- (b) section 347 may catch payday advances. "Because the loan is usually made to people without established credit ratings or even bank accounts, the risk is high and the interest alone is usually substantial. But when these costs and the short term are combined with what may be reasonable fees for processing and administration, the usual result is an interest rate (as computed under s. 347) in excess of the criminal limit."
- (c) "The growth of the payday lending industry is a testimony to the fact that it fulfills a significant consumer need.";
- (d) "...criminal prosecution of payday lenders has been non-existent";
- (e) it is possible to make various amendments to s.347 to deal with concerns about the breadth of its application. One proposal is to exempt provincially regulated loan companies from the application of the section. This would allow the provinces and territories to licence and regulate payday advance companies.

(Proposed Amendments to Section 347 of the *Criminal Code*, pages 1-5)

65. In the above-noted paper, the author discusses the purpose of s. 347 of the *Criminal Code*, and examines the nature of the conduct which the section was intended to criminalize. The author observes that most Canadians would not consider it criminal merely to charge a high rate of interest. The difficulty is that the other factors which do make the activity worthy of criminality, such as threats, intimidation and violence, could become insurmountable obstacles to criminal prosecutions. (pages 2, 19-20).

66. The Waldron paper also outlines options for dealing with s.347: repeal, tinkering with the section, or imposing limitations on its application. Ultimately, given that criminal prosecutions unrelated to CFS are taking place under the section, the author dispensed with an outright repeal. She also concluded that tinkering would not balance interests appropriately. She therefore recommended that the application of the section be limited, such that certain commercial and consumer loans, including payday advances if separately regulated by the provinces, be exempted. (pages 19-24).

67. Waldron's specific recommendations are found on page 24, and can be summarized as follows:

- (a) "interest" should exclude profit participation and fees paid to independent third parties;
- (b) the criminal rate of interest should be raised significantly;
- (c) the civil consequences for violation should be restricted unless a criminal prosecution occurs; and
- (d) certain industries which are separately regulated should be exempted entirely. This could include payday advance providers and utility companies.

68. According to the material posted on the ULCC website, the ULCC resolved at its August 2003 meeting to send a copy of the above-noted report to the federal Minister of Justice recommending the report's consideration and adoption.

**The Recommendations from PIAC**

69. The First PIAC Report also made some policy suggestions. Those suggestions were taken up in the Second PIAC Report, which focuses on regulating the CFS sector. The authors of the report note the status of efforts to regulate as at the date of the report (November 2003) as follows:

In Canada, meanwhile, the issue of regulating payday lenders, and possibly most elements of the AFS, has been undertaken by the Consumer Measures Committee, comprised of consumer and business regulators from the provincial and federal governments. The CMC has recently completed extensive draft cost of credit disclosure regulations which are intended to apply to the entire "Alternative Consumer Credit Market" (ACCM), which have been, or are due to be, enacted as provincial legislation. Such legislation will influence the scope of any eventual regulation of the payday lending industry, since it may largely cover the cost of credit disclosure aspects of payday lending.

Recently, the CMC has been directly considering potential "regulation" of the payday lending industry through amendment of s.347 of the *Criminal Code* and possibly other provincial measures. Although these deliberations are secret for the moment, the CMC regulators are scheduled to meet on this subject and are likely to provide something to the provincial ministers of consumer protection at their upcoming meeting in early 2004 in Winnipeg. Government therefore appears to be willing to consider the regulation of payday lending as a discrete subject.

70. The ministers responsible for consumer affairs did meet in January, 2004, and a press release was issued as a result, a copy of which is attached to this affidavit as Exhibit "M". The press release states that the ministers have concerns about certain practices within the CFS industry, and that they will work together to establish a consumer protection framework for improved consumer protection in a legitimate, viable marketplace for short-term credit. Initiatives will include the establishment of Best Practices for the industry.

71. The Second PIAC Report follows up on the First PIAC Report's conclusions, which outlines the regulation options as follows: enforce s.347 of the *Criminal Code*, amend it, require industry self-regulation, institute provincial updates of consumer protection statutes and/or enact legislation specifically for payday lenders.

72. The Second PIAC Report includes the following suggestions for regulating the payday advance industry:

- (a) implement mandatory licensing of payday advance operators, in which the operators would be required to report regularly to a regulator;
- (b) create a strong regulator with powers to prosecute operators, manage consumer complains, obtain information from operators, and educate consumers about the costs of payday advances;
- (c) implement mandatory, standardized cost of credit disclosure, including "annual percentage rates" for the advances;
- (d) create interest rate caps and limits on specific charges and fees;
- (e) prohibit "rollovers", back to back advances, and extensions;
- (f) conduct consumer education campaigns;
- (g) implement other borrowers rights, such as rescission, pre-payment options, and privacy of borrowers' information collected during the application process;
- (h) impose limits on collection practices; and
- (i) maintain a lender database to, among other things, assist borrowers in developing a credit rating that can be used to move to a mainstream lending institution.

(pages 48-52)

73. Many of the recommendations from the Second PIAC Report are consistent with the CACFS's own plans for self regulation, based upon Best Practices models from which it is currently working.

### ***Other Materials Relating to Regulation***

74. Apart from funding and / or receiving such reports noted above, the ACCM is actively seeking to understand the industry's cost structure through its own consultant, Chris Robinson, of York University, who has been asked to consult with the CFS sector. A copy of Robinson's "scoping study" report, submitted to Industry Canada this March, is attached as Exhibit "N". This document indicates that the ACCM may use Robinson's study as a prelude to a larger study to be conducted in the future.

75. Robinson approached many of the members of the CACFS for information required for his study, and we have provided necessary feedback.

76. The scoping study developed a framework for a study to quantify the costs of providing the payday advance service. The question the ACCM seeks to have answered, according to Robinson's report, is: what is the maximum cost structure for a payday advance to ensure both the viability of small, short term, credit marketplace and protection of consumers?

77. The CACFS has recognized the need for cost information identified by government, and it has commissioned its own study from the highly regarded Satya Poddar of Ernst & Young, to assist government in understanding the economic imperatives of the industry. It is the intention of the CACFS to provide the provincial and federal assistant deputy ministers of consumer affairs departments with a work-in-progress report at the meeting of those parties scheduled for this June in Montreal.

### ***Where the CMC / ACCM is Heading***

78. In the autumn of 2002, the ACCM sent questionnaires out to operators in the CFS sector seeking opinions on two regulatory options: (1) changing s.347 to exclude its operation in provinces that regulate payday advances; or (2) amending s.347 to set maximum fees and / or interest rates for payday advances, applicable across Canada. The results of those questionnaires have not been released.

79. In January 2004, other industry members and I met with Reg Faubert, the British Columbia member of the ACCM, and one of its co-chairs, to attempt to understand the ACCM's progress towards regulation. At that meeting I was able to further my understanding of the ACCM's perspective on regulating the CFS.

80. Based upon what I have read and heard from government and industry members about regulating the CFS, I believe that s.347 of the *Criminal Code* will be amended to prescribe a maximum fee for the industry. In order to propose a maximum fee, policy makers need to understand the cost structure of the payday advance industry, which is the question being addressed by Chris Robinson on behalf of Industry Canada, and Satya Poddar of Ernst & Young on behalf of the CACFS.

#### ***Regulation Timeline***

81. I believe that regulation of the CFS sector, and in particular, payday advance operators, will likely occur in the next 1-2 years. I further believe that regulation is likely to ensure that the CFS continues to carry on business, but in accordance with government regulation, and possibly industry Best Practices. I believe that consumer protection will be balanced against business imperatives to ensure a healthy CFS sector that is available to continue responding to the increasing demands in the marketplace.

#### **COMMENTS ON THE PIAC REPORTS**

82. I have referred extensively to the PIAC Reports in this affidavit in order to provide the court with as much information as possible about the CFS sector and possible regulatory options. With respect to demographic information about the CFS sector, there is no alternative, comparable Canadian source of information, and thus I have had to refer to a document prepared by a consumer advocacy group which clearly disfavours payday advances.

83. The authors of the First PIAC Report appear to have begun their investigation from the mistaken assumption that payday advances are expensive,

addictive, and that practices in the CFS industry are abusive. As the authors came to observe, however: "Many people are attracted to cheque cashing and payday lending institutions because they are 'non-judgemental'. They are therefore equally disdainful of policy interventions that seek to judge their financial habits." (page 32).

84. It is my belief that the research approach of the authors of the First PIAC Report was fundamentally biased against the CFS industry, and payday advance services in particular.

- (a) First, although the payday advance industry was the focus of the study, information was also gathered about other businesses, such as pawn shops and rent-to-own shops, which may well have skewed the results.
- (b). Second, the authors could not seem to accept the possibility of a rational rejection of traditional banking. On this issue, the authors were clearly at odds with those surveyed, who repeatedly dismissed banks as unfriendly and judgemental. As the authors note at page 61, traditional banks have given up on many CFS customers by closing branches, and, I would add, by limiting service hours. Given that traditional banks have chosen not to focus on these services and clients, it is not surprising that some of those surveyed have dismissed banks.

85. I believe that the Second PIAC Report is similarly biased against the CFS sector.

#### COMPOSITION OF THE CLASS

86. The plaintiff has defined the proposed class as follows: "all persons in Canada who (i) have taken or will take payday loans from Cash Money and did not or have not or will not repay the loan prior to the due date, 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". According to our records, there are approximately 43,782 people in the proposed class to date. Given the definition of the class, it will continue to expand as new customers obtain payday advances.

87. I also believe that the above defined class contains individuals of diverse interests and positions. Quite apart from demographic issues, the above class lumps

together those who obtained advances both before and after this litigation was commenced. It also includes customers who became aware of the litigation, those who obtained funds under the Ontario form, and those who obtained funds under the other form, as well as those who have paid interest and those who have not. Indeed, even those who have provided NSF cheques and never repaid Cash Money are captured in this definition. This includes the proposed representative plaintiff himself, who has not made good a \$840 NSF cheque.

#### **CLOSING COMMENTS**

88. I believe that consumers need, want, and deserve choices for managing their financial affairs. As a result of the rise of the CFS sector, consumers who have been neglected or abandoned by traditional banks are starting to get those choices. Using a payday advance to meet short term or emergency needs is one of those choices.

89. Many consumers who have ample cash flow may not be able to appreciate that consumers without ready funds need to have services available to them to meet their cash needs. Traditional banks have exited the small loan market and closed branches in less affluent neighbourhoods. Traditional banking services may not therefore be an option for consumers who have experienced unexpected expenses and need to obtain funds prior to their next payday.

90. Consumers faced with a need to repair the car they use to get to work, or pay bills in a timely manner, appreciate the option to obtain advance funds on their next paycheque. Fees associated with this service are fully disclosed and known to the consumer who makes the personal choice to obtain the advance.

91. There are many good reasons why consumers choose to deal with the CFS sector, and Cash Money in particular. Our stores are bright, spacious and clean. They are open seven days a week, at convenient hours. Our staff are friendly, courteous, and above all respectful. Unlike some banks, our organization values "small"

customers and we make that clear. We provide efficient service, with minimal difficulty and waiting.

92. Our customers and their reasons for obtaining payday advances are as varied as the Canadian population generally. They cannot be pigeon-holed into a specific and limited demographic profile. More importantly, they are not confused, ignorant, or misinformed. They are adults, earning paycheques, capable of making rational decisions in their own best interests. As set out above, they want, deserve, and are entitled to the personal responsibility of making their own choices from a wide array of reasonable options.

93. Cash Money and I seek to see regulation of the CFS sector in Canada. Like others in this business, I have heard rumours of unscrupulous business practices, and I believe it would be for the good of the industry on the whole for those practices to be stopped. Cash Money, and others in the industry, are not waiting for government regulation. We have formed the CACFS with a view to self-regulating member companies through, among other things, the development and adherence to a code of Best Practices.

94. These class action lawsuits and the process of government regulation are, and will continue, to place a strain on the CFS industry. I suspect that the result will be that many CFS operations will not survive. I am striving to position Cash Money in the marketplace so that it can survive.

95. There is nothing inherently wrong with offering payday advances, but like many industries, such as banking itself, these services are best offered in a regulated environment. I do not believe that the attempts of some special interest groups to eradicate payday lending, and thereby undermine personal responsibility and choice, will ultimately succeed. Many consumers need and want payday services.

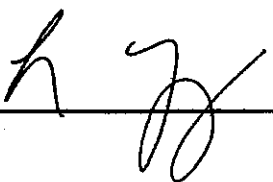
96. This affidavit is made in response to the plaintiff's motion for certification of this action as a class proceeding and the appointment of the plaintiff as a representative of that class, and for no other purpose.

SWORN before me )

at the City of Toronto, )

in the Province of Ontario, )

this 26th day of May, 2004. )

  
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Commissioner for Taking Affidavits )

**KENNETH D. MORTILLARO**

Plaintiff

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

Defendants

Court File No. 03-CV-257364CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**  
Proceedings commenced at Toronto

Proceeding under the  
*Class Proceedings Act, 1992*

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**DEFENDANTS'  
RESPONDING RECORD**

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