PARTICULARS OF CLAIM

THE PARTIES:-

1. The plaintiff is **THE NEW ECONOMIC RIGHTS ALLIANCE (NPC), [NewERA]**, a not for profit non-governmental organisation that is capable of bringing this application by virtue of its incorporation under section 21 of the Companies Act 61 of 1973, as amended, with registration number 2011/0100074/08 as per certification of incorporation annexed hereto as "**NE1**", which has its principal office at No. 7 Village Walk Paulshof Johannesburg GAUTENG;

1.1 Within these premises, the NewERA will be represented by **SCOTT COLIN CUNDILL,** an Executive Director of the Plaintiff, duly authorised herein to represent and to bring these summons proceedings on behalf of the **NewERA** by virtue of a special resolution annexed hereto as "**NE2**."

1.2 In terms of its Constitution, the **NewERA** has, as its principal object, the promotion and freedom of economic rights, including transparency and protection of these rights in South Africa and the opposing of economic suppression as more fully set out in its founding Constitution annexed hereto as "**NE3**."

1.3 The **NewERA** has a number of objections auxiliary to paragraph **1.2** above, which *inter alia* include;

1.3.1 Opposing preparatory and/ or enacted legislation, rules and policies that signify potential infringements on the 'Bill of Rights' and other hereditary laws.

1.3.2 The promotion of corporate transparency, as outlined in Section 32 and 34 of the Constitution regarding public knowledge and know how, so to enable the consumer to make informed decisions when dealing with agreements that affect their financial well-being.

1.3.3 The development of co-operative, sound economic principles to ensure that risk and/ or fault does not devolve onto the consumer unnecessarily and unconditionally; causing loss of property, investments and/ or value.

1.4 This application is supported by more than 115, 000 (*one hundred and fifteen thousand*) people and 154 (*one hundred and fifty four*) joining members of **NewERA** as per annexure "**NE4**" hereto. Relevant 'Powers of Attorney' authorising joinder to these proceedings have been omitted so as not to unnecessarily burden these papers, however, should these be required same will be made available on request.

1.5 The joining of these members is critical to these proceedings, as each joining member has, to one degree or another, been prejudiced by the actions of the DEFENDANTS, as is more fully set out hereunder. It is also imperative to support this action with facts that have been collated from a broader community who has experienced these same contentions, but had failed independently for the following reasons;

1.5.1 The costs associated with proceedings of this nature are substantial.

1.5.2 The subject matter is technically challenging and requires significant research and resources.

1.5.3 Collaboration was required between joining members to ascertain the similarity between various financial

structures and financial service providers in the way in which they act towards consumers.

1.5.4 It will be wasteful and unnecessary for each joining member to institute individual cases before the courts for the same relief sought herein.

1.5.5 The nature of this action is one that is in the greater public interest.

1.6 It is respectfully submitted that the **NewERA** has an interest in the issues arising in these proceedings due to the nature and objectives of the organisation and the fact that this case raises issues of considerable public importance, which may have an impact far beyond the present litigants.

2. The **FIRST DEFENDANT** is **ABSA BANK LIMITED**, with registration number 1986/004794/06, a limited liability company duly registered and incorporated in accordance with the company laws (Companies Act No.61 of 1973) of the Republic of South Africa and an authorised financial service provider and registered credit provider in terms of the National Credit Act' 34 of 2005 with registration number NCRCP7 and a banking company, a bank as defined in section 1 of the Banks Act, 1990 (Act 94 of 1990) with principal place of business situated at Absa Towers, 160 Main Street Johannesburg.

3. The **SECOND DEFENDANT** is **FIRSTRAND BANK LIMITED**, with registration number 1929/001225/06, a limited liability company duly registered and incorporated in accordance with the company laws (Companies Act No.61 of 1973) of the Republic of South Africa and an authorised financial service provider and registered credit provider in terms of the National Credit Act' 34 of 2005 with registration number NCRCP20 and a banking company, a bank as defined in section 1 of the Banks Act, 1990 (Act 94 of 1990) with principal place of business situated at 6th Floor FNB Towers, 27 Diagonal Street, Johannesburg.

4. The **THIRD DEFENDANT** is **NEDBANK LIMITED**, with registration number 1951/000009/06, a limited liability company duly registered and incorporated in accordance with the company laws (Companies Act No.61 of 1973) of the Republic of South Africa and an authorised financial service provider and registered credit provider in terms of the National Credit Act' 34 of 2005 with registration number NCRCP16 and a banking company, a bank as defined in section 1 of the Banks Act, 1990 (Act 94 of 1990) with principal place of business situated at 135 Rivonia Road Sandown Sandton, Johannesburg.

5. The **FOURTH DEFENDANT** is **THE STANDARD BANK OF SOUTH AFRICA LIMITED**, with registration number 1962/000738/06, a limited liability company duly registered and incorporated in accordance with the company laws (Companies Act No.61 of 1973) of the Republic of South Africa and an authorised financial service provider and registered credit provider in terms of the National Credit Act' 34 of 2005 with registration number NCRCP15 and a banking company, a bank as defined in section 1 of the Banks Act, 1990 (Act 94 of 1990) with principal place of business situated at 9th Floor, 5 Simmonds Street, Marshalltown, Johannesburg 2000.

6. The **FIFTH DEFENDANT** is **THE SOUTH AFRICAN RESERVE BANK**, established by Section 9 of the Currency and Banking Act, 1920 (*Act No 31 of 1920*) and governed by the South African Reserve Bank Act, 1989 (*Act No 90 of 1989*), as amended and Section 223 to 225 of the Constitution of the Republic of South Africa, 1996; the South African Reserve Bank Act, 1991, Public Accountants and Auditors Act, 1991 (*Act 80 of 1991*) – Under Banks Act of 1990 Sections 7(b), 9(2)(c), 12(3)(b), 54(11)(b), and 63(1) read with the Financial Institutions Act, 1991 (*Act 54 of 1991*) and the regulations framed in terms of this Act, provide the enabling framework for the Reserve Bank's operations and acts as the 'Central Bank' of the Republic of South Africa, with principal place of business Situated At 370 Church Street, Pretoria 0001.

REFERENCE TO PARTIES:

7. The members of the Plaintiff who have joined this action shall be referenced hereinafter as "the JOINING PARTIES."

8. The FIRST, SECOND, THIRD and FOURTH Defendant shall jointly be referred to hereinafter as "the BANKS."

9. The FIFTH Defendant shall be referred to as "the FIFTH DEFENDANT."

JURISDICTION:

10. The Honourable Court has jurisdiction insofar as the BANKS are concerned as their principal place of business is situated within the area of jurisdiction of the Honourable Court.

11. Insofar as the FIFTH DEFENDANT is concerned; it holds its head office within the jurisdiction of the North Gauteng High Court, Pretoria. It is submitted that due to the following facts, this Honourable Court has jurisdiction over the FIFTH DEFENDANT;

    11.1 The FIFTH DEFENDANT has an office within the Honourable Court's jurisdiction which is situated at 57 Ntemi Piliso Street, Newtown, Johannesburg, 2001;

    11.2 The BANKS are all situated within the Honourable Courts jurisdiction, thus the FIFTH DEFENDANT will not be prejudiced to submit to the Honourable Courts jurisdiction for convenience sake;

    11.3 As there is more than one court that can exercise jurisdiction over this action, the Plaintiff as *dominus litis* elects the aforesaid Honourable Court;

    11.4 In terms of section 169 read with section 167 of the Constitution of The Republic of South Africa, 108 Of 1996, the Honourable Court has jurisdiction to rule upon the constitutionality of legislation of parliament.

NATURE OF APPLICATION:

12. This is an action for the finding and declaring by unconstitutional certification that the conduct of the BANKS with regard to loans and credit advancements are tantamount to unfair, self-serving, monopolistic economic activities that cause arbitrary deprivation of property, monetary depreciation and inappropriate conduct in an open and transparent Democratic South Africa.

OVERVIEW:

13. The FIFTH DEFENDANT, the South African Reserve Bank was established by Section 9 of the Currency and Banking Act, 1920 (*31 of 1920*) and is governed by the South African Reserve Bank Act, 1989 (*90 of 1989*), as amended.

13.1 At present, Sections 223 to 225 of the Constitution of the Republic of South Africa 1996, together with the South African Reserve Bank Act, 1991, and the regulations framed in terms of the latter, provide the enabling framework for the FIFTH DEFENDANT'S operations.

13.2 The FIFTH DEFENDANT is the central bank of the Republic of South Africa. The primary purpose of the FIFTH DEFENDANT is to achieve and maintain price stability in the interest of balanced and sustainable economic growth in South Africa. Together with other institutions, it also plays a pivotal role in ensuring financial stability, and in this particular action, its role as 'Registrar' to the BANKS.

13.3 The FIFTH DEFENDANT enjoys a considerable degree of autonomy in the execution of its duties. In terms of section 224 of the Constitution, "*the Bank, in pursuit of its primary object, must perform its functions independently and without fear, favour or prejudice, but there must be regular consultation between the Bank and the Cabinet member responsible for national financial matters.*" The independence and autonomy of the FIFTH DEFENDANT are, therefore, entrenched in the Constitution.

13.4 The FIFTH RESPONDENT has been entrusted with the overarching monetary policy goal of containing inflation and can use any instruments of monetary policy at its disposal to achieve this monetary policy goal. This implies that the FIFTH DEFENDANT has instrument independence in monetary policy implementation, but not goal independence in the selection of a monetary policy goal.

13.5 The Governor of the FIFTH DEFENDANT holds regular discussions with the Minister of Finance, and meets periodically with members of the Parliamentary Portfolio and Select Committees on Finance. In terms of Section 32 of the Constitution, the FIFTH DEFENDANT publishes a monthly statement of its assets and liabilities, and submits its annual report to Parliament. The FIFTH DEFENDANT is, therefore, ultimately accountable to Parliament.

13.6 It must, however, be noted here, that despite the FIFTH DEFENDANT'S responsibilities aforesaid, which are only a segment of its obligations in relation to this action, the FIFTH DEFENDANT remains a private institution.

14. The BANKS are established in terms of the Banks Act (*94 of 1990*) and the Companies Act's (*61 of 1973 and 71 of 2008);* furthermore, the BANKS are also subjected to the FIFTH DEFENDANT'S rules, internal policies and monetary policies;

14.1 In conjunction with the aforesaid, there are other legislative requirements which the BANKS are subjected to and must conform with, which *inter alia* include the National Credit Act (*34 of 2005*), Bills of Exchange Act (*34 of 1964*) as amended by Act 56 of 2000, Collective Investment Schemes Control Act (*45 of 2002*), Co-Operative Banks Act (*40 of 2007*), Deeds Registries Act (*47 of 1937*), Financial Advisory and Intermediary Services Act (*37 of 2002*), Financial Services Board Act (97 of 1990), Home Loan And Mortgage Disclosure Act (*63 of 2000*),

Mutual Banks Act (*124 of 1993*), National Payment System Act (*78 of 1998*), Prevention of Counterfeiting of Currency Act (*16 of 1965*), Securities Services Act (*36 of 2004*) and the Uncertificated Securities Tax Act (*31 of 1998*).

14.2 It is submitted that the definition of '*the business of a bank*' under Chapter I of the Banks Act, which deals with the interpretation and application of the Banks Act, Section 1, is prescriptive as to what the legislature intended to allow or disallow the business of a bank to be. It follows that in terms of the Banks Act that the FIFTH DEFENDANT, with due consultation with the Minister of Finance can amend by publication in the Government Gazette, those activities which may lawfully form part of 'the business of a bank'.

14.3 It is common cause that the main functions of the BANKS are as described in the case of Amritsar Bank. Ltd v Income Tax Commissioner, Lahore [1940] 4 All E R 87(PC) at 95 F – "*In the ordinary case of a bank, the business consists, in its essence, of dealing with money and credit. Numerous depositors place their money with the bank, often receiving a small rate of interest on it. Numerous borrowers receive loans from a large part of these deposited funds at somewhat higher rates of interest, but the banker has always to keep enough cash or easily realizable securities to meet any probable demand by the depositors ...*"

14.4 Given the proposition that the BANKS are to retain a percentage in security (*prudential requirements*) to fulfil their customers' withdrawals, it is contended that the BANKS resorted to questionable financial and economic practices to increase their market share to offer more loans.

14.4.1 In relation to paragraphs 14.3 and 14.4 above, the main purpose of requiring the BANKS to maintain a minimum level of capital is to create a cushion to absorb losses in

case any of the risks to which banks are exposed in the conduct of their business should materialise.

14.4.2 This provides a safeguard against the risk of insolvency. It is the principal yardstick against which the marketplace assesses the BANKS capacity to withstand adverse conditions. It also imposes an indirect constraint on the ability of the bank's management to expand their activities.

14.4.3 Thus, broadly speaking, the BANKS should maintain a minimum capital balance of R250 million.

14.4.4 The Banks Act draws a distinction between banks that trade in financial instruments and those that do not. A bank, whose business does not include trading in financial instruments (*such as shares*), must manage its affairs in such a way that the sum of its primary and secondary capital and its primary, and secondary unimpaired reserve funds in South Africa, does not at any time amount to less than the greater of;

14.4.4.1 R250 million; alternatively, in the case of a bank which was, prior to the date of commencement of the Banks Act, registered as a banking institution or building society under a law repealed by the Banks Act, R1 million; *or*

14.4.4.2 an amount which represents a prescribed percentage of the sum of amounts calculated by multiplying the average of the amounts (*as shown in its returns to the FIFTH*

DEFENDANT) of such different categories of assets and other risk exposures as may be prescribed in the regulations relating to the BANKS, by the risk weights expressed as percentages, prescribed in respect of such different categories of assets and risk exposures.

14.5 A bank is also required to maintain a minimum level of "*liquid assets."* These are defined in the Banks Act and, broadly speaking, relate to notes and coins, treasury bills, Land Bank bills and securities issued by the Reserve Bank.

14.5.1 The purpose of this requirement is also to guard against liquidity risk (*i.e. to ensure that the bank can meet its obligations*). The minimum liquid asset requirement is measured against the bank's liabilities (*principally the deposits which it receives from its customers*).

14.5.2 There are other requirements that need to be met by the BANKS; however, these fall outside the ambit of this action; save to say the BANKS or their controlling company or branch may not, without the prior written approval of the FIFTH DEFENDANT, commit themselves to an exposure of more than 25% of a prescribed amount to a specific "*private sector person."*

14.6 In conjunction with the previously mentioned, the BANKS also need to contend with ever-changing economic fluctuations and defaulting debtors. Thus, the BANKS have an on-going balancing act to achieve growth and make a profit for their investors and shareholders alike.

14.7 Within these means, the BANKS undertook a financial 'TRADE USAGE' that would enable them to sell-off the security and debt from the liability account within their books, thus enabling them to trade far below the radar of prescribed security thresholds required by law.

14.8 The instances described above conjured a supply surplus that caused several legislative changes brought about by the FIFTH DEFENDANT to control and govern the change in its business.

14.9 Regrettably, market failures have resulted, having been caused by the inability of depositors to monitor the risk-taking conduct of the BANKS and the systematic risk of a "*run on the banks,*" for example that of 'Saambou' in 2001/ 2002.

14.10 These trends were noted in the reports of Ms Gail Tensfeld, Prof Colin Firer and Dr Mike Bendixen (*1993*), Cruickshank (*2000*) and Falkena (*2005*). The aforementioned reports are omitted herein, so as not to unnecessarily burden these papers. These reports will however, be made available if required.

14.11 These fundamental financial trade 'methodologies' have brought about the Dedicated Banks Bill, Co-operative Banks Bill and other legislative changes to accommodate sub-banking industries or tier-banking companies. None of these Bills, however, addresses the contentions under this action.

14.12 The actual financial trade methodologies that are utilised by the BANKS, to the majority of people, in particular the BANKS own clients, are unknown.

14.13 These financial trade methodologies are described herein because there is currently no governing or enacted legislation that polices, regulates or enforces the necessary stops and balances to prevent the misuse or exploitation of these financial trade methodologies.

14.14 The actual financial ‘trade methodologies’ utilised by the BANKS form part of these proceedings and are described hereinafter;

TRADE METHODOLOGY 1

15. SEIGNIORAGE:

15.1 Money in the modern world is a FIAT PAPER CURRENCY. its intrinsic value depends on the legal guarantee of the sovereign government and not metals like gold as it was in the past. By issuing paper currency, the government earns income that is known as ‘seigniorage’ [*seign·ior·age*] in monetary theory. Seigniorage is defined in the literature as: "…. *a duty levied on the coinage of money for the purpose of covering the expenses of minting, and as a source of revenue to the crown, claimed by the sovereign by virtue of his prerogative.*" [McKinnon, 1979: p. 283]

15.2 According to *Professor S. Black (1998)*, seigniorage is the difference between the face value and the cost of production of fiat money. The rationale for why the issuer should get the seigniorage is that the minting of money makes its supply limited, and for the resulting limited supply, money yields a rent that should go to *seigneur*.

15.3 It is to be noted here that an aspect of seigniorage is that it remained more or less absent during the era when money consisted of metallic coins, either silver or gold. The reason was obvious, as the difference between the face value of the coin and the cost of production, including the cost of the metal, was not significant. This prevented the rulers from issuing reserve money for the sake of reaping the seigniorage. The invention of paper money facilitated this process, as a form of money not backed by precious metal, could be released into the economy with a minimum cost.

15.4 The introduction of fiat paper money brought huge advantage to the government. They found it a more practical method of marshalling resources from the economy because paper money is cheap to produce. These are the disadvantages of Fiat money as a system;

15.4.1 The intrinsic value of paper money depends on strict control of its supply;

15.4.2 It requires the strenuous legal backing of the government to enforce its use;

15.4.3 It leads to abuse by the issuer and then it loses its credibility. In this perspective J M Keynes observed: "*There is no subtler, no surer means of overturning the existing basis of Society than to debauch the currency. The process engages all the hidden forces of economic law on the side of destruction…..*" [Keynes, 1923, page 80]

15.5 It is common cause that the FIFTH DEFENDANT is the only private company to produce (*print*) currency in South Africa [*see par. 13 above*]. To further illustrate this point, the publication on 20 May 2012 by Colin Makala (*SME South Africa*) described the embarrassing and scandalous printing of 3.6 million defective R100 notes (totalling R360 million). R8 billion in R100 notes were printed on behalf of the FIFTH DEFENDANT by a Swedish company. They were rejected due to incorrect paper size and duplicate numbering.
(See: *http://www.banknotenews.com/files/tag-south-africa.php*)

15.6 To illustrate the aforesaid points, seigniorage is the revenue earned by Government on the value of the printed note after deduction of the notes' production and related cost. Thus, it is government revenue from the manufacture of notes and coins, calculated as the difference between the face value and the metal value of the note or coin.

15.7 The FIFTH DEFENDANT provides notes (i.e. currency) on demand to the BANKS at ‘face value’, debiting their accounts as payment thereof. The BANKS in turn provide notes on demand to depositors, debiting their individual accounts as payment. Conversely, depositors can return notes to their banks and regain credits in their accounts. Likewise the BANKS can return notes to the FIFTH DEFENDANT and regain credits in their accounts.

15.8 It is submitted here, given the statement in the foregoing paragraph, that the BANKS do not effect payment for the said currency supply. The supply is merely credited to the account of the BANKS, and when the BANKS return used notes, their account is once again credited. Thus, the supply of notes to the BANKS is at zero cost. This amount excludes administrative, transport and related costs. See annexure “**NE5-A**” hereto.

15.9 Since the FIFTH DEFENDANT buys notes at cost and ‘sells’ them to the BANKS at ‘face value’, it would seem that seigniorage from notes accrues to the FIFTH DEFENDANT. However until the notes are sold to the BANKS, they are not a part of the monetary base, but only pieces of paper stored in the vaults of the FIFTH DEFENDANT. As the FIFTH DEFENDANT sells and redeems notes, it simply swaps liabilities on its balance sheet. The asset side of the balance sheet remains unchanged, and the FIFTH DEFENDANT gains nothing from the ‘sale’ of notes to the BANKS. The more notes withdrawn from banks, the greater the seigniorage benefit to the FIFTH DEFENDANT.

15.9.1 The meaning of ‘face value’ equates to the perceived value of the note. In these instances the value can fluctuate on the notes manufactured cost plus 1/4 % in terms of Section 3(a) of the Currency and Bank Act, 31 of 1920. Thus, presuming the cost of printing is 75c on a R100 note it would equate to (.75c + .25) = R1.

15.10 It is to be noted here that the BANKS are continually exchanging notes as they receive deposits and withdrawals from their customers. It follows suit that the BANKS' liability to the FIFTH DEFENDANT is almost 0% (*zero percent*) as these exchanges in deposits and withdrawals continuously supply the BANKS with notes. However, the contention is that the customers of the BANKS are required to pay deposit fees, handling fees and auxiliary charges on these transactions.

15.11 Furthermore, the contention is held that the more money is printed, the more there will be an increase in money supply, thus an increase in prices occurs which contributes to inflation.

15.12 There are other economic observations under principles of seigniorage which fall outside the ambit of these proceedings and therefore not addressed here.

<u>TRADE METHODOLOGY 2</u>

16. FRACTIONAL RESERVE BANKING:

16.1 The principle of 'fractional reserve banking' is a form of banking where the BANKS maintain reserves (*of cash and coin or deposits at the FIFTH DEFENDANT*) that are only a fraction of the customer's deposits. Funds deposited into a bank are mostly lent out, and a bank keeps only a fraction (*called the reserve ratio*) of the quantity of deposits as reserves. See paragraphs 14.3 and 14.4 above.

16.2 Some of the funds lent out are subsequently deposited with another bank, increasing deposits at that second bank and allowing further lending. As most bank deposits are treated as money in their own right, 'fractional reserve banking' increases the money supply, and banks are said to create money.

16.3 Due to the prevalence of ‘fractional reserve banking’, the broad money supply is a multiplier larger than the amount of base money created by the FIFTH DEFENDANT. That multiple (*called the money multiplier*) is determined by the reserve requirement or other financial ratio requirements. These are imposed by the FIFTH DEFENDANT from the excess reserves kept by commercial banks, and by the publicly held currency not deposited in banks.

16.4 The FIFTH DEFENDANT mandates the reserve requirements that require the BANKS to keep a minimum fraction of their demand deposits as cash reserves. See paragraphs 14.4.1 to 14.4.3 above. These both limit the amount of ‘money creation’ that occurs in the commercial banking system, and ensures that banks have enough ready cash to meet normal demand for withdrawals.

16.5 To illustrate how ‘money creation’ and ‘deposit multiplication/ relending model’ within the ‘fractional reserve system’ works, an example will be used for each one of these processes.

16.5.1 If Y, a client of ‘BANK A’ deposits R1 000 into his/ her account, ‘BANK A’ is required to retain 10% (required reserve fraction) or R100. Thus ‘BANK A’ can loan the balance, R900. If client ‘X’ of ‘BANK A’, borrows the R900, it is likely that the money will be received into an account held at ‘BANK A’ as a deposit. Using the aforementioned scenario, ‘BANK A’ will retain R810 from the deposit (900 x 10% = 90). Thus ‘BANK A’ will have the R810 available to loan to another client. Using the latter process and repeating the mathematics it will be noted that the initial deposit of R1 000 of Y has generated R8 999.95 to ‘BANK A’s’ advantage.

16.5.2 In using the 'deposit multiplication', 'BANK B' receives R100 from client E. The initial deposit is lent out 10 times at a reserve rate of 20% (*twenty percent*). The latter is best explained by illustration hereinafter;

Table: 16.5.2.1

Bank	*Deposit*	*Lent Out*	*Reserves*
'B'	100	80	20
'C'	80	64	16
'D'	64	51.20	12.80
'E'	51.20	40.96	10.24
'F'	40.96	32.77	8.19
'G'	32.77	26.21	6.55
'H'	26.21	20.97	5.24
'I'	20.97	16.78	4.19
'J'	16.78	13.42	3.36
'K'	13.42	10.74	2.68
'L'	10.74		
		Total Reserves	89.26
	Total	Total	Total
	457.05	357.05	100

16.5.3 Although no new physical money was created in the example above, the application of 'money creation' as shown in paragraph 16.5.1 is very much applicable. Each bank can loan its share of the FIAT currency received less the retained percentage to their clients. In other words; this is called creating money out of "thin air" or "nothing".

16.5.4 The illustration above displays the 'mainstream economic relending model' of how loans are funded and how the money supply is affected. It also shows how the FIFTH DEFENDANT'S money is used to create commercial bank money from an initial deposit of R100 of the FIFTH DEFENDANT'S money. In the example above, commercial bank money to the value of R457 was

established. Each successive bank involved in this process creates new commercial bank money on a diminishing portion of the original deposit of the FIFTH DEFENDANT. This is because banks only lend out a portion of the FIFTH DEFENDANT'S money deposited in order to fulfil reserve requirements, and to ensure that they always have enough reserves on hand to meet normal transaction demands.

16.5.5 The importance of the above transactions is that the initial R100 money supply actually totals R180 and not the R100. This is so because the bank has loaned out R80 of the FIFTH DEFENDANT'S money, kept R20 in reserve (*not part of the money supply*) then substitutes a newly created R100 '*I Owe You*' claim for the depositor that acts equivalently. This note can then be redeemed from the FIFTH DEFENDANT'S money. These claims are termed 'demand deposits' or 'commercial bank money' recorded as a liability in the bank's account. It is also notable that it is impossible to distinguish between the two forms of money.

TRADE METHODOLOGY 3

17. SECURITISATION PRACTICES:

17.1 The definition of securitisation according to the Oxford Dictionary is to '*convert (an asset) into securities*'. It is the process by which a company transforms assets on its balance sheet (*like loans, receivables or leases*), into marketable securities that are sold to investors and traded in the capital markets (*Rand Merchant Bank [RMB] 2005; Cowan et al 2003*).

17.2 Securitisation provides the BANKS with additional flexibility in managing credit, liquidity and other risks involved in originating and

funding loans. Depending on the particular structures utilised, these risks can either be retained by an originating institution or passed on to investors and others involved in the transaction.

17.3 Restrictions imposed by regulatory bodies stifled the development of securitisation before 2001. After the introduction of the amended securitisation regulation and the removal of regulatory constraints in 2001, the first Residential Mortgage-backed Securities (RMBS) programme was initiated followed shortly by the first 'Asset Based Securities' [ABS]. (*Fitch Ratings 2006a*) – [*Also see: Government notice 153 (Government Gazette 13723) of 3 January 1992; Government Notice 1375 published in Government Gazette 22948 on 13 December 2001; Government Gazette No. 24088 on 22 November 2002; Government Gazette No. 26415 4 JUNE 2004 and Government Gazette No. 30628 dated 1 January 2008*]

17.4 Securitisation is the creation and issuance of debt securities, whose payments of principal and interest are derived from cash flows generated by a segregated pool of assets (*Cowan et al 2003*). The end result of securitisation is financing, however the organisation securitising its assets is not borrowing money as if it were issuing corporate bonds. Instead, it is selling a stream of cash flows that would otherwise accrue to it (*Kothari 2006a:5*).

17.5 Securitisation involves three key steps;

17.5.1 Firstly, the company that owns the assets (*the originator, in these proceedings, i.e. the BANKS*) sells them to a Special Purpose Vehicle [SPV] (*the issuer*) which is a newly formed company or trust.

17.5.2 Secondly, the SPV issues securities, typically bonds (*or notes*), which are backed by the cash flows of the underlying assets.

17.5.3 Thirdly, the securities are sold to investors and are traded in the capital markets. (*Gumata & Mokoena 2005*)

17.6 Securitisation can be classified by asset class. RMBS are home loans; CMBS are commercial property loans and commercial real estate; ABS are auto loans, credit card receivables, equipment leases and trade receivables; CDO/ CLO are corporate debt/ bank loans.

17.7 The payment structure of securitisation schemes are generally divided into two structures, namely 'pay-through' and 'bond structures'.

17.7.1 In a pay-through structure, the SPV reinvests the cash flows from the receivables, until the stated payment date due to the investors. For example, cash flows are received from the assets monthly, but the payments made to the investors are at quarterly intervals. (*Kothari 1999:75*)

17.7.2 The 'bond structure' is an extension of the 'pay-through structure' whereby the cash flows of the securitisation are actively managed at SPV level. The notes or bonds that result from this structure can have different payment priorities and various maturities that are unrelated to the underlying assets. (*Kothari 1999:75; Kothari 2006b*)

17.8 When the pool of assets is sold to the SPV, the nature of the sale can take two forms;

17.8.1 It can be a true sale transaction which is referred to as a traditional or physical securitisation. In this case the assets are sold to the SPV making the SPV the new legal owner of the assets. Consequently, the assets are transferred off the balance sheet of the originator. (*Gumata & Mokoena 2005*)

17.8.1 The other possible form of sale is a synthetic sale. With synthetic securitisations, only the underlying credit and/or market risk of the assets are transferred to the SPV through the use of derivative instruments. The assets themselves remain on the balance sheet of the originator. With both types of transactions, the economic rights relating to the securitised assets are owned by the SPV. (*RMB 2005; Deloitte & Touche 2003; Fergus & Jacobs 2000; Gumata & Mokoena 2005*)

17.9 The process of securitisation does not consist of single assets being sold to an SPV. Similar assets, risk, terms and market segments are 'boxed' together to equal a total value under which the SPV is established.

17.5 The last phase is the 'holding and trading phase' during which the investors can either hold on to their notes, receiving interest and principal payments on them, or they can trade the notes on the bond exchange. (*Barclays Capital 2006*)

17.6 A number of accounts need to be set up for a securitisation transaction. In this matter, it is sufficient to note that the 'collections account' holds the payments from the collateral properties. This account is held in the name of the borrower (*the customer of the BANKS*).

17.7 The BANKS typically perform a number of roles in a securitisation event if it is not the originator. For example, the BANKS can carry out the functions of: arranger, programme manager, underwriter, warehouse lender, administrator, loan servicer, recovery agent, calculation agent, liquidity provider, swap or hedge provider, account bank and even property manager (*Van den Berg 2000; Deloitee & Touche 2003*). By taking the role of warehouse lender, and providing interim funding to the structuring process, the BANKS earn interest income which is similar to

their normal lending activities (*Van den Berg 2000*). For all the other services, the bank receives a fee income which compensates it for transferring its rights to the assets (*Kothari 1999:192*).

17.8 There are certain requirements which a borrower SPV must fulfil to be considered separate from the originator. The applicable requirements are cited hereunder;

17.8.1 It must hold itself out as being a separate legal entity from the originator.

17.8.2 It must have a separate corporate existence.

17.8.3 It must maintain its own books, records and accounts.

17.8.4 It must conduct its business and hold its assets in its own name.

17.8.5 It may only engage in the business of owning and operating properties and the financing thereof.

17.8.6 It may not have any assets other than those related to its properties.

17.8.7 It may not have any indebtedness other than the loans originating from the issuer SPV.

17.8.8 It may not consolidate with another entity.

17.9 The Basel II (the Securitisation Framework) is the second of the Basel Accords, (*now extended and effectively superseded by Basel III*), which provide recommendations on banking laws and regulations, issued by the Basel Committee on Banking Supervision, International Convergence of Capital Measurement and Capital Standards, published by the Bank for

International Settlements [BIS]. The Basel reports, as used and implemented in South Africa, provide guidelines to the regulators, the FIFTH DEFENDANT and the BANKS regarding the business of the bank.

17.9.1 The FIFTH DEFENDANT will exercise its discretion in a number of areas to ensure that implementation is appropriate for South African circumstances. These areas of national discretion are specifically provided for in Basel II itself.

17.10 Having considered the aforementioned, it is observed that the BANKS 'sell' their rights and title (in other words, their client's debt) to a "SPV". This transaction is considered an 'arm's length' transaction. The 'SPV' then sells the said 'debt' onto a securitisation company, who in turn places the 'debt' onto the securities platform to be traded on the Johannesburg Stock Exchange. The latter transaction is not at 'arm's length' with the BANKS.

17.11 Because the process of securitisation consists of the 'selling' of a debt, the BANKS cannot hold any sort of right to recover the debt from their debtors. This right is squarely bestowed onto the securitising company. Thus, the BANKS cannot claim a debt which they do not own.

17.12 Due to the requirement of security (*see paragraph 14.5 above*), the BANKS removed the 'debt' from their accounting records to enable them to further trade in loans. Therefore, the BANKS do not have to increase their security or be subjected to its limitations.

17.13 Should a reversal take place (i.e. the debt is returned to the BANKS), they would be required to purchase the said debt back. This would entail that the 'SPV' acquires the debt from the securitisation company, while the BANKS acquire same from the "SPV'.

17.14 Lastly the process of securitisation does not entail any formal registration at the Deeds offices, as the required transaction authorisation is contained in the credit/ loan agreements of the BANKS.

<u>THE CREDIT AGREEMENT:</u>

18. It is common cause that from a written agreement a loan will follow. Within this premise, the BANKS formulated so called ‘pro-forma’ agreements that *inter alia* included the following provisions;

18.1 A description of the principal debt and the provision of fees described as an “initiation fee”;

18.2 Provision for monthly service fees;

18.3 The interest rate, be it a variable or fixed percentage, the provision that interest shall be calculated in advance on a monthly basis, and that all payments shall be set-off against interest, cost and then the capital loan amount;

18.4 Provisions for default administration fees and charges;

18.5 Collection cost in respect of legal action taken by the BANKS;

18.6 Appointment of bond registration attorneys;

18.7 Terms and conditions of the loan agreement, which the following segments are of importance;

18.7.1 The wording of “collateral” is defined as ‘any security provided by the borrower to the BANKS to secure the repayment of the loan’.

18.7.2 The word ‘loan’ is defined as ‘an amount the BANKS have agreed to lend the debtor”;

18.7.3 ‘Property’ is given the meaning of ‘immovable property which is to be mortgaged by the BANKS as collateral for the loan’;

18.7.4 Provision is made that the BANKS will inform the debtor of his dues via a monthly statement;

18.7.5 That no interest will be paid on an accounts reflecting a credit balance;

18.7.6 The factoring of insurance is stipulated as a pre-requisite on fixed and unfixed property. Where the loan is not secured by either of these assets, the assets given as security for the loan are required to be insured;

18.7.7 That all payments are to be made to the BANKS, free from any deduction or claim/ demand;

18.7.7 Where the loan is secured by fixed property, the BANKS are given reasonable access to such property for inspection;

18.7.8 The debtor may not cede, sell or otherwise dispose of the ‘asset’ unless such disposal is authorised in writing by the BANKS;

18.7.9 Authority is granted to the BANKS to cede the debt, ‘without notice’ and at their discretion at any given time, be it that the debt is ceded in full or in part or absolute; *and*

18.7.9.1 Where such cession is concluded, the debtor grants the BANKS such authority to administer the loan agreement on behalf of the third party;

18.7.9.2 It is construed that the aforementioned cession includes the sale of the said debt.

18.7.10 Provision is made for a 'certificate of balance' to be issued by any person employed by the BANKS, and this certificate is indisputable.

18.7.11 Lastly, a 'power of attorney' is signed by the debtor granting the appointment of attorneys (*pre-registered and appointed by the BANKS, thus they must be on the BANKS panel of approved attorneys*). The attorneys are granted the authority to register a 'bond of security' and registration of the deed on behalf of the debtor. The latter only being applicable on fixed and certain movable assets like vehicles.

18.8 Where the security is fixed property, the 'appointed' attorneys of the BANKS attend to the bond registration on the title deed. The authority to do so is as stated in paragraph 18.7.11 above. The contents are, in every such registration, similar to Annexure "**NE5**" hereto.

18.8.1 The terms of the bond are contained on pages 2 to 5 of annexure "**NE5**" and consists of the following provisions; (1) Cause of indebtedness, (2) Acknowledgement of debt (3) Additional amount (4) Continuing covering bond, (5) Joint and several liability, (6) Repayment, (7) Interest, (8) Default, (9) Proof of indebtedness, (10) Domicilium citandi et executandi, (11) Jurisdiction, (12) Legal cost, (13) Presumption of due compliance, (14) Standard mortgage conditions and (15) Mortgaged property.

18.8.2 At page 5 of annexure "**NE5**" the bond is signed by the appointed attorneys, binding the debtor to the contents of the bond.

18.8.3 The contents of paragraph 18.8.1 above, and its ramifications and consequences, are not disclosed prior to or on signing the power of attorney, and remain unknown to the debtor until the debtor requests the record from the deeds office.

FUNDAMENTAL PRINCIPLES UNDERLINING UNCONSTITUTIONAL ACTION

19. UNWILLING PARTICIPANT:

19.1 The fundamental aspect of being a willing participant is that the person participating in a scheme, has such knowledge of that scheme, that when he or she considered their participation, he or she was made aware of all the relevant facts of the transaction. For example, a person cannot say he was a willing participant when he believed he was ‘depositing money’ for safe keeping, while in fact it was a scheme to enable the BANKS to generate more money, which was then loaned and profited on. In these instances, the person is an unwilling participant.

19.1.1 Within each and every industry the scope of its business is very clear to the consumer. Be it the rendering of services like an accountant, doctor or attorney or the retail sector like hardware stores, pharmacies or grocery stores. It follows that one would not go to a hardware store to fulfil a medical prescription as the different industries are clearly identifiable.

19.1.2 It is common cause that a savings account is very different to an investment account. Each one of these accounts has a different earmark or purpose to a consumer. One is to be used to deposit and withdraw funds, the other to invest a particular amount of money for a particular reason like further education or a holiday. The latter is beneficial as it can attract interest.

19.1.3 In neither of the aforementioned accounts has it been explained to the consumer that it is in fact funding and assisting the liquidity of the BANKS business. This is so because, as of the date that money is deposited into an account with the BANKS, such deposit is forfeited to the BANKS. The rights and entitlement to the value of the deposit have just become the subject of manipulation, driving the BANKS' liquidity allowing them to profit.

19.1.4 It does not end there. The depositing of money by a consumer attracts service fees to be rendered on the deposit; in instances of cash deposits the fees are higher and subjected to a cash deposit fee.

19.1.5 If the funds are withdrawn or used on purchases, the transaction also attracts a service fee.

19.1.6 In addition to the above, the BANKS charge a monthly service fee to uphold/ administer the bank account.

19.1.7 To illustrate the above in conjunction with paragraphs 16.5 above, the following scenario is illustrative of the prejudice caused to the consumer as an unwilling participant;

Table: 19.1.7.A

		Fee/Cost	Balance
19.1.7.1	R1 000 cash deposit	0	1000
19.1.7.2	Cash deposit fee	(18.90)	981.10
19.1.7.3	Transaction fee	(21.79)	959.31
19.1.7.4	Monthly fee	85.00	874.31
19.1.7.5	Account reserve	50.00	824.31
19.1.7.6	Balance	175.69	824.31

Table: 19.1.7.B

Application of the Fractional Reserve Banking System as illustrated in paragraph 16.5 above.

19.1.7.7	Balance b/f	175.69	824.31
19.1.7.8	10% Reserve	(17.57)	806.74
19.1.7.9	Available for lending		806.74
19.1.7.10	Loan Fee generated	150.00	956.74
19.1.7.11	Cost on loan (fee)	253.00	1209.74
19.1.7.12	Interest on loan 19%*	229.71	1439.45
19.1.7.13	Balance	790.83**	1439.45

*Loan (19.1.7.9) + Loan Fee (19.1.7.10) + Cost (19.1.7.11) = R1 209.00

** This transaction only represents one leg of the several legs that follow on a deposit. See the illustration at paragraph 16.5.2 above.

19.1.8 From the illustration above, the consumer has spent R175.69 on his deposit of R1 000.00 and the BANKS have gained in excess of R790 on the same deposit.

19.1.8.1 To further illustrate the impact of the above, if Bank A has one million clients and each client deposits R1 000.00 as per Table 19.1.7.A above the revenue would be R1 billion. The fees in accordance with paragraphs 19.1.7.2 to 19.1.7.4 would amount to R125.690 million and the reserve as per paragraph 19.1.7.5 amounts to R50 million. The total revenue gained is R1.175 690 billion. Also see 16.5.1 above.

19.1.8.2 Using the same example above and applying the Fractional Reserve Banking system as per Table 19.1.7.B above, Bank A has generated

an additional R790.830 million. If the total in paragraph 19.1.8.1 is calculated with this total, Bank A has generated R1.999 830 billion.

19.1.8.2 If the required reserve, as contemplated in paragraph 19.1.7.8 is applied, Bank A has R1.799 847 billion available to lend out. In conjunction with the latter, if Bank A loans the said total and generates 10% interest per annum on the loans, it would generate R179 9847 (million) per annum and R14 998 725 (million) per month in profit. It is to be noted that the figures are estimated and could be far greater because the cost of loans in administration fees etc. are excluded.

19.1.9 In the transaction above, (Table 19.1.7.A) the consumer would gain interest if the funds were to remain in the account for more than 30 days. As the illustration above shows, the consumer will gain R2.75 (*calculated at 10% interest per annum [4%/12 = 0.33 per month]*)

19.2 If the application of seigniorage is applied to the above scenario, see paragraphs 15 above, the BANKS have set-off their credit held at the FIFTH DEFENDANT by the value of the cash deposit above. The consequence being that the BANKS have gained liquidity with the FIFTH DEFENDANT, enabling it to triple its supply of notes or FIFTH DEFENDANT loans.

19.3 Should the application of securitisation (*see paragraphs 17 above*) be applied to the loan aforesaid in paragraph 19.1.8.2, the BANKS effectively on-sell the loan and gain their capital back (i.e. R1.999 83 billion) and make an additional profit from the process of securitisation.

In addition the bank also gained the 10% (*paragraph 19.7.1.8 and 19.1.8.2 above*) reserve back into its accounting books.

19.4 Within this premis, the BANKS gain substantially from the deposit and the consumer is an unwilling participant, who not only paid to deposit his money in the accounts of the BANKS, but also unknowingly assisted the BANKS to generate more than the initial deposit.

19.5 It is therefore submitted that the BANKS have unfairly profited from the deposit in more than one way;

19.5.1 They received fees and costs on the initial deposit;

19.5.2 They were paid a service fee;

19.5.3 The depositor's deposit was used, together with other deposits, to make loan(s) to other account holders;

19.5.4 The BANKS then make additional profit on these loans when the loan is sold to a third party. Again the BANKS reap the benefit of profiting by writing the loan off their accounting records to keep their reserves in tack.

19.6 If the depositor was a willing participant in the scheme, surely the depositor would be entitled to receive certain benefits for his participation. These could include free deposits, no account/ transaction fees or monthly account fees, as well as other benefits, for instance, share profits on the contribution, or lower interest on loans.

19.7 Under the current dispensation of unwilling participant, only the BANKS' investors and shareholders share in profits. It is submitted that if the BANKS allow the depositor to benefit from his deposits, it will create transparency and more willingness to stimulate savings and

growth, benefitting the majority of people and providing more accessibility to banking facilities.

19.8 In contrast to the above, if the BANKS are to profit from the deposits they receive, then the BANKS are to tender payment for receiving those deposits. The mere fact that a depositor is required to pay for depositing money, which becomes the property of the BANKS to use at their discretion, amounts to an imbalance in modern business. This is so because consumers borrow from banks at high cost; consumers deposit at high cost, and yet consumers are subjected to minority control. No compromise is made to bring the scales into balance.

19.8 It is commonplace within the Banks Act that a depositor's deposit becomes that of the BANKS [Sec 1(c), "the business of a bank"] (*paragraph 14 above*). This was also clearly illustrated in the case of Amritsar v Income Tax Commissioner, Lahore [1940] 4 All E R 87(PC) at 95 F (*paragraph 14.3 above*). The contention that will follow from the latter statement is that once the funds belong to the BANKS, the shutters are drawn and the matter becomes no business of the public.

19.8.1 By transferring the ownership of deposits from one party to another, the BANKS can replace physical cash as a method of payment. In fact, deposits account for most of the money supply in the BANKS. For example, if a bank makes a loan to a customer by depositing the loan proceeds into that customer's checking account, the bank typically records this event by debiting an asset account on the bank's books (*called loans receivable or some similar name*) and credits the deposit liability or checking account of the customer on the bank's books. From an economic standpoint, the bank has essentially created economic money *(although obviously not legal tender*). The customer's checking account balance has no Rand notes in it, as a demand deposit account is simply a

liability owed by the bank to its customer. In this way, banks are allowed to increase the money supply *(without printing currency, or legal tender).*

19.8.2 The underlining argument is that the BANKS and the FIFTH DEFENDANT are privately owned institutions who enjoy specific legislation governing their *modus operandi*. Within these premises, legal application has existed since 1996 which is more than willing to open the shutters so transparency can prevail. One cannot simply say "*it's none of your business*" when the very nature of the BANKS existence is founded on the public's participation. (See: *Le'Bergo Fashions CC v Lee & Another 1998(2) SA 608 (C); Gilford Motor Co Ltd v Horne [1933] CH 935 (CA); [1933] All ER Rep 109*)

19.8.3 Because legislation permits such action by the BANKS, this does not necessarily make it right. The contention is not so much the enacting legislation but rather the application of the law by the BANKS; and further how it causes prejudice to the people who make use of such facilities. (See: *Argus Printing and Publishing Co. Ltd. v Darby's Artware (Pty.) Ltd. and Others 1952 (2) SA 1 (C) at 8H citing, with approval, Jennings v Stephens 1936 (1) All ER 409 (CA) in which Lord Wright said: "... The public's interest... is a term of uncertain import: it must be limited in every case by the context in which it is used. It does not generally mean the inhabitants of the world or even the inhabitants of [the] country..." See also Clinical Centre (Pty.) Ltd. v Holdgates Motor Co. (Pty.) Ltd. 1948 (4) SA 480 (W) at 488 where Roper J held that: "In my view a scheme is in the public interest if it is to the general interest of the community that it should be carried out, even if it directly benefits only a section or class" AT 145.*)

19.8.4 The perception in modern business is that every single kilobyte, second or signal is charged for. There is no ‘free’ in modern business society. However, this statement is profoundly wrong when one realises the effect of deposits into the BANKS. There is no reason whatsoever why the BANKS should receive such benefit and more so why a handful of people should receive the benefit from profiteering.

19.8.5 It is submitted that deposit fees could be converted into “credit insurance” to protect the consumer in the event that they become unemployed, incapacitated or otherwise unable to pay his debt to the BANKS. This would help restore the imbalance of financial prejudice, loss of property and improve confidence in the financial industry in toto. (Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC) para 27)

19.9 It is submitted that Section 1 of the Banks Act, “*the business of the bank*” and other legislation authorising the use of customer deposits, as stated herein, is inconsistent with Section 9 of the Constitution. The BANKS, together with the FIFTH DEFENDANT are enriched unfairly by both receiving payment for deposits, withdrawals and other transaction fees, and applying such monies deposited to issue loans, which also incur interest and cost. The latter being achieved at the expense and financial hardship of the customers with no benefit to them.

(*AV Dicey An Introduction to the Study of the Law of the Constitution (10 ed. 1959), Chapter IV. As Jackson J of the US Supreme Court put it in Railway Express Agency v New York 336 US 106 (1949) at 111-13 And Du Plessis v De Klerk 1996 (3) SA 850 (CC) paras 44 and 136 And Janse van Rensburg v Minister of Trade and Industry 2001 (l) SA 29 (CC) para 25*)

19.10 <u>*In the alternative*</u>, the enactment of Section 1 of the Banks Act concerning “*the business of the bank*” is in violation of Section 13 of the

Bill of Rights, as customers of the BANKS are encouraged by operation of law and/ or advertisements to make use of the BANKS' services. In return, their customers pay to deposit and withdraw funds and, in the same instance, customers are assisting and supporting the funding of the BANKS' business without remuneration or benefit. Revenue is collected from customers under the pretence of 'penalty fees,' but the customer is not a willing participant.

(*X v Federal Republic of Germany Application Number 4653/70 And lversen v Norway Application Number 1468/62*)

19.11 It is therefore submitted that Section 1, "*the business of the bank*" and other legislation authorising the use of public deposits as floating or enabling capital to sustain the BANKS' business, be amended or substituted. This will bring its application in line with a fair and balanced system, benefiting the BANKS' customers and promoting equality in an open and transparent South Africa.

20. SUBSTITUTION WITH NO VALUE:

20.1 The Banks Act read with the South African Reserve Bank Act both provide for the substitution of Rand notes with certificates or notes, commonly referred to as promissory notes or "*I owe you notes*". (*See: Sec. 1, 72 and 73 of the Banks Act and Sec. 1, 'financial instrument', 10A, 13, 17 of the South African Reserve Bank Act. Also 14.6/7 and 15 above.*)

20.2 Transactions wherein these substitutions of Rand notes are to be found are predominately in credit or loan accounts.

20.3 The supply of notes (*'Rand' and 'Cent' as defined in the South African Reserve Bank Act, Sec. 15*) to the BANKS are exclusively done by the FIFTH DEFENDANT. When notes are supplied to the BANKS, it is done by entering a debit into the accounting records of the FIFTH

DEFENDANT and when the BANKS return used notes, a credit entry is made in the accounting records of the FIFTH DEFENDANT.

20.3.1 From the aforementioned statement it is clear that the BANKS receive notes on credit and therefore no physical payment for the notes are made.

20.3.2 Also, when the notes are returned due to them being worn out, the account is credited with the value associated to the supply of the note. It follows common logic that this process is a continuous debit and credit entry system without any true payment in liquid notes ever taking place.

20.3.3 The only difference being that notes that are torn or damaged, to the extent provided for in Section 14(3) or (4) of the South African Reserve Bank Act, are excluded from the exchange.

20.3.4 Notes so manufactured and issued shall not attract any Tax. (*Section 20 of the South African Reserve Bank Act.*)

20.3.5 The value of the notes are more fully described in paragraphs 15.5, 15.6 and 15.7 above.

20.3.6 To illustrate the aforementioned, if the FIFTH DEFENDANT produces R100 000 worth of R100.00 notes, there are 1 000 (one thousand) R100 notes in circulation. The BANKS distribute these notes via ‘cash’ withdrawals from their respective branches at a given fee. The public then use these notes, at their printed face value, to purchase services or goods from merchants. The merchants re-deposit these notes, at a fee, back into their respective BANKS. Thus the process starts afresh until the notes become stale, whereupon they are returned by the BANKS to the FIFTH DEFENDANT. It must be noted here that every Rand note must be equivalent

to a debt. For more notes to be made available, more debt must be issued.

20.3.7 In the example above, it will be noted that the public trades the note for the value depicted on the face of the note; thus calculations for VAT, TAX and exchange for services or purchases are based on these valuations, not on the value perceived by the FIFTH DEFENDANT and the BANKS e.g. 'I.O.U' notes.

20.3.8 It is not our contention to question the validity of the above; however same is stated to indicate the ramifications when the process used by the FIFTH DEFENDANT and the BANKS is not in perfect harmony with the factual value of notes issued. (*See: Exchange Risk, Hedging, & Covered Interest Arbitrage: McKinnon (1979, chs. 4, 5, & 9.; Hallwood & MacDonald (2000), ch. 3.; Eichengreen, B., & Ricardo Hausmann (2005), chs. 1 & 2, "The Pain of Original Sin," Other People's Money, ed. by Eichengreen & Hausmann, pp. 3–37, (with G. Schnabl))*

20.3.9 The contention is that the BANKS receive these notes from the FIFTH DEFENDANT on credit; such credit being based on its manufacturing and auxiliary cost. Thus, presuming the cost in making a R200 note is 75c, the BANKS are debited and credited 75c respectively.

20.3.10 The charges associated with deposits and withdrawals are calculated on the printed face value of the note; thus a deposit of R1000 is calculated at R1000 = (R10 + 1.5%) = R25.

20.3.11 Given the proposition above, the BANKS are no more than a distribution centre for FIFTH DEFENDANT notes, whereby they charge the consumer a distribution (*withdrawal*) fee and a collection fee (*deposit*).

20.3.12 The 'face value' of a note is entirely based on outstanding debt, that is, the price of money is determined at any point in time by the debt of the Nation. The name "FIAT money" is founded on the modern money system; established on the principle that every Rand must be tied to an outstanding "I owe you" (I.O.U). When the underlying 'I.O.U' that backs the debt becomes worthless, the BANKS must back up the 'created money' with real money, i.e. FIFTH DEFENDANT notes, called 'deleveraging'. (*See: paragraph 15.1 above; Investment Basics VII, G M W Cross, 2006, pg. 39 – 41*)

20.3.13 Noting the above, it follows that the BANKS do not trade in the FIFTH DEFENDANT notes too often or at all when dealing in loans. The BANKS have replaced the requirement for notes with internal processes like the issuing of promissory notes or issuing their own 'I.O.U' notes. This statement is supported, inter alia, by the fact that the BANKS only draw or obtain the necessary notes on supply and demand. Traditional note trading has subsided due to the combination of electronic and internet banking. (See Section 10A and 17 of the South African Reserve Bank Act.)

20.3.14 The Government earns revenue from the manufacture of coins/ notes calculated as the difference between the face value and the metal/ manufacturing value of the coins referenced herein as seigniorage. (*See paragraphs 15.2 to 15.5 and 15.6 above.)* The fewer notes in distribution, the less the Government earns in revenue. (*See: Sec 24 of the South African Reserve Bank Act.*)

20.3.15 Taking into account the aforementioned paragraphs, it is clear that the base structure in the supply of money is for the BANKS to supply to the consumer, on demand, cash withdrawals. Internally, transactions occurring via electronic fund transfers, loans and mortgage bonds are conducted via issuing of promissory notes, 'I.O.U' or forms of undertakings other than notes from the FIFTH DEFENDANT.

20.3.16 The only exception to the aforementioned being that, where the consumer requests a cash withdrawal, same is to be supplied by notes. If consideration is given to Tables 19.1.7.A and B with paragraph 19.1.8.2 above, the BANKS have an ample supply of notes.

20.3.17 Should the above happen, the BANKS can make such cash withdrawals available from their current cash deposits (*paragraph 19.1.8.2 above*) or obtain same from the FIFTH DEFENDANT at a fraction of the printed face value of the note.

20.3.18 This aforesaid submission is made and relied on by comparing the BANKS' financials to the loans they had granted over the same period. Using the National Credit Regulator' publication, "Consumer Credit Market Report, Executive Summary, First Quarter, March 2012" Annexed hereto as "**NE7**", the complete annexure has been omitted due to its volume and content being unrelated. The author indicates on page 1 of the report that the BANKS had granted R79 billion (83.13%) of loans in the first quarter of 2012 alone. Mortgage loans account for R796.33 billion and its gross debtor book stands at R1,162 trillion.

20.3.18 It will be noted here that retail stores and service providers who are affiliated or use the financial services provided by the BANKS have been excluded in the calculations above.

20.3.19 On page 9, figure 2.1 of annexure "**NE7**" the authors indicate that there has been a slight decrease of .15% in the number of mortgage loans for the same period in 2011.

20.3.19.1 Given the significant value of exposure, it is clear from the data contained in annexure "**NE7**" that the BANKS are, more than ever before, issuing alternative methods of payment/ loans as described in paragraphs 20.3.15 above.

20.3.19.2 The contention is that whilst the BANKS are receiving substantial revenue from interest payments, cost and fees, their backing is unsupported and tantamount to misuse of the 'Fiat' currency principals as described above.

20.3.19.3 The above could lead to a term referred to as 'quantitative easing' which describes a monetary policy that could be used by the FIFTH DEFENDANT to increase the supply of money by increasing the excess reserves of the banking system. This policy is usually invoked when the normal methods to control the money supply have failed, for instance the bank interest rate, discount rate and/or interbank interest rate are either at, or close to zero.

20.3.19.4 Should the FIFTH DEFENDANT implement 'quantitative easing', it will first credit its own account with money it creates *ex nihilo* ("*out of nothing*"). Then it purchases financial assets, including government bonds, agency debt, mortgage-backed securities and corporate bonds, from the BANKS and other financial institutions in a process referred to as 'open market operations'.

20.3.19.5 One of the biggest consequences of 'quantitative easing' is the surge in the gold price. This was illustrated in the United States of America when the Federal Reserve announced its plan of 'quantitative easing'. Gold jumped $14.50 per ounce, reaching a new all-time high of $1 407 per ounce in London that night and on the 9th of November 2010 it settled at $1 411 per ounce.

20.4 The moral hazard here is twofold. As the BANKS reap risk free benefits, incredibly high returns from budget deficits, and the destruction they entail, cause the taxpayer to end up paying the spread. The FIFTH DEFENDANT charges banks, for instance .25%, and the Treasury pays the BANKS 3.5% while the difference is paid by the public/ customers.

20.5 The BANKS are taking legal action, demanding the loan amount with interest and, in many instances, declaring security executable. Families are being evicted into the street and austerity measures are forced onto entire nations to recoup payment for the money they borrowed. The legal contention is: did the BANKS lend real money? Was the money loaned through tangible, calculable work? Or was the loan simply created by a slight of hand for which the BANKS now demand their

pound of flesh? The legal question is: can something be demanded back if it was in fact never theirs in the first place?

20.6 Given the facts aforesaid and weighing the BANKS financial statements against that of Annexure "**NE6**", one would come to realise that there is a serious difference between the two documents.

20.7 The reason for this is stated in paragraph 15 and the aforesaid paragraphs. The manipulation of Fiat currency and the issuing of paper 'I.O.U' notes has replaced real money. However, the BANKS' customers are required, as per the contract, to return their payments in notes and no other currency. When the debt is paid-up the BANKS simply destroy the 'I.O.U.'.

20.8 Accordingly, the BANKS ensure that they incorporate a contractual term referred to as a "certificate of balance" into their contracts. (See paragraphs 18 (*18.7.10*) hereto.)

20.8.1 By virtue of this clause, the 'certificate of balance' is issued by an employee, who merely prints it from a computer. This document stands uncontested before a Court, disabling the premise in which to question the true existence of the debt being in liquid money.

20.9 It is therefore submitted that the BANKS conduct is *contra bonus mores*, discriminative and deceitful. Irrespective of whether the BANKS are to stand good for the 'I.O.U.' note at a later stage, the fact remains that the BANKS have demanded and received liquid money on demand, where they had and could not have 'loaned what they possessed' in the first instance. The method used by the BANKS is simply that of '*wait and see*'; if the debt is paid off, then matters remain the same. If not the 'I.O.U.' note is exchanged in trade or satisfied.

20.10 Support for the statement above in found in that a loan agreement purports that one party, the BANK, has discharged its obligation in terms of an agreement (i.e. by providing the loan). The customer is obliged, on these premises alone, to fulfil his obligation of repayment. The security given by the borrower spreads two ways, one is for securing the debt and the other is to enable the Bank to '*sell-off*' its liability onto a third party.

20.11 It is submitted that Section 1 of the Banks Act, "*the business of the bank,*" the South African Reserve Bank Act and other legislation authorising the use of 'other methods of payment', as stated herein, are inconsistent with Section 25 of the Constitution; cause prejudice and are fraudulent. The BANKS, together with the FIFTH DEFENDANT, are being enriched unfairly and are acting *contra bonus mores,* enjoying an unfair advantage by receiving payment on loans which exist as a fiction as opposed to a legitimate liquid transaction;

20.11.1 The use of 'certificates of balance' by the BANKS is to be subjected to a thorough examination as to their authenticity. Their true value should not be accepted on face value in any legal proceedings, and the issuing of such certificates must be subjected to testimony under oath by the issuer.

20.11.2 The FIFTH DEFENDANT is to launch an enquiry into the averments aforesaid and to publish in collaboration with the MINISTER OF FINANCE such rules and regulations as required to prohibit or alternatively police such activities;

20.11.2.1 That the BANKS, *inter alia*, be interdicted from continuing or instituting or executing judgments against any client of the BANKS until paragraph 20.11.2 aforesaid is concluded; or as the Honourable Court deems fit under the circumstances.

21. REMOVAL OF LIABILITIES:

21.1 The principles underlying securitisation (irrespective of its reference or use in the financial world as ABCP Conduits, Residential Mortgage-Backed Securitisations, Commercial Mortgage-Backed Securitisations, Asset-Backed Securitisations, Synthetic Securitisations) have one thing in common: they diminish the debt in the books of the original owner.

21.2 The exemption Notice relating to securitisation schemes, 2008, requires that both rights and obligations of the originator must be transferred to the SPV. The requirement that the obligations of the originator must be transferred, leads to the conclusion that the Notice requires a transfer of claims by means of cession and a transfer of duties by means of delegation. For several reasons, delegation is not a suitable method of transfer during securitisation. Foremost among these reasons is that delegation is a form of novation, which means that the claims cease to exist and are replaced with new claims between the debtors and the SPV. Security rights that were ancillary to these claims will then also cease to exist.

21.3 Due to the fact that the BANKS are only allowed to lend what they hold in security (see paragraphs 14, in particular 14.4 above), the loan will only be adjusted by the value that is paid by the debtor. Thus, their security is affected by the loan until such time as the loan has been paid in full or part thereof e.g. monthly instalments. For this reason, the BANKS have, for more than two decades, adjusted their debtors books by selling-off (See paragraphs 17, 17.4 and 17.5 in particular above) their debt into securitisation, thus allowing the BANKS to trade against their full security.

21.4 The application of the above, and the contention in these premises are, that the BANKS lose the rights as claimant due to the second sale, the latter being sold from the SPV to a designated securitisation company. The sale is therefore not at arm's length (see paragraphs 17.5.1 to

17.5.3.) Also see Government Gazette, 4 June 2004 No. 26415, page 53 sub-paragraph (b), "*A traditional or a synthetic securitisation scheme that involves the <u>transfer of revolving assets</u> or the risk relating to such assets to a special-purpose institution shall contain terms and conditions that ensure, amongst other things, ownership…*"

21.5 To illustrate the prejudice and legal consequence of the aforementioned, the affidavit of **LOUIS FREDERICK LOUW** is Annexed hereto as "**NE6**".

21.5.1 The effect of a cession is that the cession is incomplete without delivery of the document that evidences its right to be ceded. Provided, the existence of the ceded right is dependent on that right's incorporation in a document, as with negotiable instruments. (*See: Botha v Lick [1995] 2 All SA 78 (A), 1995 (2) SA 750 (A) 778F-779B*)

21.5.2 Cession of the interest in a claim destroys the cedent's locus standi, but cession of an interest in the result of the litigation does not. A cessionary in an 'out-and-out cession' cannot sue in the name of the cedent. (*See: Portion 1 of 46 Wadeville (Pty) Ltd. v Unity Cutlery (Pty) Ltd [1984] 1 All SA 260 (A), 1984 (1) SA61 (A) And African Consolidated Agencies (Pty) Ltd v Siemens Nixdorf Information Systems (Pty) Ltd [1992] 3 All SA 611 (C), 1992 (2) SA 739 (C) And in the latter statement Goodwin Stable Trust v Duohex (Pty) Ltd [1996] 2 All SA 558 (C), 1998 (4) SA 606 (C)*)

21.6 In conjunction with the aforesaid, further evidence shall be presented in collaboration with paragraph 21.5 above, including the JOINING MEMBERS who support this matter as referenced in annexure "**NE4**" hereto.

21.7 It is submitted that the BANKS have diminished their right and title to institute legal action against a debtor. Nonetheless, with full knowledge of their lack of standing to bring lawful civil proceedings, the BANKS have instituted legal action, obtained judgments and executed against these judgments, thus depriving people of their right to property.

21.8 The severity of the wrongful actions stated above are far-reaching if one considers the content of annexure "**NE6**" against the declarations made in the BANKS financials for the same period. The inference is found at the declaration of debtors (loans) declared by the BANKS. Under the same period that the declarations are made in "**NE6**", the submission is that the difference in declarations is due to securitisation. The BANKS financials, obtained via their websites, are omitted purely due to their volume. Should the same be required, they will be made available.

21.9 It will, in all probability, be submitted by the BANKS that after signature of their terms and conditions (*the contract*), see paragraphs 18 above, what the BANKS do thereinafter has nothing to do with the client. The anticipated response is not only wrong, it is factuality unfounded. It has everything to do with the customer when the BANKS no longer become the owner of the debt and the prospect of self-enrichment on the customer's security is at play.

21.9.1 Firstly, the BANKS' claim cannot be for a debt or liquidated demand. The inference of sale by securitisation has broken the link between the agreement and ownership thereto. It is submitted that the BANKS have no *locus standi*, and if they purport to have, they are required to submit same.
(*ABSA Bank Limited v Studdard and Others* (2011/24206) ZAGO (JHB) 26 (13 March 2012) And *Klerck NO v Van Zyl and Maritz 1989 (4) SA 263 at 275*)

21.9.2 In the United States of America Case of Wells Fargo Bank, N.A. v Farmer, 2008 NY Slip Op 51133(U) [19 Mise 3d

1141(A)] Decided on JW1e 5, 2008 Supreme Court, Kings Cowlty, the Honourable Judge Schack held that "*AMERIQUEST to WELLS FARGO - are voided and cancelled. ARGENT is the owner of the FARMER mortgage loan. Therefore, plaintiff WELLS FARGO's application for an order of reference is dismissed with prejudice. WELLS FARGO does not have* <u>*title to the instant mortgage and lacks standing to proceed in the instant action*</u>*. The Appellate Division, Second Department (Kluge v Fugazy, 145 AD2d 537, 538 [2d Dept 1988]), held that a "foreclosure of a mortgage may not be brought by one who has no title to it and absent transfer of the debt, the assignment of the mortgage is a nullity." Citing Kluge v Fugazy, the Court (Katz v EastVille Realty Co., 249 AD2d 243 [1st Dept 1998]), held that "[p]laintiffs attempt to foreclose upon a mortgage in which he had no legal or equitable interest was without foundation in law or fact. " The Court, in Campaign v Barba 23 AD3d 327 [2d Dept 2005], held that "[t]o establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and the mortgage note, ownership of the mortgage, and the defendant's default in payment*"

21.9.3 Also, in the MERS Decision (*In re: FERREL L. AGARD Case No. 810-77338-reg// In Re Agard 48750818 US Bankruptcy Court New York*) "*... the Debtor argues that the Movant, acting on behalf of U.S. Bank, has failed to establish that it holds an enforceable right against the Property. The Movant's initial response to the Debtor's opposition was that MERS's authority to assign the mortgage to U.S. Bank is derived from the mortgage itself which allegedly grants to MERS its status as both "nominee" of the mortgagee and "mortgagee of record."*

The Movant later supplemented its papers taking the position that U.S. Bank is a creditor with standing to seek relief from stay by virtue of a judgment of foreclosure and sale entered in its favour by the state court prior to the filing of the bankruptcy. The Movant argues that the judgment of foreclosure is a final adjudication as to U.S. Bank's status as a secured creditor and therefore the Rooker-Feldman doctrine prohibits this Court from looking behind the judgment and questioning whether U.S. Bank has proper standing before this Court by virtue of a valid assignment of the mortgage from MERS." and "*...that any member/lender which holds a note secured by real property, that assigns that note to another member by way of entry into the MERS database, need not also assign the mortgage because legal title to the mortgage remains in the name of MERS, as agent for any member/lender which holds the corresponding note. .. This Court does not accept the argument that because MERS may be involved with 50% of all residential mortgages in the country, that is reason enough for this Court to turn a blind eye to the fact that this process does not comply with the law.*" further "*... even if the Movant could show that U.S. Bank is the holder of the Note, it still would have to establish that it holds the Mortgage in order to prove that it is a secured creditor with standing to bring this Motion before this Court.*" Then "*... MERS asserts that it has authority to act as agent for each and every MERS member which claims ownership of a note and mortgage registered in its system. This authority is based not in the statutes or case law, but rather derives from the terms and conditions of a MERS membership agreement. This Court finds that MERS's theory that it can act as a "common agent" for undisclosed principals is not supported by the law. The relationship between MERS and its lenders and its*

distortion of its alleged "nominee" status was appropriately described by the Supreme Court of Kansas as follows: "The parties appear to have defined the word [nominee] in much the same way that the blind men of Indian legend described an elephant – their description depended on which part they were touching at any given time." Landmark Nat'l Bank v. Kesler, 216 P.3d 158, 166-67 (Kan. 2010)." The Honourable Jude Robert E. Grossman finds in his conclusion for the motion and concludes "*For all of the foregoing reasons, the Court finds that the Motion in this case should be granted. However, in all future cases which involve MERS, the moving party must show that it validly holds both the mortgage and the underlying note in order to prove standing before this Court.*"

21.9.1 The consequence of the BANKS not disclosing their securitisations in civil procedures, is a fraudulent abuse of justice, causing unlawful dispossession of property. This was the case in Francis J. Bevilacqua, Third vs. Pablo Rodriguez, Oct. 18th, 2011 where the Massachusetts Supreme Judicial Court ordered foreclosure sales in the commonwealth over the last five years, wholly void. Further, the judgment held that "*a. In holding that Bevilacqua could not make "something from nothing" (bring an action or even have standing to bring an action, when he had a title worth nothing) the lower land court applied and upheld long-standing principles of conveyance., b. a foreclosure conducted by a non-mortgagee (which includes basically all of them over the last*

five years, including the landmark Ibanez case) is wholly void and passes no title to a subsequent transferee, c. where (as in Bevilacqua) a non-mortgagee records a post-foreclosure assignment, any subsequent transferee has record notice that the foreclosure is simply void. d. a wholly void foreclosure deed passes no title even to a supposed "bona fide purchaser" d. The Grantee of an invalid (wholly void) foreclosure deed does not have record title, nor does any person claiming under a wholly void deed, and the decision of the lower land court properly dismissed Bevilacqua's petition. e. The land court correctly reasoned that the remedy available to Bevilacqua was not against the wrongly foreclosed homeowner but rather against the wrongly foreclosing bank and/or perhaps the servicer."

21.10 In the 'Ontario Securities Commission's' recent decision in Coventree Inc. (*in the matter of the securities act, r.s.o. 1990, c. s.5, as amended - and - in the matter of Coventree Inc., Geoffrey Cornish and Dean Tai, 28 September 2011*), it was held by the commission, after a 45 day hearing that, inter alia, "*… failed to meet continuous disclosure obligations and that the conduct of Coventree, Cornish and Tai, in contravening Ontario securities laws, was contrary to the public interest.", "… failed to meet its continuous disclosure obligations by failing to disclose the decision by Dominion Bond Rating Service Limited (DBRS) in January 2007 to change its credit rating methodology, which resulted in a material change to Coventree's business or operations.*", "*… made a misleading statement on April 25*

and 26, 2007 by telling the market that the total U.S. subprime mortgage exposure ("subprime exposure") of its sponsored conduits was 7.4% (the "subprime statement"), and by failing to provide investors with a breakdown of that exposure by conduit and ABCP note series (contrary to subsection 126.2(1) of the Act);" and "*… failed to comply with its continuous disclosure obligations by failing to issue and file a news release, and file a material change report, disclosing liquidity and liquidity-related events and the risk of a market disruption in the days leading up to the disruption in the ABCP market that occurred on August 13, 2007 (contrary to subsections 75(1) and 75(2) of the Act).*"

(See:http://www.newswire.ca/en/story/849619/osc-panel-releases-decision-regarding-coventree-inc-geoffrey-cornish-and-dean-tai-related-to-breaches-of-ontario-securities-act)

In respect to the above, the FIFTH DEFENDANT only published a memorandum to all the BANKS on the 24th of January 2012, a directive (2/2012) requiring the BANKS to disclose all their securitisation transactions. The requirements for compliance does not provide for retrospective reporting. Therefore, the only way to establish whether a debt has been securitised, is to consider annexure "**NE6**" with the financial reports of the BANKS. This non-disclosure is explained in detail by the FIFTH DEFENDANT in Annexure "**NE8**" hereto.

21.11 The application of securitisation is not restricted to fixed property alone. Its application is wide and touches every aspect of debt, be it secured or not, or be it an overdraft, credit card or other type of loan.

21.12 The case of ABSA Bank Limited v Lynette Van Eeden and Others (49918/2009) [2011] ZAGP (JHC), in execution procedures, the Sheriff/ Judgment Creditor is to obtain a copy of the National Registrar of Vehicles, so as to show the rights/ entitlement that the BANKS have registered on the said vehicle. In the securitisation process, these rights have changed, but it is unlikely that this was changed with the National Registrar of Vehicles.

21.13 The Constitution, Section 25 and in particular Section 25(1) grants particular protection against arbitrary deprivation of property. In these

premises, particularly the affidavit annexed herein as "**NE6**" and the evidence contained in annexure "**NE7,**" together with the overwhelming international case law cited above, it is clear that the BANKS have acted *mala fide* causing civil action to be instituted in their own name, where they had no *locus standi,* thus causing prejudice by arbitrarily depriving the people from property.

21.14 Due to technical aspects or non-compliance with court rules, the South African Courts have failed to realise the ramifications of securitisation, dismissing several actions across the country. This is principal to this case, as is the continuation by the BANKS to disregard their defective actions. Such actions can and will only lead to further arbitrary deprivation of property and evictions. In this regard see the unreported case of ABSA Bank Ltd v M A Noad & One Other, in re – Bond, Case Number 20394/1, Western Cape High Court, Cape Town at 15 at pg. 2 "*… I must say I have great difficulty understanding and articulating what their second defendant submits is a bona fide defence…*" and at 5, pg. 3 "*The submissions made… is so far fetching and ludicrous that I do not intend attempting to repeat them.*"

21.15 To prevent further arbitrary deprivation of property, the BANKS are to be precluded by way of interdict from executing against judgments already obtained. Further, to suspend all current action before the Courts until such time as the FIFTH RESPONDENT has implemented the required rules to secure proper disclosure in collaboration with the Department of Justice and Constitutional Development. And to rectify the application procedure in civil cases where the BANKS are the Plaintiff/ Applicant.

22. MISLEADING CONTRACTS:

22.1 Regarding paragraphs 15, 16 and 17, the application of the aforesaid paragraphs (more fully stated in paragraphs 19 to 21 above), the presumption can be made that BANKS made loans where the BANKS were not in a liquid financial position to do so, for the following reasons;

22.1.1 The BANKS, being reasonably aware that they could not fulfil their obligation in terms of the loan, pre-empted that they will sell-off the loan into securitisation; wherein it shall gain the necessary liquidity to make good on its obligation in terms of the loan;

22.1.1.1 Having been aware of the notion aforesaid, the BANKS negated to inform the client of the material fact that the BANKS *locus standi* will be or could be that of intermediary or administrator as the case might be. The notion of informing a consumer of the prevalent facts is similar to the requirements set-out and applied in the short and long term insurance industry legislation, and that of the Estate Agent legislation. The latter legislation provides for the explicit notification to the client as to its 'intermediary position' and commission earning and fees.

22.1.2 At the inception of the loan, the BANKS reasonably foresaw, or were reasonably aware, that they could not sustain or grant such loans based on available liquid money. Despite having this knowledge, they failed to warn the client that in the event where the third party ('SPV' or 'securitisation company') were to be placed in liquidation, or

fails in trade, it might cause a 'bank run' resulting in negative exposure and possible loss of the clients assets.

22.1.2.1 Notwithstanding the above, the SPV or Securitisation Company is not subjected to the Banks Act or the South African Reserve Bank Act. Therefore, it does not gain from the protection offered by these Acts. Furthermore, the principle of securitisation does not purport to include individual transactions. In fact, it comprises of packages consisting of several loans of substantial value. In an event like in paragraph 22.1.2 would the BANKS be able to absorb such impact? No provision is made in legislation or rule to protect the consumer from such occurrences.

22.1.3 A loan transaction is based on the premise that the lender is capable of fulfilling its obligation to the loan. Vis-à-vis the borrower is to pay in 'liquid money' or 'lawful money'. The presumption is, and the BANKS allude to this in their contract, that they do loan liquid money. However, the contention in these proceedings is that the BANKS do not. Their loan is based on "I.O.U" notes or "promises to fulfil their obligation later". It is submitted that the loan agreement is a misrepresentation of the facts which causes prejudice to the borrower. See annexure "NE7" hereto.

22.2 What transpires, or what the BANKS do after the contract is concluded, has everything to do with the borrower if his claim, security and defence is at risk or potentially at risk. The customer has the right to know the BANKS legal position to act against them or alter their agreement.

23. Plaintiff will give notice of these proceedings in terms of Rule 16A of the Uniform Rules of Court, but will also ensure that notice of these proceedings is given to all other known interested and affected organisations in civil society.

24. **WHEREFORE** the plaintiff claims for an order in the following terms:

24.1 With respect to paragraphs 19 (19.1 to 19.11) read with paragraphs (14 and 15) above dealing with seigniorage;

24.1.1 Declaring that the legislative authority granting the BANKS authority to benefit or to cause benefit from deposits, of whatever nature, is inconsistent with the Constitution and therefore invalid;

24.1.2 That the declaring of invalidity, and the relief in consequence thereof, be suspended for such a period the Honourable Court finds just and equitable, to enable the legislature to pass appropriate legislation to regulate the BANKS fees relating to deposits and account usage;

24.2 In respect of paragraphs 20 (20.1 to 20.11) read with paragraphs (16) dealing with fractional reserve banking;

24.2.1 Declaring that the legislative authority granting the BANKS authority to benefit or to cause benefit from Fractional Reserve Banking, of whatever nature, is inconsistent with the Constitution and therefore invalid;

24.2.2 That the declaring of invalidity, and the relief in consequence thereof, be suspended for such a period the Honourable Court finds just and equitable, to enable the legislature to pass appropriate legislation to regulate the BANKS usage of the Fractional Reserve Banking system;

24.2.3 That the FIFTH DEFENDANT be ordered to investigate the BANKS use of the Fractional Reserve Banking system, and to make such recommendations and findings to assist it in giving force and effect to paragraph 23.2.2 above, and make such findings available to the general public;

24.3 In respect to paragraphs 21(21.1 to 21.15) read with paragraphs (17) dealing with securitisation;

24.3.1 Declaring that the legislative authority granting the BANKS authority to benefit, or to cause benefit from securitisation, of whatever nature, is inconsistent with the Constitution and therefore invalid;

24.3.2 *In the alternative;* declaring that the process of securitisation be declared inconsistent with the Constitution, and therefore the BANKS are to give prior notice to the consumer of its intention to enter into such securitisation scheme prior to it doing so, and to declare any proceeds or profit it may be making, and to declare what the BANKS' position will be after such securitisation has taken place, (e.g. administrator or agent;)

24.3.3 That the declaring of invalidity, and the relief in consequence thereof, be suspended for such a period the Honourable Court finds just and equitable, to enable the legislature to pass appropriate legislation to regulate the BANKS usage of securitisation in respect of the consumer;

24.3.4 That all pending civil matters against any debtor of the BANKS, and those in the process of execution, be suspended to enable an enquiry to determine whether the BANKS have/ had the appropriate *locus standi* to bring such actions.

24.4 In respect of paragraphs 21(21.1 to 21.15) read with paragraphs (18 and 22) dealing with securitisations and contracts;

24.4.1 That all pending civil matters against any debtor of the BANKS, and those in the process of execution, be suspended to enable an enquiry to determine whether the BANKS have/ had the appropriate *locus standi* to bring such actions.

24.4.2 That the common law of contract be extended to include that any company or alike who deals in, or contemplates dealing in securitisation, make their intentions clear within the contract. Further, they are to disclose what their legal standing will be after such transaction has been concluded; and if it is to benefit, how such benefit shall affect the consumer.

24.5 In respect of paragraphs 19(19.1 to 19.11) read with paragraphs (18 and 22) dealing with fractional reserve banking and contracts;

24.5.1 That the declaration of invalidity, and the relief in consequence thereof, be suspended for a period as this Honourable Court finds just under the circumstances, to enable the legislature to pass appropriate legislation to regulate the '*business of the bank*' to safeguard the consumer vis-à-vis and/ or enable the sharing in profits and/ or restructuring of relevant loans;

24.6 Cost:

24.6.1 Cost of suit against the BANKS;

24.6.2 Cost of suit against the FIFTH DEFENDANT, if it defends the action, the cost to be that of the BANKS and the FIFTH

DEFENDANT jointly and severally between the parties, the one to pay, the other to be set free.

24.6.3 If the Honourable Court so finds, cost in these proceedings in respect of paragraphs 24.6.1 or 24.6.2, be reserved until the Constitutional Court finding on Certification.

24.7 Further and/ or alternative relief.

DATED AND SIGNED AT **MIDRAND** ON THE 19TH OF **JULY 2012**

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