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COURT	COURT OF QUEEN'S BENCH OF ALBERTA IN BANKRUPTCY AND INSOLVENCY	
JUDICIAL CENTRE	CALGARY	
PROCEEDING	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED AND IN THE MATTER OF THE CHOCOLATERIE BERNARD CALLEBAUT PARTNERSHIP	
DOCUMENT	**AFFIDAVIT OF BRIAN BECK**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Norton Rose Canada LLP 400 3rd Avenue SW, Suite 3700 Calgary, Alberta T2P 4H2 CANADA Phone: +1 403.267.8222 Fax: +1 403.264.5973 Attention: Howard A. Gorman File No. 01141834-0001	

Affidavit of Brian Beck

Sworn on February 26, 2013

1. I, Brian Beck, am the President of Cococo Chocolatiers Inc. ("**Cococo**"), formerly 1563181 Alberta Ltd. As such I have personal knowledge of the statements made in this affidavit, except where based upon information and belief, in which case I verily believe the same to be true.

2. I make this affidavit to provide additional information and background to this Court and the creditors generally. Based upon the information set out herein, Cococo is concerned Barnard Callebaut, or any party or creditor claiming through him, includng the Applicant, Invesco Mortgage Mortgage Inc. ("**Invesco**") are not properly creditors of the

bankruptcy estate and should not participate in any distributions through Inveco's settlement proposal or otherwise.

3. On October 12, 2012, a letter was sent to Invesco's counsel explaining, among other things, that a settlement like that now being proposed by Invesco creates an inherent conflict between Cococo / participating creditors and non-participating creditors (see **Exhibit 1**).

4. This affidavit is organized as follows:

Paragraphs	Subject Matter
5-21	Introduction and Summary
22-26	Identification: My role and Cococo's role
27	Defined Terms
28-35	Major transactions of CBC Group during the period 2006-2008
36-59	Financing transactions (loans) during the period 2006-2008
60-87	Cash flows
88-96	Summer 2009 / 2009 Dividends
97-99	Preliminary Conclusions: Liquidity and Solvency
100-103	Quantification issues (a): Proof of Claim of Bernard Callebaut
104-108	Quantification issues (b): The 2007 Dividend
109-112	The personal role of directors / What caused the cash problems?
113	Conclusion

Introduction and Summary

5. Bernard Callebaut claims to be an unsecured creditor of his bankrupt company, Chocolaterie Bernard Callebaut Partnership (**"CBCP"**). He claims he is owed $4,068,101 (see **Exhibit 2**, the proof-of-claim document). That amount exactly equals the amount of certain dividends that were purportedly declared by the two directors of CBCP—Bernard Callebaut and

his wife, Francesca Callebaut—as being payable by the business to Bernard Callebaut, effective June 30, 2009 (the **"2009 Dividends"**). A year later the business went bankrupt.

6. The Proof of Claim of Bernard Callebaut inextricably depends upon the validity of the 2009 Dividends. Via bookkeeping entries rather than cash payments, the amount of the disputed dividends was credited in the financial statements of CBCP to the shareholder account of Bernard Callebaut. These journal entries thus purported to transform equity into corporate debt owed to Bernard Callebaut personally, who is now claiming that debt from the company that he and his wife managed into bankruptcy the following year.

7. Significantly, if the 2009 Dividends were not validly declared, then rather than being a creditor who was owed money by the business at the time of its bankruptcy, Bernard Callebaut would instead be a debtor who owed money to the business at that time.

8. The validity (or invalidity) of the 2009 Dividends depends, among other things, upon whether CBCP was adequately liquid and solvent on the date of their declaration.

9. My primary purpose in swearing this affidavit is to summarize information relevant to the question of whether CBC Group had sufficient liquidity and solvency to declare the 2009 Dividends in the amount of $4,068,101, effective June 30, 2009.

10. Questions of liquidity and solvency overlap in the financial affairs of CBC Group, as reviewed later in this affidavit. That history and the related paperwork is complex and voluminous. I therefore summarize the key facts relating to liquidity and solvency as of June 30, 2009 in paragraphs **11-21** immediately below, by way of introduction, and then only subsequently review the detail (in terms of information sources and exhibits) that supports my summary.

11. The liquidity and solvency issues effectively merge in answering the question: why did CBC Group go bankrupt? The CBC Group went bankrupt because Bernard and Francesca Callebaut borrowed millions of dollars (certainly more than $5 million) against the credit of the business from Invesco (the company which now stands alongside Bernard

Callebaut claiming monies under the Proof of Claim of Bernard Callebaut) while at the same time paying or diverting to themselves millions of dollars in cash (again, more than $5 million) for personal consumption. The cash transactions choked the company's liquidity and the loans crippled its solvency.

12. On the liquidity side, the CBC Group experienced one cash flow crisis after another during the period 2008-2010. Even ignoring the 2009 Dividends, the business was regularly unable to pay its debts as they came due. Spikes in the cash-flow problem are clearly evident in the periods April-June 2008, September 2009, January-February 2009, and then consistently after that, and there is even clear evidence of a cash-flow crisis within 20 days of the purported effective date of the 2009 Dividends.

13. During this period of continued cash-flow crisis, net cash was paid or diverted by CBC Group to Bernard Callebaut and Francesca Callebaut personally totalling at least $5.543 million (payroll plus net shareholder payments). The company could not afford such cash payments to its two executives and its namesake shareholder, particularly when, during this same period, the operating results of the business were sharply declining. The business had a net operating loss for fiscal 2009 (July 1, 2008 to June 30, 2009) of ($1,165,271), immediately prior to the date of the 2009 Dividends, and then lost money again during fiscal 2010. Among other things, operating results during that period absorbed the effects of a very large 28% price increase instituted by Bernard Callebaut in September 2008. Sales volumes fell consistently after that price change (which Cococo rolled back in 2011).

14. When the 2009 Dividends were purportedly declared, CBCP was in default with ATB. ATB consented to the 2009 Dividends after consultation with CBC Group's auditors, but the context was that declaring the 2009 Dividends would result in zero cash actually being paid out of CBC Group to Bernard Callebaut. No evidence is available to Cococo to suggest that anybody involved at the time—not the auditors, not ATB, and not Bernard Callebaut or

Francesca Callebaut—analyzed the dividend transaction in terms of its impact upon other stakeholders such as CBCP's other creditors.

15. In 2007-2008, Bernard Callebaut and Francesca Callebaut burdened CBCP with liability for personal loans from Invesco. There were apparently three such loans. The first was for $1.325 million and it flowed through CBCP's books and records between July 2007 and January 2008 (the **"First Invesco Loan"**). The second was for $6 million (the **"Second Invesco Loan"**); that borrowing occurred in 2008 and its full import became known only in approximately February 2010. The third was for $500,000 (the **"Third Invesco Loan"**); that borrowing occurred in 2008, too, and it came to light in early 2009. $2.581 million was already outstanding under the Second Invesco Loan as of the alleged effective date of the 2009 Dividends, and that number had climbed to more than $4.4 million by August 3, 2010, the date of the receivership and bankruptcy (see the Third Report, **<u>Exhibit 49</u>** at paragraph 15).

16. Various details regarding the First Invesco Loan are unknown to me, but it is clear that the Second Invesco Loan and the Third Invesco Loan were not disclosed to ATB by Bernard Callebaut and Francesca Callebaut, but rather were only discovered by ATB as events unfolded. These loans were undertaken secretly and violated the banking relationship between CBCP and ATB.

17. The Second Invesco Loan likewise only became known or fully known <u>to CBCP's auditors</u> in early 2010, months <u>after</u> the auditors had communicated with ATB to permit (for tax reasons) the declaration (while prohibiting the actual payment) of the 2009 Dividends.

18. The 2009 Dividends were <u>not</u> documented contemporaneously with their purported declaration on June 30, 2009 by CBCP's board of directors—the two directors being Bernard Callebaut and Francesca Callebaut. Instead, in early 2010, CBCP's auditors wrote to CBCP's lawyers asking to have written resolutions prepared. However, by this time, CBCP's lawyers were already advising CBCP about insolvency issues.

19. All of these events unfolded in a business context that involved, over a long period of time, Bernard Callebaut and Francesca Callebaut improperly charging various personal expenses to CBCP, and improperly taking cash belonging to the business. For example: nannies for their children and personal housekeepers were put on payroll; all of their personal credit-card charges were routinely paid for directly by the company but then included personal charges were not charged back to Bernard Callebaut's shareholder accounts; and, company products were sold for cash to employees at the Callebauts' direction, with the cash then being kept by the Callebauts personally.

20. At the peak of such activities, in February 2010, Bernard Callebuat was diverting payments from a customer of CBCP into a new bank account that he opened outside the purview of ATB's supervision. Cheques properly negotiable by CBCP were deposited by Bernard Callebaut into that non-CBCP account (I suspect with the goal of funding the Second Invesco Loan), and Bernard Callebaut gave instructions to his accounting staff to make unsubstantiated "credit note" entries for processing to the CBCP customer's account in the accounting system, thereby eliminating the effect of this cash diversion from CBCP's records. All of this was detected by CBCP's auditors in early 2010 at or about the same time that the auditors came to appreciate the existence or the full scope of the Second Invesco Loan. The auditors then resigned.

21. In summary, the 2009 Dividends were ostensibly declared to Bernard Callebaut, by Bernard Callebaut and Francesca Callebaut, without being documented by them contemporaneously, at a time when: the business was experiencing serious cash flow problems that never resolved; the business was losing money in the context of large price increases implemented during 2008 by Bernard Callebaut; Bernard Callebaut and Francesca Callebaut had borrowed very large sums ($1.325 million, $500,000, and eventually also $4.8 million) on the credit of the business but kept their borrowings secret from their auditors and the bank; cash flows were consistently impacted by large net cash amounts paid out by the

business to Bernard Callebaut and Francesca Callebaut, totalling $5.743 million in 2007-2009; Bernard Callebaut and Francesca Callebaut were managing CBCP's financial affairs such that the business was wrongly burdened by their personal expenses and such that they could take cash from the business without accounting for it.

Identification

22. I am a director of Cococo and also its President, but I am not formally employed by Cococo. My employment is with an affiliated company, G.L. Black Holdings Ltd., for which I am Chief Operating Officer and Corporate Counsel. In that capacity, I oversee the management of a group of privately-owned companies involved in manufacturing, distribution, oilfield services, commercial real estate, construction, and oil and gas.

23. My education includes a Bachelor of Arts degree from the University of Calgary (1988), a Bachelor of Laws degree from Dalhousie Law School (1993), a Master of Laws degree from the University of London (1995), and also time spent in doctoral residency at Columbia Law School (1995-96). I was called to the Alberta Bar in 1998 and have since that time remained an active and practising member of the Law Society of Alberta.

24. I worked for CBCP for approximately 2 ½ years during the period 2003-05. My title was Vice President Operations and Corporate Counsel. I have been employed with G.L. Black Holdings Ltd. since 2006.

25. Cococo purchased as a going concern the business of the now-bankrupt CBCP, effective October 27, 2010. As purchaser, Cococo acquired many business records that were maintained by CBCP and its affiliates in the ordinary course of their former business, and Cococo also has employed or now employs many employees who were formerly employed by CBCP. The books and records acquired by Cococo are in many instances incomplete, and many files were left in disarray by management of the former business.

26. CBCP was formed as a corporate partnership between 1054796 and CBC Ltd., and the corporate shareholder of both 1054796 and CBC Ltd. is 1013988. As reflected in

various financial statements to which I will refer in this affidavit, 1013988 was typically described historically as carrying on business as the "Chocolaterie Bernard Callebaut Group" (the **"CBC Goup"**). The CBC Group structure was updated in 2003 leaving Bernard Callebaut owning 100 Class A Voting Common Shares and The Bernard Callebaut Family Trust owning 1000 Class A Preferred Shares. A depiction of the structure from CBCP's records is attached as **Exhibit 3**.

Defined Terms

27. For convenience I set forth below definitions that correspond to capitalized terms used in this affidavit:

Capitalized Term	**Meaning**
1013988	1013988 Alberta Ltd.
1054796	1054796 Alberta Ltd.
2006 ATB Loan	The loan arrangement between ATB and CBCP originally extended pursuant to a commitment letter dated June 29, 2006, a copy of which is Exhibit D to the Wells Affidavit and which is reproduced as **Exhibit 9** to this affidavit.
2007 ATB Loan	The loan arrangement between ATB and CBCP originally extended pursuant to a commitment letter dated November 20, 2007, a copy of which is Exhibit E to the Wells Affidavit and which is reproduced as **Exhibit 10** to this affidavit.
2007 Dividend	See paragraphs 104-108. This is a $2,630,351 dividend purportedly declared as "paid" in the 2007 Financial Statements ("Consolidated Statement of Deficit" at page 3).
2006 Financial Statements	The Consolidated Financial Statements of 1013988 Alberta Ltd. (operating as The Chocolaterie Bernard Callebaut Group) dated June 30, 2006, a copy of which is attached to this affidavit as **Exhibit 4**.
2007 Financial Statements	The Consolidated Financial Statements of 1013988 Alberta Ltd. (operating as The Chocolaterie Bernard Callebaut Group) dated June 30, 2007 (restated), a copy of which is attached to this affidavit as **Exhibit 5**.
2008 Financial Statements	The Consolidated Financial Statements of 1013988 Alberta Ltd. (operating as The Chocolaterie Bernard Callebaut Group)

Capitalized Term	Meaning
	dated June 30, 2008, a copy of which is attached to this affidavit as **Exhibit 6**.
2009 Dividends	Defined in paragraph 5. These are the capital dividends totalling $3,323,101 and the taxable dividends totalling $745,000, purportedly declared with effect as of June 30, 2009, and being $4,068,101 in the aggregate. The amounts are reported in the 2009 Financial Statements (**Exhibit 7**) ("Consolidated Statements of Retained Earnings") at page 5. The pertinent corporate resolutions are at **Exhibit 50**.
2009 Financial Statements	The Consolidated Financial Statements of 1013988 Alberta Ltd. (operating as The Chocolaterie Bernard Callebaut Group), Year Ended June 30, 2009, Auditor's Report dated October 23, 2009 except as to Note 16 which is as of February 11, 2010, a copy of which is attached to this affidavit as **Exhibit 7**.
2009 Draft Financial Statements	Draft Consolidated Financial Statements of 1013988 Alberta Ltd. (operating as The Chocolaterie Bernard Callebaut Group), Year Ended June 30, 2009, draft Auditor's Report dated November 5, 2009, a copy of which is attached to this affidavit as **Exhibit 8**.
ATB	Alberta Treasury Branches, CBC Group's bank from 2006 until the receivership and bankruptcy in 2010.
CBC Group	See paragraph 26. The corporate group comprising 1013988, the owner of both CBC Ltd. and 1054796, which are the two corporate partners of CBCP.
CBC Ltd.	Chocolaterie Bernard Callebaut Ltd.
CBCP	Chocolaterie Bernard Callebaut Partnership, the partnership entity that operated the now-bankrupt business
Cococo	See paragraph 1. Cococo Chocolatiers Inc., formerly 1563181 Alberta Ltd.
Deloitte	Deloitte & Touche, Inc., initially a financial advisor to CBCP in the period prior to the receivership, subsequently receiver-manager of CBCP, and currently trustee of these bankruptcy proceedings.
First Invesco Loan	See paragraphs 41-50. A $1.325 million loan facility from Invesco that flowed through the books of CBC Group in fiscal 2007 and 2008.
Head Office and Factory Building and	See paragraph 33. The building and lands municipally described as 1313 – 1 Street S.E., Calgary, Alberta, and also

Capitalized Term	Meaning
Lands	as 133 – 13 Avenue S.E., Calgary, Alberta. Upon the lot is situate a 4-storey building which houses a retail store, administrative offices, dry goods storage, a factory, a shipping/receiving dock, several "strip mall" retail bays, and a parking lot.
Invesco	Invesco Mortgage Inc., a party to these proceedings.
Invesco Mortgage	See paragraph 53. This is a mortgage claim against the Trans Canada Lands agreed to by Bernard Callebaut and Francesca Callebaut in support of their personal indebtedness to Invesco as recorded in the Second Invesco Loan.
McCaffrey Transaction	See paragraphs 29-30. The purchase by CBC Group of four retail stores in Calgary formerly operated by Don McCaffrey, and as described in Note 3 of the 2007 Financial Statements (page 8).
McCaffrey Transaction Financing	See paragraph 37. Two loan facilities as recorded in the 2006 ATB Loan as having been extended by ATB in support of the McCaffrey Transaction, both being term reducing loans—one for $5 million and one for $500,000; as restated in the 2007 ATB Loan at the amounts of $4,747,780.63 and $387,406.52, respectively.
Operating Line Financing	The revolving operating line facility (aka "line of credit") extended to CBCP from time to time, initially by TD Bank and capped at $1.75 million (see Note 9 (page 12) to the 2006 Financial Statements), and then later by ATB to CBC Group under both the 2006 ATB Loan and the 2007 ATB Loan, in both cases capped at $2.5 million, and in all cases subject to margining requirements that defined the actual borrowing levels permitted at any given time.
Original Term Debt	See paragraph 37.
Second Invesco Loan	See paragraphs 51-57. A $6 million loan facility from Invesco as initially memorialized in a financing proposal outline dated May 12, 2008 addressed to Bernard and Francesca Callebaut as Borrowers, a copy of which is attached as **Exhibit 11**. The loan facility was apparently later amended by means of an "addendum" dated May 18, 2009, but Cococo does not possess a copy of this document. The addendum presumably extended the scope of the security support for the Second Invesco Loan to include property corporately owned by 1054796, including the Trans Canada Lands.
Third Invesco Loan	See paragraph 59. A $500,000 loan facility from Invesco as memorialized in a financing proposal outline dated June 6,

Capitalized Term	Meaning
	2008 addressed to "1254769 Alberta Ltd. and B & F Callebaut" as Borrowers, a copy of which is attached as **Exhibit 12**.
Third Report	Third Report of the Court-Appointed Receiver and Manager of Chocolaterie Bernard Callebaut Partnership, by its Managing Partner, Chocolaterie Bernard Callebaut Ltd., 1013988 Alberta Ltd., Chocolaterie Bernard Callebaut Ltd. and 1054796 Alberta Ltd. dated February 3, 2011 and prepared by Deloitte, a copy of which is attached as **Exhibit 49**.
TD Bank	TD Commercial Banking, the lender to CBC Group before ATB, and which was paid out as contemplated by the 2006 ATB Loan.
Trans Canada Lands	See paragraph 31. A parcel of predominantly agricultural lands identifiable as being 191.58 acres more or less, Portion of Section 34, Township 24, Range 4, Meridian 5, as depicted in the appraisal document dated July 5, 2007 attached as **Exhibit 13**.
Wells Affidavit	The affidavit of Aubrey G. Wells in these proceedings sworn July 30, 2010.

2006-2008: Major Transactions

28. For a business of its size, CBC Group experienced—during the period 2006 to 2008—a series of large financial transactions, being the McCaffrey Transaction, the purchase of the Trans Canada Lands, and the Sale of the Home Office and Factory Building and Lands

(a) McCaffrey Transaction

29. Effective the last day of its 2006 fiscal year, CBC Group purchased the Calgary-based business formerly owned and operated by Don McCaffrey. The transaction is recorded, among other places, in the CBCP financial statements for fiscal 2006, 2007, and 2008: see Note 3 (page 8) of the 2006 Financial Statements; see Note 3 (page 8) to the 2007 Financial Statements; and see also the Consolidated Statement of Cash Flows (page 5) to the 2008 Financial Statements ($691,290 "Repayments of long-term debt"). The McCaffrey Transaction

involved the purchase by CBC Group of four "Chocolaterie Bernard Callebaut" dealer locations in Calgary from Don McCaffrey.

30. The purchase price for the McCaffrey Transaction was $5,130,719, as recorded in the financial statements. Part of that price was financed by a vendor take-back loan. The 2006 Financial Statements record the payment terms in Note 11 as follows:

> The vendor take-back loan with a face value of $1,105,000 is non-interest bearing, is repayable in three annual installments of $368,333, is secured by real property and all present and after acquired property of the Company, subject to the prior charge of the Alberta Treasury Branches. The loan has been recorded at the estimated fair value computed using an imputted rate of interest of 7.5% per annum compounded annually. The loan matures in January 2009.

(b) Purchase of the Trans Canada Lands

31. In or about the late summer of 2007, CBC Group (via 1054796 as registered owner) committed to purchase lands located immediately adjacent to (on the north side) of the Trans Canada highway west of Calgary (the **"Trans Canada Lands"**). At the time of this purchase (which closed November 30, 2007—see paragraph 48) CBC Group had not paid out the vendor take-back financing mentioned in paragraph 29-30 above. The price of the lands was $4,841,000, although a higher capitalized value was eventually recorded in the 2008 Financial Statements. In the fall of 2010 and in early 2011, Bernard Callebaut made statements to the media, in support of his efforts to raise funds for a new business, to the effect that the Trans Canada lands were purchased so that CBC Group might one day relocate its operations to those lands and also operate its own dairy farm there (see, for example, the transcript at **Exhibit 14**).

32. The financing for the Trans Canada Lands purchase was complex in both banking and accounting terms, and is separately examined in paragraphs 38-39 below.

(c) Sale of the Head Office and Factory Building and Lands

33. In June of 2008, CBC Group (via 1054796 as registered owner) sold the Head Office and Factory Building and Lands. In the 2006 Financial Statements, the net book value of the land and buildings comprising the Head Office and Factory Building and Lands is recorded as $3,185,092 ($1,059,703 as "Land" and $2,125,389 as "Buildings"), and there was only a small mortgage remaining on that property, recorded in the amount of $514,375. The market value of the Head Office and Factory Building and Lands rose dramatically over the years. The property was ultimately sold for $11.4 million, triggerring a very large capital gain for the business when the transaction closed on June 23, 2008—see paragraphs 72-73.

(d) Major Transaction Summary

34. To summarize, the major transactions undertaken by CBCP in 2006-2008 were as follows:

a. June 30, 2006 – McCaffrey Transaction – price $5,130,719.

b. Summer 2007, closed November 1, 2007 – Purchase of Trans Canada Lands – price $4,841,000.

c. June 23, 2008 – Sale of Home Office and Factory Building – price $11.4 million as compared to net book value of $3,185,092 and existing mortgage of $514,375.

35. On the face of it, the difference between the cash price paid upon the sale of the Home Office and Factory Building and Lands, on the one hand, and the prices paid for the McCaffrey Transaction plus the purchase price of the Trans Canada Lands, on the other hand, *i.e.* $11.4 million - ($5,130,719 + $4,841,000 = $9,971,719) = $1,428,281, would tend to suggest a net infusion of cash to CBC Group during the period outlined. However, this arithmetic proves false in the financial affairs of CBC Group.

2006-2008: Loans

(a) ATB Loans

36. As recorded in the 2006 Financial Statements, TD Bank was formerly CBC Group's bank. The relationship between CBC Group and TD Bank deteriorated in approximately 2003 when TD Bank placed CBCP into default for failure to maintain its required reporting to the bank, and accordingly assigned the account to its "special loans" division.

37. CBCP obtained new bank financing from ATB dated June 29, 2006 (the **"2006 ATB Loan"**) . The 2006 ATB Loan identifies loan facilities that were to replace the facilities formerly provided to CBCP by TD Bank—*i.e.*, (i) the ordinary-course Operating Line Financing, and (ii) some modest term debt associated with equipment and the financing of the Head Office and Factory Building and Lands (the **"Original Term Debt"**). The 2006 ATB Loan also describes a new loan facility to finance the McCaffrey Transaction (the **"McCaffrey Transaction Financing"**). The ATB Operating Line was capped at $2.5 million, the ATB agreed to re-finance the Original Term Debt as part of establishing a new term reducing loan in the amount of $5 million, and the McCaffrey Transaction Financing was embedded within that same $5 million term loan but also reflected in a separate term reducing loan in the amount of $500,000. The sum of the banking, callable, and long-term debt load of CBCP therefore rose from $3,202,589 as reported for fiscal 2005 (see the comparative column in the 2006 Financial Statements) to $7,832,503 as reported for fiscal 2006 in those same statements.

38. In 2007, ATB issued a further loan commitment to CBCP in the form of a commitment letter dated November 20, 2007 (the **"2007 ATB Loan"**). The terms of the 2007 ATB Loan are in many respects similar to the terms of the 2006 ATB Loan in that it restates the Operating Line facility, the Original Term Debt Facility, and the McCaffrey Financing Facility. However, the 2007 ATB Loan also established a new facility (the **"Trans Canada Lands Facility"**) as follows:

Facility #4 – Non-Revolving Reducing Loan Facility – Cdn. $5,500,000.00

- Facility #4 is available by way of Prime-based loans in Canadian dollars.
- Facility #4 is to be used to provide financing of the purchase of 191.58 acres and reimburse Bernard and Francesca Callebaut for the 964020 Alberta Ltd. vendor take back payout
- Facility #4 is available by way of multiple draws on or before December 14, 2007, subject to the notice periods provided hereunder. Any amount not drawn down at that date will be cancelled and no longer available to Borrower.
- Facility #4 is non-revolving. Amounts repaid may not be reborrowed.

39. The 2007 ATB Loan effectively contemplated a sort of "bridge financing" of CBCP to carry it from one large financial event which already had financing in place in respect of it (*i.e.* the McCaffrey Transaction), through to another contemporaneous and very large transaction (*i.e.*, the purchase of the Trans Canada Lands), and with such events also occurring in anticipation of the sale of the Head Office and Factory Building and Lands. The "bridging" quality of the 2007 ATB Loan is evident in the following terms:

Facility #4:

- Facility #4 is payable in full on demand by Lender but in any event no later than October 31, 2008 (the "Facility #4 Maturity Date")
- Borrower shall make monthly interest payments on the last day of each month commencing on the last day of the month following initial advance.
- Borrower shall reduce the advanced proceeds of Facility #4 by $3,100,000 from sale proceeds of the 1313 – 1st Street SE Calgary property, with the remaining balance reducing monthly, plus interest, in full within 60 months.
- In the event the Borrower does not have a firm sale agreement, satisfactory to the Lender, for the 1313 – 1st Street SE Calgary property by June 1, 2008, $500,000.00 will be due and payable as a principal lump sum payment and thereafter, semi-annually commencing January 2, 2009.

(b) June 30, 2007 – Overlap of ATB and Invesco financings

40. Commencing in approximately July 2007, the business of CBC Group experienced complicated and overlapping debt financings as provided by ATB, the primary lender, and Invesco, a secondary lender linked to Bernard Callebaut and Francesca Callebaut personally.

41. The 2007 Financial Statements disclose the following as a subsequent-event note:

> **17. Subsequent events**
>
> The Company has obtained a term loan in an amount of $1,325,000 bearing interest at 15.5% per annum, repayable in two instalments, $735,000 on November 30, 2007 and $590,000 on July 30, 2008. The loan is secured by a general security agreement on all present and after acquired property of the Company, and a first charge on the real property of the Company, as (*sic*) assignment of the rents and leases on the real property, and a first charge on real property of the shareholder, Officer and Director. The proceeds from the term loan have been used in part to repay the vendor take-back loan.

42. The 2007 borrowing of $1.325 million at 15.5% interest from Invesco (the **"First Invesco Loan"**) is also recorded in the minute book of 1054796. The relevant resolutions are attached as **<u>Exhibit 15</u>**.

43. In my experience, the 15.5% interest rate of the First Invesco Loan is very high. As of July 1, 2007 (the date of the First Invesco Loan), the Bank of Canada reported prime rate for commercial lenders (monthly) to businesses as 6.25%. See also the 7.5% interest rate of the McCaffrey Transaction vendor take-back loan noted at paragraph 30 above.

44. The funds borrowed under the First Invesco Loan were disbursed as follows (see **<u>Exhibit 16</u>**):

a. $267,099.49 was paid to Bernard Callebaut personally. Of this amount, $236,442.50 was described as a "Cash Injection Correction", $15,000.00 was described as "Renewal Fees Existing Loan", and $15,656.99 was described as "Correct Deposit of Remaining Restricted Cash".

b. $250,000.00 was disbursed to "2nd Lepage Deposit".

c. $700,803.31 (plus $20,863.35 in legal fees) was disbursed to pay off the vendor take-back financing on the McCaffrey Transaction and recorded as Restricted Cash paid disbursed to CBCP's legal counsel.

d. The remaining $86,253.80 ($20,863.35 + $75,000.00 + $5176.35 + $1077.50 + $5000.00) was disbursed to pay various other legal fees, financing fees, and costs.

45. The uses to which the First Invesco Loan was put as documented in the accounting system of CBCP overlap with the expected uses of the 2006 ATB Loan and the 2007 ATB Loan, according to their terms. Both of those ATB loans contemplated that ATB would finance the McCaffrey Transaction (*viz.* **Exhibit 10**: "Facility #2 originated to..." and "Facility #3 originated to ... provide financial assistance toward the purchase of 4 dealer locations in Calgary"), and the 2007 ATB Loan contemplated that amounts would be repaid to Bernard Callebaut personally from ATB's Trans Canada Lands Financing (*viz.* "Facility #4 is to be used to provide financing of the purchase of 191.58 acres and reimburse Bernard and Francesca Callebaut ..." (emphasis added)). Instead of that, however, CBCP's general ledger records that Invesco's money paid out the McCaffrey Transaction ($700,803.31) and also repaid Bernard Callebaut in respect of his involvement in the Trans Canada Lands transaction ($267,099.49). In cash terms inside the accounts of CBCP, therefore, the sum of these two amounts, $988,766.15, effectively became an undesignated "cash float" or "cash bump" that was financed by ATB as opposed to the operations of the business.

46. The terms of the 2007 ATB Loans do not mention Invesco or the First Invesco Loan. That 2007 ATB Loan was signed approximately four months after the date of the First Invesco Loan.

47. In the case of the First Invesco Loan, Cococo suspects that ATB did not—at least initially, and perhaps ever—know either about the existence of the First Invesco Loan, or, alternatively, about its true meaning in terms of it being a loan for which the business was liable

or in terms of it being a loan that the business would, as subsequent events show, repay while also dealing with ATB on the same topics.

48. In November of 2007, the new funds contemplated by the 2007 ATB Loan—*i.e.* the Trans Canada Lands Financing—were released. At that time, funds were disbursed as follows as recorded in the General Ledger and in other corporate records (collectively reproduced as **Exhibit 18**):

a. $4,491,145.89 went to pay the vendor take-back mortgage on the Trans Canada Lands; and,

b. $1,000,000 was paid to Invesco.

(This leaves a small unreconciled difference of $8854.11.) In the financial statements of CBC Group, various capitalized amounts were added to the $4,491,145.89 figure, such that the Trans Canada Lands were recorded in the 2008 Financial Statements as having a value of $4,917,932.

49. Soon after the Trans Canada Lands Financing closed, CBCP paid Invesco the remaining $325,000 payable under the First Invesco Loan (noted within **Exhibit 18**).

50. From the perspective of instititional financing, it is germane to note the following snapshot of the business as it would have appeared after the Trans Canada Lands were purchased and the 2007 ATB Loan funds advanced:

a. The business had bought the Trans Canada Lands premised upon ATB financing. However, instead of this having occurred as against a backdrop of shareholder support as contemplated by the 2007 ATB Loan, it occurred against a backstop of financial support provided by Invesco. The Trans Canada lands were therefore 100% financed.

b. The outstanding indebtedness of CBCP was very high—approximately $11.245 million.

51. Notwithstanding this level of corporate indebtedness, in May 2008—with the sale of the Head Office and Factory Building and Lands still only contemplated but not having yet occurred, and also while facing the requirement of making significant principal payments under the 2007 ATB Loan in the event that the Head Office and Factory Building and Lands did not sell—Bernard Callebaut and Francesca Callebaut personally agreed to borrow $6 million from Invesco, at 15% interest, such borrowing being secured by corporate property. In particular, they pledged the corporately owned Trans Canada Lands as security for the Second Invesco Loan (see the discussion of Note 16 at paragraph 94 below).

52. The corporate resolutions of 105 approving the Second Invesco Loan are dated in May 18, 2009, the year following the actual transaction. See **Exhibit 17**.

53. The Second Invesco Loan conflicts with aspects of the 2007 ATB Loan and the related security package because, among other things, the Second Invesco Loan gave security to Invesco in the form of a mortgage (the "**Invesco Mortgage**") on the Trans Canada Lands. The conflicts between the Second Invesco Loan and the Invesco Mortgage, on the one hand, and the 2007 ATB Loan, on the other hand, include the following:

a. The Second Invesco Loan and the Invesco Mortgage conflict with the following "Negative Covenants" from the 2007 ATB Loan:

> Borrower (and, to the extent applicable, each other Loan Party) covenants with Lender that while it is indebted or otherwise obligated (contingently or otherwise) to Lender, it will not do any of the following, without the prior written consent of Lender. If a Guarantor is not to do an act, Borrower also covenants with Lender not to permit Guarantor to do such act.
>
> (a) a Loan Party will not create or permit to exist any mortgage, charge, lien, encumbrance or other security interest on any of its present or future assets, other than Permitted Encumbrances;
>
> (b) a Loan Party will not create, incur, assume or allow to exist any Indebtedness other than:
>
> i) trade payables incurred in the ordinary course of business;

ii) any Indebtedness owing to another Loan Party (but only if that Loan Party has provided security in favour of Lender);

iii) any Indebtedness secured by a Permitted Encumbrance;

iv) any unsecured advances from affiliates/shareholders which are postponed in all respects to the Facilities; and

v) any Indebtedness owing to Lender;

. . . .

(d) a Loan Party will not provide financial assistance (by means of a loan, guarantee or otherwise) to any person (other than Lender) other than loans permitted under clause (b) above;

b. The Second Invesco Loan and the Invesco Mortgage conflict with terms of the general security agreement (**Exhibit 19**) granted by CBCP to ATB in support of the 2007 ATB Loan, which general security agreement attached to "Collateral" including all present and after-acquired real property:

4. AUTHORIZED DEALING WITH COLLATERAL

Until Default, or until ATB provides written notice to the contrary to the Debtor, the Debtor may deal with the Collateral in the ordinary course of the Debtor's business in any manner not inconsistent with the provisions of this Agreement, provided that the Debtor may not, without the prior written consent of ATB:

. . .

(b) create or incur any security interest, mortgage, lien, claim, charge or other encumbrance upon any of the Collateral whether it would rank or purport to rank in priority to, equally with or behind the Security Interest granted under this Agreement, except operating leases incurred in the ordinary course of the Debtor's business.

c. The Second Invesco Loan and the Invesco Mortgage conflict with terms of the collateral mortgage granted by CBCP to ATB in support of the 2007 ATB Loan (**<u>Exhibit 20</u>**):

8. COVENANTS UNDER THE LAND TITLES ACT

. . . .

> (c) On default the Mortgagee will have quiet possession of the Lands, subject to the Permitted Encumbrances;
>
> (d) The Lands are free from all encumbrances except the Permitted Encumbrances;
>
> . . . .
>
> (f) The Mortgagor has done no act to encumber the Lands except the Permitted Encumbrances;
>
> 9. DEFAULT AND ACCELERATION
>
> The security of this mortgage will, at the option of the Mortgagee, immediately become enforceable and may be enforced without the requirement of any or any further notice from the Mortgagee to the Mortgagor, in each of the following events, each of which shall constitute an event of default:
>
> (a) if the Mortgagor defaults in ... the observance or performance of any obligation, covenant or liability ...

54. The Second Invesco Loan document bears a handwritten notation made by Bernard Callebaut, by means of which a proposed typewritten term that would have required the following as a term of the Second Invesco Loan

> Confirmation letter from ATB confirming they will not advance any additional funds under their existing 1st mortgage and confirming that the current balance is not greater than $720,000.

was deleted and replaced by a handwritten statement that

> Bernard and Francesca Callebaut will not receive additional funds from the ATB under their existing 1st mortgage and the current balance is not greater than $720,000 for this property.

55. This handwritten notation might be interpreted as having functioned to ensure that the Second Invesco Loan could proceed without any requirement for ATB to be made aware of it.

56. The $6 million Second Invesco Loan did not have a business purpose but rather benefitted Bernard Callebaut personally. As disclosed in Note 16 to the 2009 Financial Statements: "Proceeds from the financing were used to acquire land and a building and for the construction of a new building which are owned by the shareholder." This Note refers to the

"shareholder" of 1013988, *i.e.*, Bernard Callebaut, and the references in the Note to a "building" and to "construction of a new building" are not references to the corporately-owned Trans Canada Lands. No construction project ever began on that property. Instead, these references are to an existing building, and to a project by Bernard Callebaut and Francesca Callebaut to construct a new multi-million mansion adjacent to that building, both on their personal property in Bragg Creek, Alberta.

57. 1054796 was the registered owner of the Trans Canada Lands. The minute book of 1054796 does not contain any documentation to suggest that consent of the shareholders to the financial assistance provided to the directors personally (for example, in the form of title to the Trans Canada Lands being pledged as security for the personally-incurred Second Invesco Loan) was ever sought or obtained. This omission may have conflicted with statutory requirements and also the bylaws of the business, which appear at **Exhibit 21**. This conflict may explain a notice sent by Deloitte to unsecured creditors of the business dated August 2, 2011 (**Exhibit 22**), in which it was noted that "the Invesco Mortgage may have been entered into in breach of the bylaws of 105 [1054796]."

58. No information is presently available to Cococo concerning the exact pace at which Bernard and Francesca Callebaut personally drew down upon the Second Invesco Loan, or as to how many such draws may have occurred. The loan document itself refers to an initial advance of $1,400,000, and as at June 30, 2009, the 2009 Financial Statements record that that outstanding balance had climbed to $2,581,875. Later, as of the bankruptcy date of August 3, 2010, Invesco filed a proof of claim in respect of the Second Invesco Loan for $4,465,303 (see the Third Report, **Exhibit 49**, at paragraph 15).

59. A further loan with Invesco was also entered into dated June 6, 2008, with terms identifying a principal amount of $500,000 and interest of 15% (the **"Third Invesco Loan"** / see **Exhibit 12**). The Third Invesco Loan is addressed to CBCP, and under the heading of "Security" it identifies a security requirement for a "Second mortgage on 191 acres west of

Calgary [the Trans Canada Lands], assignment of rents and leases, GSA from the borrower. Third Mortgage on Bragg Creek property [the Callebauts' personal residential property]". The Third Invesco Loan identifies the "Borrowers" as being "1254769 Alberta Ltd. and B & F Callebaut". Cococo does not have any information concerning the named entity "1254769 Alberta Ltd." and corporate search results indicate that a corporation by this designation has never existed **(Exhibit 23)**. In any event, as of early 2009, Karin Benson, the personal assistant to Bernard and Francesa Callebaut (who was for a period of time also an employee of Cococo), gave instructions that CBCP make payments to the "Lender" named in the Third Invesco Loan, Landale Services Ltd. See the email records at **Exhibit 24**. Thus regardless of who the borrower was, CBCP was paying.

Cash Flows

60. As reflected in the 2007 ATB Loan, CBCP obtained Operating Line Financing (aka, a "line of credit") from ATB to fund its "general operating purposes"—that is to say, to fund its day-to-day working capital. The Operating Line Financing facility contemplated a maximum permitted indebtedness of $2,500,000, but in practice the actual amount available to CBCP under the Operating Line Financing at any given time would have been limited by the margining covenants:

> Notwithstanding the amount of Facility #1 ... advances, after November 30, 2007, will be limited to the amount (the "Margin Limit) equal to the lesser of:
>
> - the maximum principal amount of Facility #1 [*i.e.*, $2,500,000]; and
>
> - the aggregate of (a) 75% of Good Accounts Receivable of Borrower plus (to a maximum of $2,000,000 (b) 67% of finished goods Inventory plus (c) 50% of raw materials Inventory plus (d) 40% of the 2007 or later packaging and supplies of Borrower.

61. My experience with CBCP is that its borrowing needs typically peaked in approximately late October each year. That is to say, at or about late October annually, the business would typically have encroached upon the maximum borrowing amount permitted by

the margining calculations of its Operating Line Facility. This matches Cococo's own experience, in that the demand for working capital is greatest in the chocolate business during the period when the business and the retail stores build inventory for Christmas.

62. CBCP historically would have enjoyed either a cash-positive position, or at the very least a strong borrowing and working-capital position, early in each calendar year once the cash flows from Christmas retail sales were collected and with the year's second-busiest chocolate sales season—Valentine's Day—at hand.

63. Given these introductory comments, a strong indication that there was a problem with cash flows in the business of CBCP historically begins with identifying any "cash crunch" occurring in any particular calendar year before October.

Fiscal 2008 Cash – July 2007 to June 2008

64. Together with my Chief Financial Officer, Gordon Paul, I have analyzed the movement of cash as recorded in the various accounts of CBCP. At the instruction of Mr. Paul, reports were generated using the accounting system to summarize General Ledger transactions, and to permit the month-by-month tracking of the key accounts, all as noted in the spreadsheet summary of cash-relevant transactions attached as **Exhibit 25**. As noted on that summary, and as also identified in the formal 2007 Financial Statements, as of June 30, 2007, CBCP had a net cash position as reflected in its ATB accounts of (-$1,398,695), being the sum of its cash accounts and its Operating Line Facility.

65. As of the first month of the 2008 fiscal year (July 2007), the net cash position as summarized on **Exhibit 25** moved to (-$704,948). The one-month difference between these two figures is not fully scrutable based upon records available to Cococo. It is clear, however, that the +/- $700,000 improvement in the recorded cash position does not derive from operating results, which were negatively affecting cash during that month, nor was there an infusion of cash from any other financing source such as the shareholder. Rather, it appears that this +/- $700,000 increase in recorded cash pertains to the manner in which the business was cash

credited with that portion of the First Invesco Loan that was used (as so-called "Restricted Cash") to pay down the vendor-take-back portion of the McCaffrey Transaction. As recorded within **Exhibit 16**, there was a disbursement of $721,666.66 included within the First Invesco Loan transactions that appears at the relevant time.

66. Except insofar as the proceeds of the First Invesco Loan seem to have been recorded as "cash" en route to paying down the vendor-take-back loan on the McCaffrey Transaction, **Exhibit 16** suggests that most of the remaining balance of that loan was not recorded as cash but rather was managed via non-cash journal entries. In particular, the entries in the system in **Exhibit 16** pertaining to the $250,000 "2nd Lepage Deposit" and also the $236,442.50 "Cash Injection Correction", suggest that those two amounts (and related interest payments) were, in one manner or another, intended to record the aggregate $486,442.50 sum (*i.e.* $250,000 plus $236,442.50) as having been obtained from Invesco for the benefit of the business and in relation to the Trans Canada Lands.

67. In any event, after July 2007, the net cash position of CBCP quickly moved more negative. It peaked negatively in October 2007 at (-$2,061,088), before improving to (-$277,928) in December 2007, by which time ATB had released funds under the 2007 ATB Loan. That financing closed effective November 30, 2007, but it resulted in no net infusion of cash to CBCP. Rather, as disclosed in **Exhibit 18**, the new loan proceeds were paid out as follows: $1,000,000.00 to Invesco, and approximately $4.5 million in favour of the Trans Canada Lands vendor.

68. Following these events, in January 2008—when one would have expected the cash position of CBCP to be at its best—the cash position deteriorated from its December position and became (-$942,261). One notable cash transaction during this period was the repayment to Invesco of the remaining $325,000 owed to it under the First Invesco during January—see **Exhibit 18**.

69. After January 2008, the net cash position of the business continued to worsen during the succeeding months of fiscal 2008: in February, (-$964,998); in March, (-$1,346,393); in April, (-$1,476,447); and in May, (-$1,724,217). I am advised by Veronica Amaya, who was formerly the Operations Manager of Cococo and who worked in that same capacity for CBCP for many years, that, by the end of April 2008, CBCP had exceeded its borrowing limits, and ATB was by that date looking for an injection of cash to cover the borrowing shortfall of $68,207, as reflected in the email exchange among Veronica Amaya, Bernard Callebaut, and Francesca Callebaut at **Exhibit 26**. As further reflected in that email exchange, David Thompson of ATB had then agreed to fund the next two payrolls of the business, but only based upon an understanding that funds would be injected into the business the following week.

70. $500,000 was injected into the business and that injection credited to Bernard Callebaut in approximately May 2008. The exact source of those funds is not known to Cococo. However, it appears from documentation and from subsequent events as described in paragraph 77-78 below, that the ultimate source of this amount was the Third Invesco Loan, which was signed at the beginning of June 2008. In short, therefore, the response of Bernard Callebaut and Francesca Callebaut to an overdraft problem with ATB that crystallized in late April 2008 was apparently to borrow funds from Invesco, to make the company liable for that borrowing in terms of the security granted, and then to inject the funds borrowed as though they represented a new shareholder investment.

71. As of this date in 2008, cash and liquidity in the business had therefore already become a serious concern, a full two calendar years before the receivership, and a full calendar year before the disputed 2009 Dividends were purportedly declared.

Fiscal 2009 Cash

72. The sale of the Head Office and Factory Building and Lands—as contemplated by the 2007 ATB Loan, and that was also the subject of communications during the cash-crunch

emails of April 2008 (**Exhibit 26**)—finally occurred in June 2008. The transaction involved "Cash to Close" of $11,350,901.13.

73. The sale proceeds from the Head Office and Factory Building were disbursed as of the closing date of June 23, 2008 in the manner described by **Exhibit 27**. At my instruction, Gordon Paul reconciled those disbursed funds to the net-cash accounts of the business. In effect, what occurred is that Facility #2 (the primary McCaffrey Transaction Financing) and Facility #3 (the secondary McCaffrey Transaction Financing) as described in the 2007 ATB Loan were repaid in full, and Facility #4 (the Trans Canada Lands Financing) was paid down to the level required by the 2007 ATB Loan, *i.e.* $2,400,000. After eliminating all fees and other expenses associated with closing, the remaining balance of $2,843,917.13 was credited to CBCP. That amount sufficed to repay ATB the entire balance outstanding on the Operating Line Facility, which stood at (-$1,324,050.00) immediately prior to such payment (the amount having been reduced from the (-$1,724,217) "high" reflected as at May 2007 in **Exhibit 25**, by reason of the $500,000 infusion of funds described in paragraph 70 above).

74. As a result of these transactions, as at June 30, 2008—being the end of the fiscal 2007 year—CBCP's net-cash position was $937,279 as reflected in **Exhibit 25** and also in the 2008 Financial Statements. As further summarized in **Exhibit 25**, this balance went negative very fast. Whereas the cash position of the business from July 2007 to October 2007 had changed from its best position of (-$704,948) to (-$2,061,088), for a net negative change of (-$1,356,140), during the corresponding period in fiscal 2008, the cash position of the businesss had deteriorated from its best day-one position of $937,279 to (-$1,932,947), for a net negative change of (-$2,870,226).

75. The quick swing in the cash position of the business after the sale of the Head Office and Factory Building and Lands again meant that CBCP faced a liquidity crisis in the summer and into September of 2008. I am advised by Veronica Amaya that during that period, she dealt with ATB and was successful in negotiating a temporary "bulge" arrangement. That

arrangement (as summarized in the correspondence attached as **Exhibit 28**) included a temporary extension of credit set to expire December 19, 2008. The bulge arrangement sufficed to manage cash issues into the Christmas sales season.

76. Perhaps motivated by these cash-flow issues, in September of 2008 CBCP instituted a very large 28% price increase that applied both to its retail pricing and to its pricing of products to authorized dealers. I am advised by Kevin Kazan, Customer Services Representative for CBCP formerly and now an employee of Cococo, that Bernard Callebaut personally made the relevant pricing changes on a product-by-product basis without any accompanying financial analysis. Recalling that September 2008 was also the historical moment when economic shocks were felt around the world because of the so-called "subprime mortgage crisis" and associated problems within major financial institutions, the price increase resulted in decreased revenues and volumes in fiscal 2009 (see the 2009 Financial Statements and **Exhibit 47**).

77. I am advised by Veronica Amaya that, after these events in the fall of 2008 and the temporary management of a cash crisis during that period, in January 2009, Bernard Callebaut gave instructions to have CBCP pay $504,109.59 to Invesco. These instructions are recorded in the email exchange attached as **Exhibit 29**. The amount in question apparently reflects the sum due (with interest) under the $500,000 Third Invesco Loan. The result of this instruction being followed, however, was that the payment again caused CBCP to exceed the limit of its Operating Line Facility. As reflected in **Exhibit 30**, Anne Collins of ATB advised the business that the $504,109.59 payment caused an overdraft of $281,288.55, and ATB called for an immediate deposit of $285,000.

78. I am advised by Veronica Amaya that, so far as she is aware, it was this overdraft triggered by the $504,109.50 payment to Invesco that caused ATB to become aware initially of Invesco's involvement in the affairs of CBC Group.

79. Cococo has located various cash-analysis and "margin control" records within the files of CBC Group for the period February 2009 through November 2009. There are gaps within these records (*e.g.* there are various binders in Cococo's possession with tabbed sections that have been stripped empty by somebody), but based upon what is available to Cococo, it appears that commencing in early 2009, detailed monthly analysis was undertaken by Cameron Longeway, a former employee of CBCP who was then a financial manager, to assess cash with reference to the ATB banking relationship. Results of this analysis were addressed to Bernard Callebaut, Francesca Callebaut, and Veronica Amaya, and copies found by Cococo are attached as **Exhibit 31** (February 2009), **Exhibit 32** (March 2009), **Exhibit 33** (March 2009 – different copy), **Exhibit 34** (April 2009), **Exhibit 35** (May 5, 2009), **Exhibit 36** (May 12, 2009), and **Exhibit 37** (November 2009). The company's tenuous cash position is evident throughout these documents. The report for March 2009, for example, states (**Exhibit 32**):

> Looking forward
>
> When I look forward on the cash flow model, I have a couple of concerns:
>
> - The calculation for the revised loan control maximum with February's numbers shows a reduction of the loan by $139,000, giving a new maximum of 1,467,000. (This has not been reported to anyone else but you) This calculation is due into the bank on March 25th.
> - When I take the reduction of the loan into account, the cash available after commitments is $33,000.
> - The real concern is the first week of April, the cash available after commitments is a negative $89,000.
> - The only vendor payment that is taken into account is the $50,000 payable to Barry Callebaut. I have not issued a cheques (*sic*), but I have it recorded on the cash flow.

80. Not surprisingly, during this same period relations between CBC Group and its vendors became strained. For example, at **Exhibit 38** are email records for the period April-June 2009 between CBCP and Sunopta Inc., a supplier of ingredients. The exchange begins with an April 2009 inquiry about a February 2009 invoice that was already two months' past due

as of April, and later, as of June 15, 2009, Cameron Longeway was reporting to Veronica Amaya that:

> I have not heard anything regarding a bulge for the line of credit and Richard [Sunopta] and I discussed a possible payment plan last week. I am not sure what to tell him at this point. Do we set something up starting next week and hope that the bulge is in place?

81. Similarly, Cococo has located minutes of a "Manager's Meeting – June 10th, 2009" (**Exhibit 39**) which records the following under the "Cashflow" heading:

- Available cash is extremely low right now and we are getting a great deal of calls from vendors inquiring about payments.
    - Some vendors have us on hold right now and we are currently compiling a list of these.
    - The media exposure regarding the plant shutting down has not helped with this.
    - I am not sure what to tell vendors when they call in.

82. At or about this same time, and as noted in the Wells Affidavit, ATB first gave CBCP notice of default dated June 12, 2009. As further noted in the Wells Affidavit, there followed a series of Forebearance Agreements and related amendments (the **"Default Agreements"**), which are again reproduced as exhibits to this Affidavit for convenience:

a. August 28, 2009 – **Exhibit 40**. For illustration purposes, also included within **Exhibit 40** are corporate documents by means of which the shareholders of 1013988 consented to the provision of financial assistance (the giving of guarantees) by 1039888 in connection with the forebearance arrangements; *cf.* paragraph 56.

b. March 4, 2010 – **Exhibit 41**.

c. April 26, 2010 – **Exhibit 42**.

d. January 7, 2010 – **Exhibit 43**.

e. July 12, 2010 – **Exhibit 44**.

83. Not later than June 2009, therefore, the financial affairs of CBCP had attracted the close scrutiny of ATB, and that scrutiny persisted—including as managed by the Default Agreements—right up until the Consent Receivership Order dated August 3, 2010.

84. The Default Agreements speak for themselves, but I note that commencing June 2009:

a. The Default Agreements placed strict limits upon the payments that could be made to Bernard and Francesca Callebaut, as follows:

> 5.2(b) The Debtors, jointly and severally, covenant and agree that the Executive Compensation payable to Bernard and Francesca shall not exceed the aggregate of $25,000.00 per month.

b. The Default Agreements established deadlines (which were then extended and re-extended several times) prior to which CBCP was required to secure another bank or source of financing, such that ATB could be repaid in full. Effectively ATB allowed CBC Group a long period from the spring of 2009 until August of 2010 (*cf.* **Exhibit 14** ".... they [ATB] didn't have the patience to wait ...") to find a source of capital to solve its problems, but as events make obvious, this never occurred.

85. By the spring and summer of 2009, the financial affairs of CBC Group were clearly in a perilous state. In a letter dated March 4, 2011 submitted by Bernard Callebaut to the Court in connection for the hearing during which he and Francesca Callebaut were both found in contempt of Court (**Exhibit 45**), Bernard Callebaut admitted that "Our family has been under tremendous financial pressure since the summer of 2009."

86. Indeed, the records of CBCP contain a letter from Bernard Callebaut to Anne Collins of ATB, dated July 14, 2009 (**Exhibit 46**), addressing three issues: first, the fact that quarterly compliance certificates required by ATB were outstanding; second, the fact that "the shareholder loan account in the company has gone into a debit balance, and has exceeded the $1,200,000 remuneration limit set in the banking agreement"; and third, the existence of Invesco

security and its relevance to the ATB banking relationship of CBCP. The topic of Invesco is addressed in **Exhibit 46** in these terms:

> **Third Party Security on Assets**
>
> Invesco Mortgage (Invesco) has been given security, behind the Alberta Treasury Branch (*sic*) (ATB), on the lands sitting just west of Calgary on highway 1. Invesco is the mortgage company funding the construction of Bernard and Francesca's (Callebaut) principle (*sic*) residence. The Callebauts have met with the representatives of Invesco to see what options are available to lower or remove the security on the land. One option was at a certain point of construction the security may be removed but this may take another 12 to 16 months to reach the appropriate construction point.
>
> It is understood that the bank agreement states that a Loan Party will not create or permit to exist any mortgage, lien, encumbrance or other security interest on any present or future assets without prior written consent. Other options are being investigated but the practical solution, as the ATB has first security, may be to allow Invesco security for another 12 to 16 months and/or have a letter of understanding drawn up between Invesco and the ATB that would alleviate concerns on ATB's part. The Callebauts will be meeting with the Invesco representatives at a later date to discuss other options.

87. The documents attached as **Exhibit 47** are contemporaneous with this letter (**Exhibit 46**), and apparently pertain to a dialogue between CBCP and ATB regarding its financial affairs, with ATB questioning various financial points and noting the deterioration of financial performance in fiscal 2009, all in conjunction with efforts to budget for fiscal 2010.

Summer 2009 / 2009 Dividends

88. According to a sworn but unfiled affidavit of Bernard Callebaut attached as **Exhibit 48**, the 2009 Dividends "were recommended by the Partnership's accountants and were aimed at taking advantage of certain tax pool (*sic*) occuring in the Partnership and the related corporations (*sic*) sold their building on Macleod Trail in the 2008 fiscal year." The affidavit appends as an exhibit a letter from CBCP's audit firm (Matthews LLP) and addressed to its law firm (Burnet, Duckworth & Palmer LLP), dated February 23, 2010, and the terms of Matthews LLP correspondence specify that information is being forwarded "so you may prepare the appropriate resolutions for the minute book." The resolutions are attached at **Exhibit 50**. Also

attached at **Exhibit 50** are statements of account from the law firm which demonstrate that during the billing cycle reported, the law firm was active both in terms of drafting these resolutions with their retroactive dates, and also investigating insolvency issues.

89. There is no information available to Cococo to suggest that any documentation exists contemporaneous to the purported June 30, 2009 effective date of the 2009 Dividends that could demonstrate how or in what fashion (if at all) the issues of solvency and liquidity were considered by the Board of Directors of CBPP—*i.e.* by Bernard Callebaut and Francesca Callebaut— at that time. The only corporate paperwork was created after the fact.

90. The books and records of CBCP show that the the amount of the 2009 Dividends was never actually paid out to Bernard Callebaut. Rather, it is my understanding based upon, among other things, advice received from Veronica Amaya, that ATB consented to this handling of CBCP's fiscal 2009 year-end accounting strictly on the condition that no additional cash would exit the business. Stated differently, the ATB—during a period when CBCP was in default—conditionally consented to the recording of the 2009 Dividends in the financial statements on the basis that the dividends would not actually be paid, but would rather simply be reflected in journal entries affecting the loan account of Bernard Callebaut as shareholder.

91. Cococo is not aware of any information to suggest that CBCP, its advisors, or ATB considered the interests of any other creditor or stakeholder of CBCP when ATB's conditional consent to the 2009 Dividend was given in this fashion. There is as yet no information to suggest that anybody considered liquidity or solvency.

92. In my professional experience, I know that decisions affecting the tax-filing positions of corporations must usually be made and documented within 180 days of the corporation's fiscal year end. In the case of CBCP's 2009 fiscal year end, this means before the end of December 2009. Of interest in this regard are the Notes to the 2009 Financial Statements. As of the calendar year ended December 31, 2009, and as reflected also in the

Draft 2009 Financial Statements (dated November 5, 2009), the Auditors had included at Note 1 a "Going Concern" statement applicable to CBC Group as follows:

> 1. GOING CONCERN
>
> The accompanying financial statements have been prepared on a going concern basis, which contemplates the realization of assets and the satisfaction of liabilities in the normal course of business.
>
> The Company's ability to continue as a going concern is dependent upon its ability to: generate sufficient cash flow to meet its obligations on a timely basis; obtain additional financing as may be required throught the continued support of the Company's shareholders; and, ultimately maintain successful operations. However, no assurance can be given at this time as to whether the Company will achieve any of these objectives. (See Note 16)
>
> These financial statements do not include any adjustments relating to the recoverability and classification of recorded asset amounts or the amounts and classification of liabilities that might be necessary should the company be unable to continue as a going concern. Such adjustments might be material.

93. This Going Concern note amounts to an invitation on the part of the reader to conclude that without outside intervention, no assurance can be given to suggest that the business will continue its operations. It is a warning from the auditors, and furthermore it is a warning that directly implicates the solvency of the business by recognizing the possibility for adjustments "relating to the recoverability and classification of recorded asset amounts or the amounts and the classification of liabilities that might be necessary should the company be unable to continue as a going concern."

94. From a timing perspective, these comments from the auditors also deserve additional scrutiny in light of the cross-reference to Note 16, which was expressly made effective only "as of February 10, 2010." Note 16 (which was absent in the Draft 2009 Financial Statements dated November 5, 2009) reads as follows:

> The Company has provided a guarantee to Invesco Mortgage Inc pursuant to construction financing obtained by a shareholder of the Company for a term of 12 months maturing May 14, 2010. Proceeds from the financing were used to

acquire land and a building and for the construction of a new building which are owned by the shareholder.

The maximum amount of the guaranteed liability advanced at the year end was \$2,581,875. This represents the carrying amount, of the guarantee liability at a period end of \$2,550,000 plus the required monthy interest payments of \$31,875 at a rate of 15% per annum. The construction financing has a maximum credit facility of \$6,000,000.

A second mortgage on land owned by the Company with a legal description of NW ¼ Section 34-24-4 W5 and SW Section 34-24-4 W5 in the amount of \$6,000,000, assignments of all rents and leases on the land and a general security agreement are pledged as security for the guarantee.

95. In terms of the distinct February 10, 2010 dating of Note 16, three points are interesting, any one of which (or all of which) could have triggered this distinct dating. First, there was the bare fact of the Second Invesco Loan being in existence which may only have been discovered by the auditors as of February 2010. Second, there is the more specific fact as recorded in Note 16 that the Second Invesco Loan was secured by "a second mortgage on [the Trans Canada Lands] ... and a general security agreement" (a **"GSA"**) This is interesting because the copy of the Second Invesco Loan in Cococo's possession (**Exhibit 11**) does not identify that 1054796 gave security in support of the Second Invesco Loan. Notwithstanding that, it is nevertheless clear in these proceedings that at some point between the original date of the Second Invesco Loan in May 2008 and the note disclosure in February 2010, the Trans Canada Lands were mortgaged as security for the Callebauts' personal loan, and 1054796 itself also became directly liable to secure the repayment of that loan under the GSA. Interestingly, an attachment to the Third Report (see **Exhibit 49**) references an "addendum" to the Second Invesco Loan dated May 18, 2009, which Cococo has never seen; this "addendum" may be the instrument that granted Invesco security over the Trans Canada Lands and the assets of 1054796. Finally, there is a third potential trigger for the distinct dating of Note 16: I am advised by Veronica Amaya that in mid-February 2010, Bert Boulet of Matthews LLP became

aware of Bernard Callebaut having taken steps to divert cash belonging to CBCP outside of the business.

96. At or about the time of Note 16, I also became personally aware that Matthews LLP had resigned as auditor of CBCP and that cash was being diverted from the business by Bernard and Francesca Callebaut, resulting in my reporting the matter to CBCP's legal counsel.

Preliminary Conclusions: Liquidity and Solvency

97. I believe that CBCP, on the purported date of declaring the 2009 Dividends, was not then, and would not after the payment ever have been, able to pay its liabilities as they became due (the **"Liquidity Issue"**), and that the realizable value of CBCP's assets was less than the aggregate of its liabilities and stated capital of all classes (the **"Solvency Issue"**). The following two paragraphs summarize the factors (detailed above) giving rise to my assessment.

98. As regards the Liquidity Issue, as outlined in paragraphs 64-87 above, CBCP was faced with continued cash crises commencing by at the latest April 2008, and then continuing until the period of the ATB Default Agreements, past which point the business was under a continual obligation to find new cash—which it failed to do—in order to take out the ATB's position. It was then an express requirement of ATB in connection with the 2009 Dividends that cash could not exit the business. Furthermore, if CBCP had actually <u>paid</u> the 2009 Dividends to Bernard Callebaut, then at the moment of such payment, CBCP would have been unable to pay with cash its continuing obligations to creditors. The cash deficit would at that moment have extended into the millions of dollars. **<u>Exhibit 51</u>** is an illustrative example of the cash shortfall that would have presented itself on this basis.

99. As for the Solvency Issue, attached as **<u>Exhibit 52</u>** is a *pro forma* calculation that was prepared at my instruction to re-state the 2009 Financial Statement key accounts in light of information contained in this affidavit. In my view, the entire amount of the Second Invesco Loan must be re-stated as a liability of CBCP, given the terms of that loan and also particularly

in view of subsequent events in these proceedings which have involved the Court-sanctioned sale of the Trans Canada Lands (corporately owned property) and the payment of proceeds to Invesco. With similar implications, **Exhibit 51** presents two alternative calculations of solvency, to demonstrate the separate effect of the other disputed dividends (discussed below) on the calculation. Furthermore, in each case **Exhibit 51** notes relevant points regarding the realizable value of the assets in question. Balance Sheet assets such as future tax recoveries and intangibles such as goodwill must be discounted or eliminated when considering solvency from the point of view of what might reasonably be realized in connection with a company's going-concern value. Here too, I emphasize again the "Going Concern" note in the 2009 Financial Statements.

Quantification Issues (a): The Proof of Claim of Bernard Callebaut Generally

100. The amount of the 2009 Dividend—$4,068,101—is the same as the amount claimed in the Proof of Claim of Bernard Callebaut.

101. Even assuming for the moment the validity of the 2009 Dividends, the accounting reality is that Bernard Callebaut could only ever be owed the net amount calculated after the 2009 Dividends are applied to the outstanding balance owed to CBCP by Bernard Callebaut as of the dividend declaration date, separately from that disputed transaction. The net amount—accepting for the moment the records of CBCP at face value—as at June 30, 2009, is properly recalculated as being $3,607,149 (attached as **Exhibit 53** is a year-by-year reconciliation analysis prepared at my instruction).

102. Reversing the assumption stated in the previous paragraph, and assuming that the 2009 Dividends are not valid, then Mr. Callebaut is not owed money as an unsecured creditor of the business, but rather he owes money as its debtor.

103. There are, however, significant problems with this high-level arithmetic, too.

Quantification Issues (b): The 2007 Dividend

104. The 2006 Financial Statements and the 2007 Financial Statements identify dividends for fiscal 2005 of $108,538 (paid), for fiscal 2006 of $575,228 (paid), and for fiscal 2007 of $2,630,351 (payable).

105. The difficulty with these recorded dividends concerns the capital structure of the business. In particular, as recorded in the financial statements and also in the minute books of the business, Bernard Callebaut (for whose benefit these dividend amounts were recorded) owns only Class A Preferred Shares of 1013988. This matters because the terms of the Class A Preferred Shares of 1013988 contemplate the possibility of dividends and/or redemption, and furthermore contain specific terms regarding the manner in which either dividend or redemption might occur. The share terms from the minute book of 1013988 are attached as **Exhibit 54**.

106. What is peculiar in the case of the 2005, 2006, and 2007 dividends is that in the 2008 Financial Statements, these supposed dividend transactions were transformed into share redemptions. The relevant entries appear within Note 12, where the aggregate of these dividend amounts appears for the first time as a reduction in the balance outstanding with respect to such shares. Whereas in the 2006 Financial Statements and the 2007 Financial Statements, the balance owing as regards the "Retractable right of shareholder" is consistently reported as being $7,925,892, in the 2008 Financial Statements that balance is re-stated without explanation as being $4,634,954.

107. When reconciling the amount due to or from Bemard Callebaut as a shareholder, it is pertinent to know whether dividends were validly declared and paid or recorded as payable, or whether shares were redeemed. The issue from an accounting standpoint is that in these three financial years, either dividends were declared or shares were redeemed. Both corporate events cannot have occurred at the same time, and an inspection of the minute book of 1013988 discloses no corporate resolutions relevant to either interpretation. We are therefore left with the bare fact of three years' worth of financial statements, each approved by the

directors and signed by an accounting firm, but which state contrary things—different versions of history.

108. If, in particular, the 2007 dividends were not validly declared and therefore not accurately recorded in the 2007 Financial Statements as being payable, then the accounting pertaining to Bernard Callebaut's shareholder accounts is thrown into disarray. Indeed, if the 2007 dividends were not validly recorded, and if the 2009 Dividends were also not valid, then instead of being owed anything at all by the business, as summarized in **Exhibit 52**, Bernard Callebaut would owe the bankrupt business not less than $5.26 million.

(b) The Personal Role of the Directors / What Caused the Cash Problems?

109. I am aware that on several occasions since the bankruptcy, Bernard Callebaut has been reported in the media as having blamed the downfall of his business on the improvidence of purchasing the Trans Canada Lands. An example of such statements appears within the transcript at **Exhibit 14**. However, in my assessment that is not correct. As demonstrated by the 2007 ATB Loan, the purchase of the Trans Canada Lands was undertaken with the full support of ATB, and if the business of CBCP had otherwise been operated in the ordinary course, that transaction by itself should not have caused any problems at all. Instead, it was liquidity and solvency issues unrelated to falling real-estate values that ultimately led to the receivership of CBCP, and these issues are linked to the diversion of CBCP cash to the directors, Bernard and Francesca, personally.

110. In terms of cash payments directly paid out to the directors (*qua* shareholder or *qua* employee), the following is a summary of amounts recorded in the books and records of CBCP for the periods indicated:

Fiscal Year	Bernard Callebaut	Francesca Callebaut
2007	$1,538,241	$280,000
2008	$1,175,221	$300,000

Fiscal Year	Bernard Callebaut	Francesca Callebaut
2009	$1,134,426	$275,000
Total (individual)	$4,888,832	$855,000
Total (both)	$5,543,832	

111. In terms of cash payments made <u>indirectly</u> for the benefit of the individual directors, the following transaction categories have been identified by Cococo:

a. CBCP monies were diverted outside of CBCP through a series of transactions coordinated by Bernard Callebaut (and supported by Francesca Callebuat) in early 2010. The details are described in a memo July 15, 2011 authored by me and sent to Deloitte, which is attached as **<u>Exhibit 55</u>**.

b. Bernard and Francesca Callebaut directed the sale of product inventory to employees of the business in exchange for cash, which was kept by them personally and never recorded in the books and records of the business. The details are recorded in **<u>Exhibit 55</u>**.

c. Bernard Callebaut and Francesca Callebaut caused their personal employees (nannies and housekeepers) to be paid from the payroll of CBCP. Payments in question were not comprehensively reconciled to the "due from" sharheolder account of Bernard Callebaut. The details are recorded in **<u>Exhibit 55</u>**. I am advised by Veronica Amaya that, on July 29 or 30, 2010 (being the Thursday or Friday before the public announcement of the receivership at the beginning of the following week), Rick Anderson of Deloitte had asked her and Bernard Callebaut to review together an employee list for the purpose of identifying key employees whose employment they would recommend be maintained during the receivership. During this exercise, she recalls that Bernard Callebaut identified and then later put forward the family's nanny (then on payroll) as somebody whose employment should be maintained as key, and he also indicated that Deloitte would simply be told that the nanny was a retail employee. I am advised by Veronica Amaya that she recalls the same instruction being given by Francesca Callebaut at about the same time to the person who was then employed by CBCP to manage Human Resources—the message was, "the nanny works in retail".

d. Bernard Callebaut and Francesca Callebaut had a practice of having funds regularly deposited against their personal visa account, subject to later reconciliation intended to account separately for business and personal expenses, the latter of which would be charged to the "due from" shareholder account of Bernard Callebaut. As noted in **Exhibit 55**, the practice created a problem of personal expenses being routinely misallocated to or otherwise left inside the accounts of CBCP. Additional documents relevant to this practice appear at **Exhibit 56**.

e. Other issues similar to the foregoing have been identified since the date of **Exhibit 55**. For example, attached as **Exhibit 57** are invoices issued by Lamoureux Architect which were paid for by CBCP. I am advised by Veronica Amaya that, at the relevant dates, both she and Gord Stevens (who was then employed by CBCP as finance manager) understood that although these invoices exclusively reference a corporate "Bernard Callebaut Chocolaterie Warehouse Project," in fact Lamoureux Architect was also the firm then engaged by Bernard Callebaut and Francesca Callebaut in their personal capacity to work on the project of designing and constructing the Callebauts' residence in Bragg Creek, and that various costs associated with this personal project were embedded within these invoices.

112. Finally, there are also accounting issues at play concerning the fact that the financial records of CBCP deal with transactions of Francesca Callebaut as if there is an identity of interest between her and Bernard Callebaut. This point is meaningful because only Bernard Callebaut was a shareholder at any material time.

Conclusion

113. Based upon all of the foregoing, Cococo is concerned that Invesco's settlement proposal unfairly disentitles and prejudices the non-participating creditors by effectively recognizing an invalid claim by Bernard Callebaut, as advanced through his creditor, Invesco.

SWORN BEFORE ME at Calgary, Alberta on this 26th day of February, 2013.	)	
	)	
A Commissioner for Oaths in and for the Province of Alberta	)	Brian Beck

H. Marina Schellenberg
Student-at-Law