

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Peter Gaibisels, Plaintiff

AND:

Solart LLL Corp., Solart International Inc., Solart Group, Blacksun Investments Inc., Gestion Marc-Andre Lemieux Inc., 8378541 Canada Inc., Viviane Lea Abecassis, Elisa Marcela Barrios, Ai Chen, Julien Cyr, Natercia Dos Santos, Elaine Dubois, Martin Dupuis, Fanny Girard, Melanie Lacroix, Marc-Andre Lemieux, Francisco Lemieux, Veronique Lemieux, Mark Leyton, Lennie Moreno, Sunny Natalia, Leonor Nonnenmacher, Sophie Poirier, Nikhil Toshniwal, Nicolas Vanhove, Martin Yockell, The Toronto Dominion Bank, 2325524 Ontario Inc. O/A Sentinel Solar, Guy Phillippe Bouchard and Energia-360 Canada Inc., Defendants

BEFORE: Justice D.A. Broad

COUNSEL: Winfield Corcoran, for the Plaintiff

Zachary Parrott for the Defendants Solart LLL Corp., Solart International Inc., Solart Group, Blacksun Investments Inc., Gestion Marc-Andre Lemieux Inc., 8378541 Canada Inc., Marc-Andre Lemieux and Francisco Lemieux

John P. Ormston for the Defendant Melanie LaCroix

Adam Ronan for the Defendant Mark Leyton

Andrew D. Pelletier for the Defendant Sunny Natalia

James Renihan for the Defendant Nikhil Toshniwal

Laura F. Cooper and Rachel Hung for the Defendant Martin Yockell

Amanda McLachlan for the Defendant 2325524 Ontario Inc. o/a Sentinel Solar

Caitlin Sainsbury and Stephanie Gagne for the Defendant Guy-Phillippe Bouchard

HEARD: September 14 and 15, 2023

REASONS FOR DECISION

Introduction and description of the motions

[1] The representative plaintiff Peter Gaibisels (the “plaintiff”) in this proposed class action proceeding has brought a motion arising out of refusals made by deponents of affidavits or by persons cross-examined pursuant to Rule 39.03 of the *Rules of Civil Procedure* on behalf of certain of the defendants on their respective cross-examinations in relation to the plaintiff’s motion for certification under the *Class Proceedings Act, 1992*, S.O. 1992, c. C.43 (the “CPA”).

[2] The plaintiff seeks relief in respect of refusals to answer certain questions by or on behalf of the following defendants:

Solart LLL Corp., Solart International Inc., Solart Group, Blacksun Investments Inc., Gestion Marc-Andre Lemieux Inc., 8378541 Canada Inc., Ai Chen, Melanie Lacroix, Marc-Andre Lemieux, Francisco Lemieux, Veronique Lemieux, Mark Leyton, Sunny Natalia, Sophie Poirier, Nikhil Toshniwal, Martin Yockell, 2325524 Ontario Inc. o/a Sentinel Solar, Guy Phillipe Bouchard and Leonor Nonnenmacher

[3] The defendants Veronique Lemieux, Ai Chen, Leonor Nonnenmacher and Sophie Poirier are unrepresented by counsel and did not appear on the hearing of the plaintiff’s motion.

[4] The defendant Nicolas Vanhove has been noted in default. The defendants Elisa Marcela Barrios, Elaine Dubois and Energia-360 Canada Inc. were not served with the Statement of Claim.

[5] In his Notice of Motion the plaintiff claims the following additional specific relief:

Para. 2 - a declaration that the defendants Julien Cyr and Martin Dupuis have consented to certification;

Para. 3 - a declaration that the defendants other than Julian Cyr, Martin Dupuis, Viviane Lea Abecassis, Fanny Girard and The Toronto-Dominion Bank have failed to answer the questions of the plaintiff relevant to certification;

Para. 4 - a declaration that a question failed to be answered or refused to be answered by one defendant is a question failed to be answered or refused to be answered by all of the defendants;

Para. 5 - a declaration that a question requesting a defendant to provide the evidence the defendant will be relying upon at the hearing of the motion to support arguments that the evidence submitted by the plaintiff does not meet the test for certification is a proper question;

Para. 6 - an order that the defendants Viviane Lea Abecassis and Fanny Girard attend for examination at their expense;

Para. 7 - an order that the defendants who failed to answer or refused to answer the proper questions of the representative plaintiff relevant to the requirements for certification as set out in section 5 of the *Class Proceedings Act* and the sufficiency of the content of the affidavit of the Peter Gaibisels, sworn March 1, 2021,, and all exhibits thereto and the affidavits of the class members, be required to re-attend at their expense to answer the proper questions asked by the representative plaintiff; and

Para. 8 - an order that the defendants who refused to answer the questions of the plaintiff at the examination are not permitted to introduce at the hearing of the motion the information that was not provided except with leave of the justice hearing the motion.

[6] The defendants Solart LLL Corp., Solart International Inc., Solart Group, Blacksun Investments Inc., Gestion Marc-Andre Lemieux Inc., 8378541 Canada Inc., Marc-Andre Lemieux and Francisco Lemieux (the “Solart defendants”) have brought a motion arising out of refusals given by the plaintiff on the cross-examination on his affidavit in support of his motion for certification.

[7] In their Notice of Motion the Solart defendants have claimed of the following specific relief:

- (a) a declaration that the questions refused by plaintiff’s counsel on the cross-examination of the plaintiff on his affidavit in support of his motion for certification are proper;
- (b) an order that the plaintiff answer the refusals set out in the Solart defendants’ Refusals Chart within 30 days;
- (c) an order that the plaintiff answer further proper questions relating to the refusals and proper follow-up questions arising from answers given pursuant to the order;
- (d) an order that the plaintiff re-attend to answer questions as indicated above at his own expense; and
- (e) a declaration that the plaintiff’s counsel’s improper conduct during the examination of the plaintiff necessitated a motion.

Factual and Procedural Background

[8] The Statement of Claim was issued February 6, 2015 following the insolvency and assignment into bankruptcy of Solart LLL Corp in or about June 2014. Solart LLL Corp carried on business in the Provinces of Québec and Ontario of the sale and installation of solar panels for residential and commercial purposes.

[9] The Statement of Claim has been amended three times. The Amended Amended Amended Statement of Claim (the “Statement of Claim”) alleges that the members of the proposed class, comprising approximately 130 individuals, entered into contracts with Solart LLL Corp for the supply and installation of solar panels, and paid

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deposits to Solart LLL Corp in various amounts. Following the insolvency and bankruptcy of Solart Group LLL none of the solar panels contracted for by the members of the proposed class were supplied, and no members of the class were reimbursed by Solart or by the trustee in bankruptcy for any part of the deposits which they paid to Solart. The plaintiff alleged in the Statement of Claim that the deposits were paid by the class members in reliance upon false and misleading representations made by some or all of the named defendants, with the exception of the Toronto-Dominion Bank, and were impressed with a trust in favour of each payor.

[10] The Statement of Claim advances claims against thirty (30) named defendants.

[11] The prayer for relief in the Statement of Claim, *inter alia*, seeks the following relief:

(a) damages in the amount of \$4,800,000 for

(i) fraud;

(ii) unjust enrichment in particular against the defendants the Toronto-Dominion Bank (“TD”), 2325524 Ontario Inc. o/a Sentinel Solar (Sentinel”) and Marc-Andre Lemieux;

(iii) knowing assistance;

(iv) knowing receipt

(b) in the alternative, damages for bad faith breach of contract in the amount of \$4,800,000;

(c) an order pursuant to the CPA certifying the proceeding as a class proceeding;

(d) a declaration that the defendants, one some or all of them, are resulting trustees or alternatively constructive trustees of the deposit monies paid by the plaintiffs to the defendants;

(e) an accounting in respect of the deposits and payments to each defendant by each class member as may be determined proper;

(f) an order for restitution of the deposits paid by the plaintiffs and by which the defendants, one, some or all of them, were unjustly enriched;

(g) punitive damages in the amount of \$15,000,000;

(h) a declaration that it all material times the defendant’s Solart LLL Corp, TD and Sentinel carried on business as partners and that they are jointly and severally liable to the plaintiffs in fraud and restitution.

[12] The former representative plaintiff brought a motion for certification of the proposed class proceeding on March 31, 2021. The former proposed representative plaintiff was replaced by the current representative plaintiff Peter Gaibisels by Order dated December 8, 2021.

Plaintiff's motion on refusals by certain defendants on cross examinations on the certification motion

(a) The Solart Defendants

[13] Marc-Andre LeMieux was the president, director and shareholder of Solart LLL Corp. He was cross-examined on behalf of the Solart Defendants in respect of the plaintiff's certification motion. The plaintiff's counsel chose not to cross-examine Francisco Lemieux.

[14] Marc-Andre Lemieux refused to answer two questions on his cross-examination as follows:

Question No.	Transcript Page No.	Question
5	3	Do you have any specific objections to anything in the affidavit [of Peter Gaibisels sworn March 1, 2021]?
13	7	Alright. So those are facts that are sworn by Dr. Gaibisels at paragraph 33 in his affidavit. Do you have any evidence to dispute the authenticity or the veracity of those facts?

(a) The defendant Nikhil Toshniwal

[15] The defendant Nikhil Toshniwal refused to answer four questions on his cross-examination, summarized as follows:

Question No.	Transcript Page No.	Question
26	24	Plaintiff's counsel suggested that in January 2013 Solart had 69 customers waiting for solar panels and almost \$3 million in deposits. Counsel then asked Mr. Toshniwal whether he thought this was "a little unusual"

		or whether there was “something dishonest” about Solart LLL soliciting customers in those circumstances
27	24	Based on the same assumed facts, counsel asked Mr. Toshniwal whether “this is a proper way to run a business?”
29	25	Again, based on the same assumed facts, counsel asked Mr. Toshniwal whether he “would consider that to be dishonest”
59	35	Do you have any evidence about the cause of action?

(c) The Defendant Sunny Natalia

- [16] The defendant Sunny Natalia refused to answer four questions on his cross-examination under rule 39.03 of the *Rules of Civil Procedure* as follows:

Question No.	Transcript Page No.	Question
8	3	To confirm his residential address
30	8/9	What’s your position on this motion?
31	13	Are you consenting to this motion?
86	34	Do you have any disagreement with any of the facts that [Peter Gaibisels] has stated in that paragraph [of his affidavit]?

(d) The Defendant Melanie LaCroix

- [17] The defendant Melanie LaCroix refused to answer nine questions on her cross examination under rule 39.03 of the *Rules of Civil Procedure* as follows:

Question No.	Transcript Page No.	Question
11	3	Do you dispute the fact that the pleadings disclose a cause of action?
12	4	Do you dispute the fact that the pleadings or the notice of application discloses a cause of action?
14	5	Do you dispute the fact that there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant?
15	5	Do you dispute the fact that the claims or defences of the class members raise common issues?
18	4	Do you dispute the fact that a class proceeding would be the preferable procedure for the resolution of the common issues?
19	6	Do you dispute the fact that there is a representative plaintiff, that is, Dr. Peter Gaibisels, who would fairly and adequately represent the interests of the class?
20	6	Do you dispute the fact that the representative plaintiff has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class?
24	7	Do you dispute the fact that the representative plaintiff does not have, on the common issues for the class, an interest in

		conflict with the interests of the other class members?
41	10	And do you object to any part of [Dr. Gaibisels'] affidavit?

(e) The Defendant Mark Leyton

[18] The defendant Mark Leyton refused to answer two questions on his cross examination as follows:

Question No.	Transcript Page No.	Question
15	5	Do you have any specific part of Dr. Gaibisels' affidavit that you disagree with?
22	8	In January 2011 there was one creditor. In March 2014 there were 127 creditors. Those people are all class members. Do you agree with me that there are more than two class members?

(f) The defendant Guy-Phillippe Bouchard

[19] The defendant Guy-Phillippe Bouchard refused to answer eight questions on his cross examination under rule 39.03 of the *Rules of Civil Procedure* as follows:

Question No.	Transcript Page No.	Question
18	5	Did you continue on afterwards on a private retainer with, as a lawyer with these people, with Solart?
19	5 & 6	Referring to exhibit A to the affidavit of Nikki Basedo, sworn March 7, 2022 - what's the relevance of this document?

21	8	Exhibit B to the same affidavit - same question, what's the relevance of that document?
25	9	And I want to know what the relevance of this document is to this proceeding?
26	10	This letter dated October 23, 2012, an employment contract, what is the relevance of that to certification?
31	14	And what's the relevance of that exhibit [exhibit C to the affidavit of Nikki Basedo],
36	14	Would you please tell me the nature of your opposition [to the motion for certification] please?
39	17	What is your factual basis [for opposition]?

(g) Adam Webb on behalf of the defendant 2325524 Ontario Inc. o/a Sentinel Solar

[20] The defendant Sentinel Solar, by its representative Adam Webb, refused to answer three questions on the cross examination under rule 39.03 of the *Rules of Civil Procedure* as follows:

Question No.	Transcript Page No.	Question
2	3	Do you agree that the statement of claim sets out a cause of action in fraud?
3	4-5	Do you have any facts that are within your knowledge that would allow you to say that the statement of claim does not set out a cause of action?
4	9	Is there an identifiable class of two or more persons that would be represented by the

		representative plaintiff? Is there an identifiable class of two or more persons?
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(h) The defendant Martin Yockell

- [21] The defendant Martin Yockell attended to be cross-examined on his affidavit in response to the plaintiff's certification motion, with an English/French interpreter. A review of the transcript discloses that plaintiff's counsel began the cross-examination by asking what the position of the witness was on certification of the class proceeding. When counsel for Mr. Yockell sought to state an objection to the question, plaintiff's counsel repeatedly interrupted her and prevented her from putting her objection to the question on the record. He then went on to ask further repeated questions and refused to permit Mr. Yockell's counsel to effectively respond. Plaintiff's counsel then unilaterally adjourned the cross-examination "pending a ruling" from the court.
- [22] In the result, there were no questions posed to Mr. Yockell which he refused to answer, as his counsel was prevented from stating her position with respect to the questions on the record as provided by subrule 34.12 (1) of the *Rules of Civil Procedure* which states:

Where a question is objected to, the objector shall state briefly the reason for the objection, and the question and the brief statement shall be recorded.

- [23] The following is a transcript of the cross-examination OF Mr. Yockell in its entirety:

MARTIN YOCKELL, affirmed:

MAHDI HUSSAIN, English/French Interpreter, affirmed:

EXAMINATION BY MR. CORCORAN:

MR. CORCORAN: You know, this is going to be

maybe a little awkward. I hope that I recall

and remember that we have an Interpreter and

that what I say will be interpreted. So I ask

that we proceed slowly so as not to be talking

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over each other and that we'll be able to have
an accurate transcript of the proceeding.

I don't have that many questions to ask Mr.

Yockell. I went over his materials, his
affidavit in support of his position on
certification and I was unable to find or
recognize any of the content of the affidavit
that touched on the issue of certification.

And I take it that -- I'd like to ask what

Mr. Yockell's position on certification is. Is
he opposed?

MS. COOPER: That is a legal question and Mr.

Yockell will not ---

MR. CORCORAN: I haven't even asked it yet.

You're so eager to come up with your boilerplate
answer that you don't even let me ask the
question before you put your answer on the 1 record.

MS. COOPER: If you're not finished, please do
proceed.

MR. CORCORAN: I am. I want to remind Ms.
Cooper that this is my examination, not hers.

And unless I make a direct question to her, all

my questions will be directed to Mr. Yockell,

not Ms. Cooper.

MS. COOPER: That's fine.

MR. CORCORAN: I object to Ms. Cooper answering

the questions that I put to Mr. Yockell. The

question I am asking Mr. ---

MS. COOPER: Mr. Corcoran ---

MR. CORCORAN: Ms. Cooper, can you wait until

I'm done, please?

BY MR. CORCORAN:

Q. The question I am asking Mr. Yockell, that

has already been answered by Ms. Cooper, is what is

your position on this certification? Is it, are you

consenting? Are you opposed? Or are you unopposed?

Mr. Yockell?

MS. COOPER: Mr. Corcoran ---

MR. CORCORAN: Would you mind waiting until the

interpretation is completed before jumping in.

BY MR. CORCORAN:

Q. The first question I'd like to ask Mr.

Yockell is whether or not ---

MS. COOPER: Mr. Corcoran ---

MR. CORCORAN: --- he understands what I --

please, Ms. Cooper.

MS. COOPER: Mr. Corcoran ---

MR. CORCORAN: Mind your manners, please.

MS. COOPER: Mr. Corcoran, you ---

BY MR. CORCORAN:

Q. I want to ask Mr. Yockell if he understands

what I have just said.

MS. COOPER: Mr. Corcoran, Mr. Corcoran ---

BY MR. CORCORAN:

Q. Do you understand what I have just said,

Mr. Yockell?

MS. COOPER: Mr. Corcoran, you have to let me --

sorry.

MR. CORCORAN: Mr. Interpreter, you just have to

ignore Ms. Cooper and go on with your

interpretation. I am not finished asking these

questions.

MS. COOPER: Mr. Devenport, could I ask for your

assistance? I do need to be able to play my

proper role as his counsel and to respond as

necessary.

MR. CORCORAN: I haven't finished asking the questions yet. So why would you be impaired on answering anything?

MS. COOPER: Because you're asking a series of questions.

MR. CORCORAN: I have not asked the questions yet.

BY MR. CORCORAN:

Q. The first question I want to ask is, do you understand what I have just said?

MS. COOPER: Mr. Corcoran, is that your question completed?

MR. CORCORAN: That's the first part of the question.

MS. COOPER: Thank you. So I will object to the following things. Firstly ---

MR. CORCORAN: I didn't ask you for your opinion. I asked your client if he understands what I have just said.

BY MR. CORCORAN:

Q. Will you answer the question, please, Mr. Yockell?

MS. COOPER: Mr. Corcoran, Mr. Corcoran ---

BY MR. CORCORAN:

Q. Will you answer the question, please. Mr.

Yockell? Do you understand what I've just said?

MS. COOPER: You need to let me -- Mr.

Devenport, I need a ruling here. I need to ---

BY MR. CORCORAN:

Q. Do you understand what I have just said?

Mr. Yockell?

MS. COOPER: Mr. Devenport?

THE OFFICIAL EXAMINER: Yes.

MS. COOPER: Could I have your assistance here,
please. I need to be able to respond and to
make proper objections.

MR. CORCORAN: Well you make your objections
after I've asked the question. Now I just asked
a very proper question. Does he understand what
I've just said to him. Does he understand it?
Yes or no? He can answer that question. You
don't need to answer that question for him.
So I want to ask him, does he understand?

MS. COOPER: I would like to ---

BY MR. CORCORAN:

Q. Mr. Yockell, do you understand?

MS. COOPER: I have an objection.

MR. CORCORAN: No, object after he has answered the question.

MS. COOPER: You object ---

BY MR. CORCORAN:

Q. Do you understand what I have just said, Mr. Yockell?

MS. COOPER: As counsel for the defendant witness I have the right to make an objection.

MR. CORCORAN: Well, object, but let him answer the question first.

MS. COOPER: We are not going to get very far, Mr. Corcoran, if you keep ---

MR. CORCORAN: I am not asking you anything.

You have to understand that. Whatever your role is and everything else in this world, this is my examination and I'm asking the questions and I want him to answer, not you. And I've asked a very straightforward question. Does he understand what I've just said?

MS. COOPER: Well I don't understand what he's

just said.

MR. CORCORAN: Well I guess you don't understand

I asked him, does he understand what I've

just said.

MS. COOPER: You've asked multiple questions and

made multiple statements.

MR. CORCORAN: Okay. Mr. Devenport, I'm going

to adjourn this examination pending a Ruling

from Justice Broad. Okay? Thank you very much.

Thank you everybody for attending.

(i) The defendant Leonor Nonnenmacher

[24] Plaintiff's counsel produced a Refusals Chart listing 40 questions which he claimed Ms. Nonnenmacher refused to answer.

[25] A copy of the Refusal Chart in respect of Leonor Nonnenmacher is appended hereto as Schedule A.

[26] As noted previously, Ms. Nonnenmacher is unrepresented by counsel and did not appear in response to the plaintiff's motion.

(j) The defendants Veronique Lemieux, Ai Chen, and Sophie Poirier

[27] The plaintiff did not produce Refusals Charts in respect of the defendants Veronique Lemieux, Ai Chen, and Sophie Poirier and did not pursue any relief against them in submissions or his Factum.

(k) The defendant Lennie Moreno

[28] The plaintiff filed a notice of abandonment of the refusals motion against the defendant Lennie Moreno dated August 10, 2023

Analysis re Plaintiff's refusals motion

[29] Master Lou Ann M. Pope set forth a useful summary of the guiding principles respecting the scope of cross-examination on a motion in the case of *Tutt v Ishakis*, 2018 ONSC 1785 at paras. 6-7 as follows:

The scope of cross-examination on a motion is well-established. The questions must be relevant to (a) the issues on the particular application or motion; (b) the matters raised in the affidavit by the deponent, even if those issues are irrelevant to the application or motion; or (c) the credibility and reliability of the deponent's evidence. (*Ontario v. Rothmans Inc.*, 2011 CarswellOnt 2916 (Ont. S.C.J.), at para. 12)

Justice Perell in Ontario, at paragraph 143, summarized the case law relating to the scope of cross-examination on an affidavit filed on a motion or application. He stated:

Case law has determined what are proper questions for a cross-examination on an affidavit. Once again, relevancy is a key determinant of a proper question, and relevancy is determined by reference to the matters in issue in the motion in respect of which the affidavit has been filed and by the matters put in issue by the deponent's statements in the affidavit.

[30] The matters in issue on a certification motion are defined by the five-part test set forth in section 5 of the CPA:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of two or more persons;
- (c) the claims of the class raise common issues;
- (d) a class proceeding would be the preferable procedure to resolve those common issues; and
- (e) there is a representative plaintiff who satisfies certain requirements.

(see *Price v Lundbeck A/S*, 2022 ONSC 7160, at para. 74)

[31] The first element of the test is not concerned with evidence, but rather with whether the pleading discloses a cause of action. Evidence may be relevant for the remaining four parts of the test, but only to a limited extent, the inquiry being limited to whether there is "some basis in fact" for each of the four remaining parts of the test.

[32] In light of the guiding principles set forth above, I am unable to accept the submission of the plaintiff's counsel that the scope of the cross-examinations on the certification motion is defined by Rule 31.06 of the *Rules of Civil Procedure* which specifically governs examinations for discovery. The scope of a cross-examination of a deponent on an application or motion is narrower than an examination for discovery and an examining party may

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not ask questions on issues that go beyond the scope of the cross-examination for the application or motion, unless the matter is raised in, or put in issue by the deponent in his or her affidavit, in which case the opposite party is entitled to cross-examine on the matter even if it is irrelevant and immaterial to the motion before the court (see *Tutt* at para. 8).

[33] In the case of *Babin v. Bayer Inc.*, 2016 ONSC 5069 Perell, J. at para. 26 listed eight categories of grounds upon which is proper for a deponent to refuse to answer a question in a class proceeding, as follows:

(1) unanswerable - the question is not capable of being answered, which is to say that the question is vague, unclear, inconsistent, unintelligible, redundant, superfluous, repetitious, overreaching, beyond the scope of the examination, speculative, unfair, oppressive, or a matter of rhetoric or argument;

(2) immaterial - the question is not material, which is to say that the question falls outside the parameters of the action and does not address a fact in issue;

(3) irrelevant - the question is not relevant, which is to say that the question does not have probative value; it does not adequately contribute to determining the truth or falsity of a material fact;

(4) untimely - the question is not relevant to the class period because it concerns events or matters outside of the class period, or more generally, it concerns events temporally unconnected to a cause of action or defence;

(5) idiosyncratic or uncommon - the question is not relevant to the common issues because it concerns an individual inquiry that was not certified for the common issues trial;

(6) answered - the question or the documents relevant to the question have already been provided by the party being examined;

(7) disproportionate - the question is disproportionate, which is to say that the question may be relevant but providing an answer offends the proportionality principle; and

(8) privileged - the answer to the question is subject to a privilege, including lawyer and client privilege, litigation privilege, or the privilege for communications in furtherance of settlement.

[34] For the reasons that follow, I find that the refusals of the parties who were examined can all be justified on the grounds that the questions were irrelevant, immaterial, unanswerable or disproportionate. The parties being examined were not required to answer the questions and properly refused them.

[35] The first refusal of Marc-Andre Lemieux (Q. 5) which asked if he had any specific objection to Dr. Gaibisels' certification affidavit was disproportionate and unanswerable as the affidavit is 25 pages long and incorporated

the entire 82-page Statement of Claim by reference. In respect of the second refusal, (Q. 13), rather than posing a specific question, plaintiff's counsel simply asked another disproportionate and overreaching question in reference to a single paragraph of the affidavit which contained multiple factual assertions.

- [36] Questions 26, 27 and 29 refused by Nikhil Toshiwal sought his personal opinions based upon assumed facts put to him, which are irrelevant and of no probative value. Question 59, which asked whether Mr. Toshiwal had any evidence "about the cause of action" was a question which was clearly unanswerable.
- [37] Question 8 asked of Sunny Natalia requesting his current address was irrelevant to the issues on the certification motion. Questions 30 and 31, which asked him his position on the certification motion and whether he was consenting to it, called for his legal position on the motion for certification, which is outside the scope of the examination and were unanswerable as being a matter of argument. Question 86 which queried whether Mr. Natalia disagreed with assertions made in a particular paragraph of Dr. Gaibisels' affidavit is unanswerable as it sought his opinion on a legal position adopted by the plaintiff and was therefore a matter of rhetoric or argument. Mr. Natalia filed no material in response to the motion for certification and was being examined pursuant to rule 39.03(1). He was under no obligation to inform himself of matters beyond his personal knowledge.
- [38] Questions 11, 12, 14, 15, 18, 19 20 and 24 refused by Melanie LaCroix, simply asked her whether she disputed the various elements of the test on certification. These questions sought to elicit a legal opinion or position and, as such, were unanswerable as being beyond the scope of the examination. Question 41 by which Ms. McCroix was asked whether she objected to any part of Dr. Gaibisels' affidavit was unanswerable and disproportionate.
- [39] Question 15 posed to Mark Leyton asked whether there is any specific part of Dr. Gaibisels' affidavit with which he disagreed was unanswerable and disproportionate. Question 22 sought an irrelevant legal opinion from Mr. Leyton on whether there are more than two class members.
- [40] Question 18 posed to Guy-Phillipe Bouchard on whether he continued "afterwards" on a private retainer with Solart was irrelevant. Questions 19, 21, 25, 26, and 31 sought his legal opinion on the relevance of certain documents to the proceeding and were therefore irrelevant.
- [41] Questions 2, 3 and 4 asked of Adam Webb on behalf of Sentinel Solar each sought to elicit his legal opinion and were therefore irrelevant.
- [42] I find that the questions posed to Martin Yockell, which his counsel was not permitted to object to fully on the record due to interference by the plaintiff's counsel, namely his position on certification and specifically whether he was opposed, were unanswerable and beyond the scope of the examination.

[43] I find that an order requiring Mr. Yockell to re-attend to be cross-examined on his affidavit, as sought by the plaintiff, is unwarranted and inappropriate.

[44] Rule 34.14 of the *Rules of Civil Procedure* governs the conduct of examinations conducted under the Rules and provides as follows:

34.14 (1) An examination may be adjourned by the person being examined or by a party present or represented at the examination, for the purpose of moving for directions with respect to the continuation of the examination or for an order terminating the examination or limiting its scope, where,

- (a) the right to examine is being abused by an excess of improper questions or interfered with by an excess of improper interruptions or objections;
- (b) the examination is being conducted in bad faith, or in an unreasonable manner so as to annoy, embarrass or oppress the person being examined;
- (c) many of the answers to the questions are evasive, unresponsive or unduly lengthy; or
- (d) there has been a neglect or improper refusal to produce a relevant document on the examination.

(2) Where the court finds that,

- (a) a person's improper conduct necessitated a motion under subrule (1); or
- (b) a person improperly adjourned an examination under subrule (1),

the court may order the person to pay personally and forthwith the costs of the motion, any costs thrown away and the costs of any continuation of the examination and the court may fix the costs and make such other order as is just.

[45] It is noteworthy that Mr. Yockell did not adjourn or seek to adjourn the cross-examination in response to the conduct of plaintiff's counsel in refusing to permit his counsel to state her objection to the question posed, as provided in subrule 34.12 (1), but rather the cross-examination was unilaterally adjourned by plaintiff's counsel. The proper course for plaintiff's counsel to follow was to permit Mr. Yockell's counsel to state briefly the reason for her objection to the question or questions, proceed with his cross-examination to completion and then adjourn the cross-examination for the purpose of moving for directions with respect to any questions refused.

[46] In the case of *Canada (Attorney-General) v. Mennes*, 2014 ONCA 690 the Court stated at paras. 26-27:

When an affidavit is submitted in support of a motion or an application, the general rule is that the responding party has the right to cross-examine on that affidavit: rule 39.02(1). Perell J. has recently synthesized the case

law on the scope of cross-examination on an affidavit in an application or motion in *Ontario v. Rothmans Inc.*, 2011 ONSC 2504, 5 C.P.C. (7th) 112 (Ont. S.C.J.), at paras. 138-149.

However, the right to cross-examine on an affidavit is always subject to the court's discretion to control its own process. In *Confectionately Yours Inc., Re* (2002), 219 D.L.R. (4th) 72 (Ont. C.A.), leave to appeal to S.C.C. refused, (2003), [2002] S.C.C.A. No. 460 (S.C.C.), at para. 65, Borins J.A. stated:

Although there is a *prima facie* right to cross-examine upon an affidavit, the court has discretion to control its own process by preventing cross-examination or limiting it, where it is in the interests of justice to do so. See, e.g., *Re Ferguson and Imax Systems Corp.* (1984), 47 O.R. (2d) 225, 11 D.L.R. (4th) 249 (Dy. Ct.).

(emphasis added)

[47] In my view plaintiff's counsel had a full opportunity to cross-examine Mr. Yockell in accordance with the directions of rules 34.12 and 34.14 but improperly and unilaterally adjourned the cross-examination. Pursuant to subrule 34.14 (2)(b) the court may in these circumstances make such order as is just. I find that the interests of justice in the circumstances call for denial of the right of the plaintiff to continue the cross-examination of Mr. Yockell following the improper adjournment by the plaintiff. The affidavit in support to the plaintiff's motion did not set forth proper and relevant areas of enquiry which the plaintiff would seek to explore on a continuation of the cross-examination of Mr. Yockell and the plaintiff made no submissions in this respect. Mr. Yockell's counsel confirmed that his role at Solart was that of a salaried employee, and not of a senior officer, for a two-year period. The plaintiff's counsel offered nothing to suggest that the plaintiff would suffer prejudice by being denied further cross-examination of Mr. Yockell.

[48] It can be seen from the Refusals Chart in respect of Leonor Nonnenmacher that the questions are of the same nature as referred to previously in reference to the other defendants against whom the plaintiff's motion was brought. Plaintiff's counsel sought Ms. Nonnenmacher's opinion on:

- (a) whether the Statement of Claim discloses a cause or causes of action and whether the causes of action are properly pled.
- (b) whether Dr. Gaibisels is a suitable representative plaintiff.
- (c) whether she agrees with what the plaintiff deposed to in all or in certain paragraphs of his affidavit on certification; and
- (d) whether it would be better to have one trial or 130 trials

- [49] Ms. Nonnenmacher maintained throughout that she was unable to answer the questions which sought her opinion relating to the requirements for certification nor did she have information on whether allegations put to her from the plaintiff's affidavit are true.
- [50] I find that the questions put to Ms. Nonnenmacher were unanswerable, irrelevant and disproportionate and need not be answered.

Additional declaratory and other relief sought by the plaintiff in his Notice of Motion

- [51] As indicated above, the plaintiff sought additional declaratory relief at paragraphs 2, 3, 4, and 5 of his Notice of Motion. The relief set forth at paragraph 8 is also in the nature of declaratory relief notwithstanding that the term "declaration" is not used as the paragraph does seek an order directing any defendant to do anything.
- [52] Paragraph 7 seeks an order requiring any defendants found to have failed or refused to answer proper questions to re-attend at their own expense to answer proper questions. As noted previously none of the defendants have been found to have improperly refused to answer any of the plaintiff's questions on cross-examination. The relief sought in paragraph 7 is therefore denied.
- [53] The plaintiff did not pursue the declaratory relief sought at paragraphs 2, 3, 4, 5 and 8 in his Factum or in oral submissions. Indeed, the only Order sought by the plaintiff in his Factum, aside from an order for costs, was set forth at para. 11 as follows:
- An Order that the defendants submit the evidence they are relying upon to defeat certification to the defendants (*sic*) within 14 days of the hearing of this refusals motion, failing which proportionality concerns dictate they shall be deemed to be consenting to certification.
- [54] It is not apparent that the declaratory relief sought by the plaintiff in his Notice of Motion is being pursued by him.
- [55] In any event, the plaintiff cited no authority for the court to grant the declaratory relief sought in his Notice of Motion. The purpose of rule 34.14(1) is to obtain directions from the court respecting the continuation of an examination, or for an order terminating an examination or limiting its scope. The rule does not contemplate the declaratory or other orders sought by the plaintiff on the motion.

- [56] I find that there is no basis in law for the court to issue a declaration that “a question failed to be answered or refused to be answered by one defendant is a question failed to be answered or refused to be answered by all of the defendants” as sought by the plaintiff.
- [57] Although rule 31.07(2) provides that if a person examined for discovery fails to answer a question, that party may not introduce at the trial the information that was not provided except with leave, there is no equivalent rule for cross examination on affidavits to be used on motions.
- [58] The declaratory relief paragraphs 4 and 8 of the plaintiff’s notice of motion is therefore denied.
- [59] At paragraph 2 of his notice of motion the plaintiff seeks a declaration that the defendants Julien Cyr and Martin Dupuis, both self-represented, have consented to certification. I decline to make such a declaration. The motion before the court is a refusals motion and not a certification motion. At the Case Management Conference on November 28, 2022 I directions were given respecting the plaintiff’s refusals motions against various defendants and any cross-motions respecting refusals. Supplementary directions for the refusals motion were given at the Case Management Conference on April 12, 2023. The plaintiff did not give notice or seek leave to bring a motion for any other purpose other than refusals on cross-examinations.
- [60] Moreover, as indicated, the plaintiff did not pursue these claims for declaratory relief in his Factum or oral submissions.
- [61] In any event, the questions of whether the named self-represent defendants effectively consented to certification and the effect, if any, of such consents are appropriately left to the certification motion. It is therefore not necessary in the context of the refusals motions before the court to rule upon the submissions of counsel for the Solart Defendants regarding the propriety, or lack thereof, of the manner by which the plaintiff’s counsel obtained these defendants’ consents to certification.

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The defendants Vivianne Abecassis and Fanny Girard

- [62] At paragraph 6 of his Notice of Motion the plaintiff sought an order that the defendants Vivianne Abecassis and Fanny Girard attend for examination at their expense. Both of these defendants are self-represented. Appended to the plaintiff’s affidavit in support of the motion are affidavits of service of notices of examination on each of these defendants as well as certificates of non-attendance on the dates set for their cross examinations of September 2 and September 12, 2022, respectively. Neither of these defendants attended on the motion notwithstanding service

of the motion materials on them. It is appropriate in the circumstances to order them to attend to be examined to answer proper questions if plaintiff's counsel is so advised.

Disposition of the Plaintiff's Motion

[63] For the foregoing reasons it is ordered as follows:

- (a) the defendants Vivianne Abecassis and Fanny Girard shall attend remotely by ZOOM for examination at their expense at a date and time to be specified in a Notice of Examination to be served by the plaintiff in accordance with the *Rules of Civil Procedure*;
- (b) each of the Vivianne Abecassis and Fanny Girard shall pay costs thrown away to the plaintiff in the sum of \$750 within 30 days hereof; and
- (c) the balance of the plaintiff's motion is dismissed.

Refusals motion brought by the Solart Defendants

[64] As indicated previously, the Solart Defendants have brought a motion for an order that the plaintiff Peter Gaibisels answer questions refused by his counsel on his behalf on his cross-examination on his affidavit filed on the certification motion within 30 days and that he re-attend to answer further proper questions relating to the refusals and proper follow-up questions arising from answers given pursuant to the Order.

[65] Attached as Schedule B to this Endorsement is the Refusals Chart prepared by counsel for the Solart Defendants setting forth 13 sets of questions which were either refused by the plaintiff or refused by plaintiff's counsel after the plaintiff answered. Each set of questions were refused by plaintiff's counsel on the basis that they went to the merits of the plaintiff's claim and therefore need not be answered.

Guiding Principles re the scope of oral and documentary discovery of the plaintiff on certification

[66] The applicable principles governing the evidentiary burden on a plaintiff on certification were usefully summarized by Strathy, J. (as he then was)) in *Roveredo v Bard Canada Inc.*, 2010 ONSC 5240 at paras. 8-10 as follows (authorities and citations omitted):

- The certification motion is not intended to be a test of the merits of the action.
- The evidentiary burden on the plaintiff on certification is not onerous - the plaintiff need only establish a "basis in fact" for the certification requirements in s. 5(1)(b), (c), (d) and (e) of the CPA.

- However, that the court has jurisdiction to require the plaintiff to produce additional documentation to enable the defendant to properly respond to the plaintiff's evidence and to ensure that there is an adequate evidentiary record.
- It is not always easy to separate, prior to the certification hearing, where an examination of the "basis in fact" ends and an impermissible excursion into the merits begins. Nor is it always easy to say whether a particular piece of evidence, viewed in isolation, will assist the court in addressing the certification test.
- It is undesirable that representative plaintiffs be subjected to burdensome production motions and extensive cross-examinations on what is meant to be a procedural motion.
- On the other hand, the process must be fair and the defendant must be given a reasonable opportunity to respond to the plaintiff's evidence.
- the court cannot address certification in a vacuum. The apparent commonality of the issues and preferability of the procedure may appear obvious when looking at the pleadings or a limited record but may become less obvious when a full and balanced record is available.
- Ultimately, the decision is driven by the circumstances of the particular case and requires a degree of balancing, so as to be fair to both parties.

[67] In *Batten v. Boehringer Ingeheim (Canada) Ltd.*, 2017 ONSC 53 Perrell, J. stated as follows at paras. 163 and 180 (authorities and citations omitted):

On a certification motion, evidence directed at the merits may be admissible if it also bears on the requirements for certification but, in such cases, the issues are not decided on the basis of a balance of probabilities but rather on that of the much less stringent test of "some-basis-in-fact."

In the context of the common issues criterion, the some-basis-in-fact standard involves a two-step requirement that: (1) the proposed common issue actually exists; and (2) the proposed issue can be answered in common across the entire class.

[68] Thus, there is no blanket prohibition on asking questions of the plaintiff on cross-examination related to the merits of the case on a certification motion, provided they are directed to testing whether the proposed common issue actually exists and whether it can be answered in common across the proposed class.

[69] Moreover, as noted previously, the plaintiff may be asked on cross-examination questions in relation to matters raised or put in issue by him in his affidavit in support of certification, even if those issues are irrelevant to the

motion. In this case the plaintiff's affidavit on the certification motion directly incorporates the entire Statement of Claim by stating at para. 39 "I reiterate the facts alleged in the Amended Amended Statement of Claim against each of the defendants in this action."

Discussion

[70] In his Supplementary Notice of Motion for Certification the plaintiff requests an Order that the proceeding be certified based on the following common issues:

(a) did the defendants fraudulently and without colour of right deprive the class members of the deposits they paid for the Solar panels?

(b) did the Toronto Dominion Bank, Sentinel Solar, Mark-Andre Lemieux and one some or all of the other defendants knowingly assist the defendants Solart LLL Corp and related corporations and related individual defendants to fraudulently and without colour of right deprive the class members of the deposits they paid for the solar panels?

(c) did the TD breach its duty of care to the class members and cause them to incur damages as a result of promoting Solart's legal business, when it knew, should have known or was reckless to Solart's illegal business?

(d) are one, some or all of the defendants been (*sic*) unjustly enriched

i. have they been enriched by the loss of the creditors deposits?

ii. have the class members been correspondingly deprived of their deposits?

iii. is there a juristic reason for the enrichment?

(e) did one, some or all of the defendants use the creditors' deposits or allow them to be used for purposes other than the installation of solar panel projects knowing they were impressed with a trust and in breach of that trust?

(f) did one some or all of the defendants knowingly receive the creditors' deposits knowing they would not be used to install the solar panels

[71] I accept the positions taken by counsel for the Solart Defendants that each of the 13 groups of questions which the plaintiff refused to answer were proper questions on the plaintiff's cross-examination for the following reasons:

(1) Refusals 1-3 – Questions 63,64,65, 66:

Proposed common issue (e) for certification alleges that some or all of the defendants took customer funds, impressed the funds with a trust and improperly used those funds in breach of that trust. The questions relate to how the alleged trust was allegedly formed, which representations were allegedly made and whether they were made to all class members and the general nature of the alleged trust obligation. As such, the questions are relevant to common issues and the appropriateness of a class proceeding and they do not go beyond the "basis in fact" standard;

(2) Refusals 4-7 – Questions 67,68,69, 70:

The plaintiff has alleged that a common issue is the "improper" use of class member funds (characterized as deprivation of deposits, use of deposits for purposes other than installation of solar panel projects, and knowing receipt of deposits) yet refused four questions relating to what constitutes an improper use, namely the plaintiff's position on the proper use of deposits, whether using deposits to install solar panels or to pay expenses was a proper use of those funds, and whether his claim relates to deposits being used for illegitimate purposes. These questions relate to the alleged common issue of whether customer funds were used improperly and are relevant to whether a class proceeding is the most appropriate forum to resolve the disputes. The questions do not go beyond the "basis in fact" standard.

(3) Refusals 8-9 – Questions 71, 73

These questions address how funds received by Solart were allegedly misused and whether the analysis of the alleged misuse must account for individual class members, individual projects and individual deposit amounts and whether the use of deposit funds was for legitimate or illegitimate purposes. The questions are fair and are relevant to the determination of whether common issues exist, whether the common issues are common across all members of the class, and therefore whether a class proceeding is appropriate. How the court would determine class members' entitlement and damages is relevant. If individual class members had funds used in different ways, both proper and improper, that is relevant to certification.

(4) Refusal 10 – questions 78,79

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These questions concern what services customers were entitled to receive in exchange for their funds. The question simply asked the plaintiff whether he agreed that paragraph 14 of the Amended Statement of Defence listed services Solart was required to provide to customers. Before his counsel refused, the plaintiff answered that the list was “not exhaustive.” The defendants are entitled to explore the plaintiff’s position with respect to what constitutes legitimate use of funds remitted, to distinguish such use from “improper” uses as alleged by the plaintiff which goes to the question of common issues.

(5) Refusal 11-Question 84

The question seeks to clarify whether part of the complaint underlying the action is that the defendants received deposits knowing that Solart was insolvent. Proposed common issues at paras. 4(a), 4(b) and 4(c) allege that some or all of the defendants knowingly defrauded customers or otherwise received deposits they knew would not be used for solar panel installations. The question is directly relevant to common issues. Having proposed the common issues for certification, fairness dictates that the defendants be entitled to cross-examine the plaintiff on the nature of those common issues.

(6) Refusal 12 – Questions 90-99

Paragraph 75 of the Amended Amended Amended Statement of Claim lists several alleged “delay tactics” or reasons Solart offered to the creditors for not being able to install solar panels. The questions posed to the plaintiff ask which of the tactics were used on him, who used the tactics on him, whether all tactics were used on all class members, whether some class members had none of the tactics used on them, and whether the only way to determine which tactics were used on which class members would be to ask each class member. The defendants are entitled to explore claims made against them. The questions relate to common issues and whether the proposed issue can be answered in common across the entire class and are thus proper questions on cross-examination.

(7) Refusal 13 – Question 100

In his affidavit the plaintiff states that part of the reason for his contracting with Solart was that he saw it as a “20-year investment.” He also states that his experience can be extrapolated to all class members. The question which asked the plaintiff whether he understood that some of the class members entered into the solar panel projects purely as a matter of investment is relevant to common issues. How class members viewed their contracts and deposits affects and changes the nature of the alleged wrongdoing. Different customers may have had different expectations and different agreements with the defendants. The plaintiff cannot simply allege that he was defrauded and assert that his experience is identical to the experience of all class members and then refuse to answer any exploratory or follow-up questions on these issues.

[72] In my view employment by plaintiff’s counsel of a blanket refusal to questions concerning to the common issues that they relate to the “merits” was misinformed, inappropriate and not in accordance with the guiding principles derived from the jurisprudence referred to above.

[73] I agree with the submission of counsel for the Solart Defendants that the plaintiff’s refusal to answer any questions relating to the alleged common issues has deprived them of the ability to test the plaintiff’s case and make their own case against certification. To permit the plaintiff to proceed on the existing record would be manifestly unfair. To remedy the situation, it is necessary to order that the plaintiff attend at his own expense to be re-examined to answer the refused questions as well as any other proper follow-up questions arising from answers given to the improperly refused questions.

- [74] The draft order submitted by the Solart Defendants includes
- (a) a provision that the plaintiff re-attend, at his own expense, to continue the cross-examination by the Solart Defendants adjourned on October 27, 2022, to answer questions related to the existence of common issues and the applicability of those common issues across all class members, as well as any other questions relevant to the test for certification; and
 - (b) a provision that upon the Plaintiff’s continued cross-examination being ordered by the court, the Plaintiff shall answer questions posed by counsel for the cross-examining party, and any objections made by Plaintiff’s counsel will be registered on the record so that counsel may make submissions about the admissibility of the Plaintiff’s answers on the Plaintiff’s Motion for Certification.

[75] These two provisions represent claims for relief which were not advanced in the Notice of Motion of the Solart Defendants and hence plaintiff’s counsel had no opportunity to address them in submissions. I therefore decline to make these orders.

[76] The draft order also contemplates a declaration that the Plaintiff’s counsel’s improper conduct during the examination of Peter Gaibisels necessitated a motion. In my view a finding of this nature bears only on the question of costs and the issue is therefore best addressed in the context of submissions on costs.

Disposition of the motion brought by the Solart Defendants

- [77] For the reasons set forth above:
- (a) It is declared that the questions refused by Plaintiff’s counsel – as set out in the Defendants’ Refusals Chart contained in the January 31 2023 Affidavit of Catherine Dennis and appended as Schedule B to this Endorsement – are proper questions;

(b) It is ordered that the Plaintiff, Peter Gaibisels, re-attend, at his own expense, on the cross-examination adjourned on October 27, 2022, to answer the refusals set out in the Defendants' Refusals Chart and further proper questions relating to the refusals set out in Defendants' Refusals Chart and proper follow-up questions arising from answers given pursuant to this Order.

Costs

- [78] The parties are strongly encouraged to agree on the costs of the motions. If some or all of the parties are able to settle the issue of costs, they shall advise the court accordingly.
- [79] If the parties cannot agree on costs, any defendant who seeks an order for costs against the plaintiff may make written submissions as to costs within 30 days of the release of these Reasons. The plaintiff has a further 30 days to respond to the submissions of each defendant who has delivered costs submissions. Each defendant has a further 10 days to deliver reply submissions. All such written submissions are to be forwarded to me care of the Trial Coordinator at Brantford using the same email address as was utilized for the release of these Reasons.
- [80] The initial submissions of each party shall not exceed four (4) double-spaced pages, exclusive of Bills of Costs or Costs Outlines and Offers to Settle and the reply submissions, if any, shall not exceed two (2) such pages.
- [81] If no submissions are received within this timeframe, the parties shall be deemed to have settled the issue of costs as between themselves.
- [82] If any party does not intend to file costs submissions or reply submissions, that party is directed to advise the court, through the Trial Coordinator at Brantford, accordingly,



D.A. Broad, J.

Date: December 12, 2023

SCHEDULE A

**REFUSALS CHART
LEONOR NONNENMACHER**

REFUSALS					
Refusals given on the examination of Leonor Nonnenmacher , dated September 16, 2022.					
Issue & relationship to pleadings or affidavit (Group the questions by issues.)	Question No.	Page No.	Specific question	Answer or precise basis for refusal	Disposition by the Court
1.Certification/Pleadings	10	4	Do you agree that the pleadings disclose the cause of action?	A. I cannot answer this question.	

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2.Certification/Pleadings	11	4	Why not?	A.It's a very broad question and I believe it's not a proper question for examination. I also believe that -- well, it is my understanding that it is the plaintiff who bears the ligation of proving to the court that the requirements for certifications are met. Therefore my view on whether the requirements for certifications are met is, in my opinion, irrelevant. And in addition it is my understanding that the examination is intended to deal with more matters of fact and what I know or saw or heard relating to the relevant issues in the case.
3.Certification/Pleadings	12	5	The answer to your question is very long. But I just wanted to ask you if the pleadings disclose a cause of action in your view.	A I cannot answer this question.
4.Certification/Pleadings	13	5	And I would like to ask you why not? Why can't you answer that question?	A I just explained it to you. Would you like me to repeat what I just said?
5.Certification/Pleadings	14	5	I'm not the one being examined; you are being examined. Why -- Do you dispute the fact that the pleadings disclose a cause of action? Do you disagree with that?	A. I cannot answer this question. It is my understanding that it is the plaintiff who bears the obligation to prove to the court that the requirements for certifications are met. Therefore, my view on whether the requirements for certifications are met is irrelevant.
6.Certification/Pleadings	18,19	6,7	No, it's not your requirement, that's what you're saying. But I'm asking you a different question. Do you agree or disagree with the fact that the pleadings disclose a cause of action?	A.I cannot answer this question. It's a very broad question. I just cannot answer it.
7.Certification/Pleadings	21	7	Is there a cause of action set out in the pleadings?	A.I cannot answer this question.
8.Certification/Pleadings	22	7	You cannot or you will not?	A.I cannot answer this question.
9.Certification/Pleadings	25	7	And you see that the cause of action pled, among other things, is fraud. Is that correct?	A.Well then let me just tell you I will not answer the question then.
10.Certification/Pleadings	31	8,9	Do you disagree then that the pleadings disclose a cause of action? Do you disagree with that?	A.I will not be answering the question.
11.Certification/Pleadings	46	12,13	Do you have any evidence that the cause of action is not properly pled in the pleadings? Or to put it the way the statute does it, do you have any evidence that the pleadings do not disclose a cause of action?	A. I cannot answer this question.
12.Certification/Pleadings	47	13	We've been through that. You know what the pleadings are. You know what a cause of action is. Is there a cause of action in the pleadings?	A.I cannot answer any questions that are regarding the requirements for certification.

13.Certification/Pleadings	48	13	And why not? That's why we're here. That's what we're here -- we're not here to talk about whether you worked for Solart or not. That's not disputed. The question is, do you have any evidence that the pleadings do not disclose -- excuse me. Do you have any evidence that the pleadings do not disclose a cause of action?	A.It is not my obligation to prove whether or not the requirements for certifications have been met Therefore I cannot	
14.Certification/Pleadings	49	13,14	I didn't ask you--I didn't ask you that. I asked you if you had any evidence that the pleadings do not disclose a cause of action.	A.I cannot answer this question. I already told you my position. I am unopposed to your motion for certification. I cannot consent since in my opinion should not be part of this action since I did nothing wrong and I always acted in good faith.	
15.Certification/Pleadings	50	14	Do you have any evidence that would prove that Dr. Gaibisels is not a suitable	A. I cannot answer this question.	
16.Certification/Pleadings	51	14	May I ask why not?	A.I'm going to repeat the same thing that I already told you. So you're going to interrupt me. So I cannot answer this question	
17.Certification/Pleadings	54	15	Is it fair enough -- is it a fair statement to say that you have not provided any evidence on the motion for certification?	A.I cannot answer this question.	
18.Certification/Pleadings	72	18.19	Reader is referred to line 15 page 18 to line 2 page 19, inclusive. Now, I'm not going to read any more. But he talks about a cause of action and its proof. And the statement he made there is that he believes that there is a cause of civil fraud pled in the pleadings. And do you disagree with that, Ms. Nonnenmacher?	A.I cannot answer this question.	
19.Certification/Pleadings	73	19	Do you disagree with the fact that Dr. IO Gaibisels has pled that he believes that there is a cause of action of civil fraud pled in the pleadings in the statement of -- amended amended statement of claim?	A.I cannot answer this question.	
20.Certification/Pleadings	74	19	Do you disagree with that?	A.I cannot answer this question	
21.Certification/Pleadings	75	19	When you say you cannot answer, does that mean you're refusing to answer?	A.I cannot answer this question	
22.Certification/Pleadings	77	20	I don't want your view, Ms. Nonnenmacher. I don't want you to keep saying the same thing over and over and over again. I asked you if you disagree with what Mr. -- Dr. Gaibisels has sworn to be true in 11 paragraph 31(a) of his affidavit. You disagree with that?	A. I cannot answer the question.	

23.Certification/Pleadings	81	20,21	What did you -- why is it you cannot answer?	A.Because your question deals with Section 5 of the Ontario Class Proceedings Act and specifically the first requirement which is the pleadings, or the notice of application disclose a cause of action. And it is not my obligation to prove that this requirement has been met. Therefore, I will -- I cannot answer your question.	
24.Certification/Pleadings	82	21	You will not answer the question, that's what you're saying.	A. I cannot	
25.Certification/Pleadings	83	21	You're refusing to -- well I need to know	A. I cannot	
26.Certification/Pleadings	84	21	I need to know if you're refusing or what here? If you're astute enough to know what Section 5 is all about, then you know what it means to refuse to answer the question. So to say you cannot answer the question, does that mean you're refusing to answer the question?	A.I cannot answer the question because I believe this is a questions that's too broad and not a proper question for examination. It IS..	
27.Certification/Pleadings	87	22	I know what broad means. What's it mean to you? You say you cannot answer the question because it deals with something that is too broad. Very simple in my view, does the cause of action -- does the pleading disclose a cause of action? That's not broad. That's very specific, narrow.	A.I cannot answer this question.	
28.Certification/Pleadings	98	24	That's not an answer to the question. I didn't ask you what your obligation is. I asked you if you had any evidence to dispute the fact that the cause of action is pled in the pleadings. And I don't think you do have any evidence, do you?	A.I cannot answer the question.	
29.Certification/Pleadings	104	25	You are part of the action, Ms. Nonnenmacher. I don't want to hear any more of your speeches. Do you disagree with paragraph (c)(i)? Yes, or no?	A.I cannot answer this question.	
30.Certification/Pleadings	105	25	Is that a refusal to answer?	A.I cannot answer this question.	
31.Certification/Pleadings	109	26	Do you disagree with what he says, paragraph (c)(i)?	A.It's his view.	
32.Certification/Pleadings	110	26	Do you agree with it?	A.I don't have any information as to be able to tell you whether or not the information that he put out is correct or not. So I cannot answer this question	
33.Certification/Pleadings	111	27	Basically what you're saying to me is, you 2 don't know if that's true or not. Is that correct?	A.Yes, I don't have any information to know whether or not this is true or not. So I cannot answer the question.	
34.Certification/Pleadings	112	27	Why don't you say that instead of, I cannot answer? Would you agree that it would be better to have one trial with 130 defendants than it would be to have 130 trials? Do you disagree with that premise or agree with me?	A. This is one of the requirements for certification. So I cannot answer the question.	

35.Certification/Pleadings	113	27	That is not an answer to the question. Do you disagree or agree with that statement, paragraph 15 (d)?	I cannot answer the question, since it is a requirement for certification as per Section 5 of the Class Action Proceedings Act.
36.Certification/Pleadings	114	27	Do you agree or disagree with that statement?	A. I cannot answer the question.
37.Certification/Pleadings	115	27	I didn't hear the word agree or disagree in your answer. Which one is it, agree or disagree?	A. I cannot answer the question.
38.Certification/Pleadings	116	27,28	Or don't know	A. I cannot answer the question.
39.Certification/Pleadings	117	28	Okay. What about any of the statements in this affidavit, do you disagree with any of them	A. I've already provided information to you by email. I have nothing else to add. And I cannot answer the question and add any information.
40.Certification/Pleadings	118	28	No? You can't tell us whether you agree or disagree with the fact that -- about this 33(d), do you agree or disagree with the fact that approximately \$4,000,000.00 was received by Solart from the class people, the class members? Do you agree or disagree with that statement?	I don't have any information that can allow me to say whether or not this is, this information is true or not. No payments were directed to me in my personal or professional capacity. I was not part of senior management while I worked at Solart. I did not have any equity interest or ability to control or influence the companies, Solart and Gestion, or any other corporate defendants in any way. Decisions on all aspects of the client's projects were solely made by senior management. I did not have any decision-making powers. I did not have access to any financial information. So, again, I don't have any information that can allow me to say whether or not this information is true or not.

SCHEDULE B

**REFUSALS CHART
PETER GAIBISELS**

Issue & relationship to pleadings or affidavit (Group the questions by issues.)	Question No.	Page No.	Specific question	Answer or precise basis for refusal
Individual Issues: Trust Claim	63	18-19	“All right. I’m just talking now money. When I use the words funds I mean the equivalent of monies. Right?”	Refusal given after Dr. Gaibisels answered the question.
	64	19	“All right. You said a moment ago that part of the basis of the trust claim were oral representations made to various class members. Correct?”	Refused.
	65-66	19-20	“Were the same representations regarding the trust nature of the deposits made to all the class members?”	Refused. Not relevant to certification. Defendants’ counsel indicated that the basis for relevance was that the question is intended to determine whether the alleged representations made to all potential class members were the same, or whether different potential class members received different representations.
Individual Issues: Use or improper use of funds	67	20-21	“... if the (Plaintiffs’) deposits were used for purposes other than the installation of solar panel projects, your position is that would be an improper use of the deposits.”	Refused. Not relevant to certification.
	68	21	“If the deposits were used for the purpose of installing solar panels, that would have been	Dr. Gaibisels said “no” and then his counsel refused for relevance.

Issue & relationship to pleadings or affidavit (Group the questions by issues.)	Question No.	Page No.	Specific question	Answer or precise basis for refusal
			a legitimate use of the deposits. Correct?"	
	69	21	"Would you agree with me that it was quite proper for Solart LLL Corp to use the funds on deposit to pay expenses associate with the project?"	Refused for relevance.
	70	21-22	"Is it fair to say, Dr. Gaibisels, your complaint is not about legitimate expenses incurred by Solart LLL Corp but rather deposits that were used for illegitimate purposes?"	Refused for relevance.
Individual Issues: Apportioning damages	71	21-22	"... in order to determine which, if any, funds were used for impermissible purposes, we would have to look at each individual class member, each individual project, and figure out what amount of their deposits, if any, were legitimate versus illegitimate?"	"[F]or the purposes of certification, we are refusing to answer any questions about trust. ... Refusing to answer any questions relating to my client's knowledge of what the trust that was imposed on the funds is."
	73	24-25	"The only way to figure out who suffered damages in the class, would be to look at each and every class member's situation, conduct a forensic trace fo	Refused.

Issue & relationship to pleadings or affidavit (Group the questions by issues.)	Question No.	Page No.	Specific question	Answer or precise basis for refusal
			the flow of deposit funds for each individual and try to determine what uses they were put to. Is that fair?"	
Individual Issues: Whether Solart LLL Corp was required to provide a list of services	78-79	26	Re: paragraph 14 of the Amended Statement of Defence: "Do you agree that this is a list of services that Solart LLL Corp. was required to provide?"	Dr. Gaibisels answered "It's not exhaustive." Plaintiff's counsel then refused because the question allegedly dealt with the merits of the claim.
Individual Issues: Whether some of defendants knew Solart LLL Corp was insolvent	84	28-30	Re: paragraph 4(a) of the Notice of Motion for certification: "But is part of your complaint not that the defendants, some or all of the defendants, knew that Solart LLL Corp. was insolvent and yet continued to accept deposits?"	Dr. Gaibisels answered "Yes." Plaintiff's counsel then refused because the question allegedly dealt with the merits of the claim. Discussion between counsel ensued.
Individual Issues: Delay tactics described at paragraph 75 of the Amended Statement of Claim	90-99	35-37	"Which ones [of the delay tactics alleged in paragraph 75 of the Amended Statement of Claim were used on you]?" "[T]o the extent that some of these justifications were used on you, were they used by various representatives of the defendants?" "Presumably not all of these	Plaintiff's counsel refused the line of questioning related to delay tactics before Defendants' counsel posed a question. Plaintiff's counsel then refused subsequent questions alleging that the questions related to the merits. Dr. Gaibisels did answer or partially answer some questions before his counsel refused.

Issue & relationship to pleadings or affidavit (Group the questions by issues.)	Question No.	Page No.	Specific question	Answer or precise basis for refusal
			<p>representations were made to all of the class members. Is that fair, Dr. Gaibisels?”</p> <p>“Is it possible that some of the class members had none of these representations made to them at all?”</p> <p>“[T]he only way to determine which of these representations were made would be to ask each class members. Do you agree?”</p>	
<p>Individual Issues: Whether some class members considered Solart an investment</p>	100	38	<p>“Dr. Gaibisels, do you understand that some of the class members entered into the solar panel projects purely as a matter of investment?”</p>	Refused. Merits.