Court File No. CV-13-477053-00-CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

KENNETH GORDON
and EQUIGENESIS CORPORATION

Plaintiffs

- and –

CANADA REVENUE AGENCY and DAVID DUFF

Defendants

Proceedings under the *Class Proceedings Act, 1992*

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS

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

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

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

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

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

IF YOU PAY THE PLAINTIFF'S CLAIM, and $2,500 for costs, within the time for serving and filing your statement of defence you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and $400 for costs and have the costs assessed by the court.

DATE: ~~**March 26, 2013**~~

Issued by ____________________
Local Registrar

Address of Court Office:
393 University Ave.
10th Floor
Toronto, ON M5G 1E6

TO:

Canada Revenue Agency
c/o Andrew Treusch
Chief Executive Officer of Canada Revenue Agency
and Commissioner of Revenue
7th Floor
555 MacKenzie Avenue
Ottawa, Ontario
K1A 0L5

AND TO:

David Duff
Canada Revenue Agency
Tax Shelter Audit Section
344 Slater Street
Ottawa, Ontario
K1A 0L5

DEFINED TERMS

1. The capitalized terms throughout this statement of claim have the meanings indicated below:

   (a) **"Class Members"** means all investors who participated in the EquiGenesis ("EQ") 2003 Program, all investors who participated in the EQ 2004 Program and all investors who participated in the EQ 2009 Program;

   (b) **"*CPA*"** means *Class Proceedings Act*, 1992, S.O. 1992, C.6;

   (c) **"CRA"** means the Canada Revenue Agency;

   (d) **"Duff"** means David Duff;

   (e) **"EQ 2003 Donation Program"** means the charitable donation program for the 2003 taxation year;

   (f) **"EQ 2003 Investment Program"** means the EQ 2003 Preferred Investment LP investment made in the 2003 taxation year;

   (g) **"EQ 2003 Program"** means collectively the EQ 2003 Investment Program and the EQ 2003 Donation Program;

   (h) **"EQ 2004 Donation Program"** means the charitable donation program for the 2004 taxation year;

   (i) **"EQ 2004 Investment Program"** means the EQ 2004 Preferred Investment LP investment made in the 2004 taxation year;

   (j) **"EQ 2004 Program"** means collectively the EQ 2004 Investment Program and the EQ 2004 Donation Program;

(k) **“EQ 2005 Donation Program”** means the charitable donation program for the 2005 taxation year;

(l) **“EQ 2005 Investment Program”** means the EQ 2005 Preferred Investment LP investment made in the 2005 taxation year;

(m) **“EQ 2005 Program”** means collectively the EQ 2005 Investment Program and the EQ 2005 Donation Program;

(n) **“EQ 2006 Donation Program”** means the charitable donation program for the 2006 taxation year;

(o) **“EQ 2006 Investment Program”** means the EQ 2006 Preferred Investment LP investment made in the 2006 taxation year;

(p) **“EQ 2006 Program”** means collectively the EQ 2006 Investment Program and the EQ 2006 Donation Program;

(q) **“EQ 2009 Donation Program”** means the charitable donation program for the 2009 taxation year;

(r) **“EQ 2009 Investment Program”** means the EQ 2009-II Preferred Investment LP investment made in the 2009 taxation year;

(s) **“EQ 2009 Program”** means collectively the EQ 2009 Investment Program and the EQ 2009 Donation Program;

(t) **“EQ Programs”** means collectively the EQ 2003 Program, the EQ 2004 Program, the EQ 2005 Program, the EQ 2006 Program and the EQ 2009 Program;

(u) **“EquiGenesis”** means EquiGenesis Corporation;

(v) **"Gordon"** means Kenneth Gordon; and

(w) ***"ITA"*** means *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.).

RELIEF CLAIMED

2. The plaintiff, Gordon, claims on his behalf and on behalf of the Class Members:

(a) an order pursuant to the *CPA* certifying this action as a class proceeding and appointing Gordon as the representative plaintiff;

(b) an order that the defendants are jointly and severally liable for general and special damages in the sum of $245 million or such other sum as this Court finds appropriate at the trial of the common issues, or at a reference or references together with, pursuant to section 26(9) of the *CPA*, the costs of notice and of administering the plan of distribution for the recovery of damages in this action plus applicable taxes;

(c) an order that the defendants are jointly and severally liable for aggravated, exemplary and punitive damages against the defendants in the amount of $25 million or such other sum as this court finds appropriate at the trial of the common issues;

(d) an order directing a reference or giving such other directions as may be necessary to determine issues not determined in the trial of the common issues;

(e) prejudgment interest and post-judgment interest, compounded, or pursuant to sections 128 and 129 of the *Courts of Justice Act;*

(f) costs of this action on a substantial indemnity basis or in an amount that provides full indemnity; and

(g) such further and other relief as to this Honourable Court seems just.

3. The plaintiff, EquiGenesis, seeks against the defendants:

(a) an order that the defendants are jointly and severally liable for special damages in the amount of $50 million or such other sum as this Court finds appropriate;

(b) an order that the defendants are jointly and severally liable for general damages in the amount of $10 million or such other sum as this Court finds appropriate;

(c) an order that the defendants are jointly and severally liable for special damages in the amount of $4 million for its costs and expenses, including but not limited to, fees incurred to retain legal counsel and special consultants as set out herein;

(d) an order that the defendants are jointly and severally liable for aggravated, exemplary and punitive damages in the amount of $5 million or such other sum as this Court finds appropriate;

(e) prejudgment interest and post-judgment interest, compounded, or pursuant to sections 128 and 129 of the *Courts of Justice Act;*

(f) costs of this action on a substantial indemnity basis or in an amount that provides full indemnity; and

(g) such further and other relief as to this Honourable Court seems just.

THE PARTIES

4. Gordon resides in the City of Toronto. He participated in the EQ 2004 Program, the EQ 2005 Program, the EQ 2006 Program and the EQ 2009 Program, offered in each of the taxation years 2004, 2005, 2006 and 2009 respectively.

5. Gordon has been a member in good standing of the Law Society of Upper Canada since 1990 and practiced corporate commercial law in the Toronto office of a major law firm specializing in tax structured finance. Since leaving the law firm, Gordon has been in the business of structuring, distributing and managing tax effective limited partnership investments since 1992. Gordon was involved in many prior transactions to those at issue in this litigation and has a long history of dealing with CRA and Duff.

6. EquiGenesis is a federally incorporated company, incorporated on December 7, 1995 pursuant to the laws of Canada, with its registered head office in Toronto. EquiGenesis is a private corporation owned by Gordon. EquiGenesis has been registered for securities law purposes in Ontario since 1996, and more recently, carries on business and is registered as an Exempt Market Dealer in most provinces in Canada.

7. EquiGenesis and Gordon began designing and marketing proprietary, long-term, tax efficient, limited partnership investments, combined with optional charitable donation programs, which are the subject matter of this litigation, commencing initially in 2003. The plaintiff Gordon and the Class Members all participated in those programs.

8. There were 173 investors in the EQ 2003 Program, 219 investors in the EQ 2004 Program, 174 investors in the EQ 2005 Program, 96 investors in the EQ 2006 Program, 59 investors in the EQ 2009 Program, 77 investors in the EQ 2010 Program, 99 investors in the EQ 2011 Program and 31 investors in the EQ 2012 Program. Some investors participated in more than one Program.

9. The defendant, Canada Revenue Agency ("CRA"), is a body corporate under the Canada Revenue Agency Act of Canada and is a tax collection agency of Her Majesty the Queen in Right of Canada. CRA is authorized to assess and collect taxes in accordance with the *Excise Tax Act* of Canada and the *ITA* of Canada provided it does so in a lawful manner.

10. In this case, the defendant CRA was represented in its dealings with EquiGenesis through the named defendant, other individuals, as well as various departments or branches and committees, including, but not limited to, the Appeals Branch, the Audit Branch and their Head Offices in Ottawa.

11. The defendant, David Duff ("Duff"), is a senior member of CRA's Audit Branch, the manager of the Tax Shelter Audit Section and a member of the Compliance Programs Branch. As a CRA employee, Duff is a public officer. Duff was involved in reviewing the results of each of the EQ Program audits and was also involved in the subsequent appeal of the EQ 2003 and 2004 Programs.

THE PROGRAMS OF EQUIGENESIS

12. Each of the EQ 2003 and 2004 Programs had two distinct components, an investment in a Limited Partnership and a subsequent optional cash donation to a charity.

13. In order to participate in the programs, investors made a long-term investment in a tax-efficient limited partnership. They borrowed, on a full-recourse basis, a portion of the invested funds from an arms-length Canadian asset-based lender to purchase units of the limited partnership. The annual interest rate on the debt was fixed for 10 years at a market rate of interest. On closing, the investors assigned their purchased units to the lender as security for the debt. Investors were able to claim as income tax deductions (i) the interest expense paid related to the borrowed funds on an annual basis (ii) related financing charges as well as (iii) the costs related to the issuing of the units.

14. The limited partnerships each entered into separate 20 year investment agreements, either directly or indirectly, with an affiliate of a money manager. The agreements specifically outlined the terms and parameters under which each of the limited partnership's assets would be invested. The aggregate investment in the 2003 limited partnership was $67,023,199.50 ($17,275 per unit x 3879.78 units) by a total of 173 investors. The aggregate investment in the 2004 limited partnership was $105,664,940 ($17,300 per unit x 6107.8 units) by a total of 219 investors.

15. Investors who purchased units in the limited partnerships were each offered the option to borrow a second full-recourse loan, from the same lender, the proceeds of which were used to make one or more cash donations to a chosen Canadian charity. Each donor then directed the recipient charity to hold and invest the majority (i.e. 99%) of the total cash it received as a donation, for a period of not less than ten years, in an investment agreement designed to create an endowment fund for the benefit of the charity for a period of up to 20 years. The investment agreement provided that a majority of the invested funds were to be invested in a fixed income instrument while the remaining funds were to be invested in a higher risk investment with the same money manager. The remaining cash donated (i.e. 1%) was used by the charity immediately to apply to further its charitable objectives.

16. Investors who made a cash donation received a tax receipt from the charity for the full amount of the cash donation made in the applicable year. Each investor made a cash donation in the amount of $10,000 per limited partnership unit purchased and investors claimed this amount as a charitable donation tax credit in either 2003 or 2004, as appropriate. The aggregate cash donations made in 2003 amounted to $38,797,800 by a total of 173 investors and in 2004 amounted to $61,078,000 by a total of 219 investors. By maturity, under the terms of the respective investment agreements, the recipient charities, in aggregate, were entitled to receive a total cash amount of approximately $97,820,893.14 from the EQ 2003 Donation Program and $157,086,508.20 from the EQ 2004 Donation Program. This conservatively assumed

that the higher risk component invested with the money manager performed at a 0% return over the term and the fixed income component performed as expected.

17. The EQ 2009 Program had a similar two step process. After certain funds were borrowed, on a full-recourse basis, and a long-term investment was made in a tax-efficient limited partnership, the purchased units were assigned by investors to the lender as security for the debt. The limited partnership then invested the offering proceeds in a note which qualified for income tax purposes as a "prescribed debt obligation", which deferred its income until maturity over a 19 year term. The note issuer subsequently invested its cash proceeds in two separate investments (i) a majority was invested in a fixed income instrument and (ii) the balance of the proceeds was invested with an investment manager with an international reputation and track record. The aggregate investment in the limited partnership was $40,250,925 ($36,140 per unit x 1113.75 units) by a total of 59 investors.

18. As in the EQ 2003 and 2004 Programs, the 2009 investors who purchased units in the limited partnership were offered the option to borrow a second full-recourse loan from the same lender, the proceeds of which were used to make a cash donation to a Canadian charitable foundation. Each donor then directed the foundation to hold and invest the majority of the total cash it received as a donation, for a period of not less than ten years in a note, designed to create an endowment fund for the foundation for a period of up to 19 years. The remaining cash donated was then used by the foundation to immediately apply to further its charitable objectives.

19. The foundation's investment note provided the foundation with (i) a fixed annual distribution of 3.75% of the original capital invested and (ii) an additional compounding amount due on maturity, the combination of which will amount to a total of a 4.75% annualized return to the foundation by maturity. Investors who made a cash donation received a tax receipt from the foundation for the full amount of the cash donation. A cash donation was made in the amount of $10,200 per unit purchased and investors claimed this amount as a charitable donation tax credit in 2009. The

aggregate cash donation made in 2009 was $11,258,250 by a total of 58 investors. By maturity, under the terms of the foundation's investment note, the foundation is due to receive, in aggregate, a total cash amount of $22,698,618.75.

20. For each charity or foundation participating in each of the EQ Programs, collateral security has been provided, on a first priority basis, equal to a minimum of 4 to 5 times the cash value of the endowment investments owing to each charity or foundation on maturity of the respective EQ Programs. The legal structure of the EQ Programs, coupled with the collateral security, provides each charity or foundation with certainty that cash will be available to fund the obligations owing to them on maturity under the terms of each investment agreement or investment note, as the case may be.

21. Significant income, in the form of cash payments, is received annually by each charity or foundation participating in the EQ Programs. In 2013, the total aggregate cash amounts due to be paid will be between $4.5 and $5 million. As of December 2012, the total cash amounts already paid and received by the charities and foundations, either from income on the endowment investments or from cash donations received on closing which were not invested, totaled almost $28.4 million. This amount is expected to reach approximately $33 million by the end of 2013 and $38 million by the end of 2014.

NATURE OF THE CLAIM

22. This is a claim by EquiGenesis and the Class Members against CRA, who is vicariously liable for the numerous actions and omissions of its employees, including the defendant Duff, which actions constituted a continuing course of wrongful conduct, including, but not limited to, misfeasance of public office and wrongful interference with economic relations which continues to this day, and has caused and continues to cause the plaintiffs significant damage and injury as described below.

CRA DUTIES

23. CRA and its representatives and employees are empowered by law to make decisions that affect the rights, privileges and interests of taxpayers. As a public decision maker, CRA through its employees, has a duty and an obligation to act fairly and must reasonably exercise its powers according to the rules of natural justice and procedural fairness.

24. CRA has repeatedly represented to taxpayers and to the public generally, that it will uphold these duties and obligations in its dealings with them. In particular, CRA has stated that its employees are "responsible for carrying out complete, professional, and impartial reviews of disputes"; that taxpayers have the right to be treated "fairly" and "to have the law applied consistently" and that CRA is committed to conducting a fair and impartial review of any disputed assessment which involves providing a decision based on an independent review of the law and the facts in a fair, open and transparent process with a full explanation of the position reached by the Appeals Branch.

24a. Section 152(1) of the *ITA* mandates that the defendants have a duty to assess "with all due dispatch."

25. In furtherance of an effective appeals process, CRA created a protocol (the "Protocol") that outlines the roles and responsibilities of its auditors and employees in the resolution of taxpayer objections. In this Protocol, concluded between the Compliance Programs Branch and the Appeals Branch of the CRA, which is publicly available, CRA lays out the rules that govern the Appeals process including ensuring that the process is "fair, open and transparent for the taxpayer". The Protocol further requires that the Appeals Branch be "objective", "impartial" and "independent" and that a position reached will be "fully" explained.

26. Section 165(3) of the *ITA* mandates that the CRA will respond to appeals with "all due dispatch".

27. These representations, together with a taxpayer's reasonable expectation that a public officer, such as an officer of the CRA, will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public duties, have caused the plaintiffs to believe and reasonably expect that their tax audits and appeals would be dealt with all due dispatch, fairly and in accordance with the applicable facts and law. The defendants have breached these duties repeatedly.

28. By its actions and its treatment of EquiGenesis and the Class Members, in the course of the audit and appeals for the EQ 2003 and 2004 Programs and the EQ 2009 Program, CRA, Duff and others have failed to comply with their statutory obligations. Further, these actions failed to comply with CRA's published Protocol and this has resulted in a significant breach of procedural fairness as well as natural justice, and a breach of their implied and express common law and statutory duties owed to the plaintiffs.

29. Duff, in particular, exceeded his statutory authority and acted to promote a ~~policy~~ position (the "Anti- Gifting Tax Shelter Policy," described below) he had decided to pursue in bad faith and without legislative authority, without any regard to the particular facts applicable to the plaintiffs ~~in this case and without due regard for the parties consequentially harmed by those actions~~. CRA, Duff and others including at Duff's direction made decisions which intentionally ignored the facts, the law and rules and policies in place at CRA and thereby injured the plaintiffs. The actions of the defendants did not and do not have a lawful or legitimate legislative, statutory or legal foundation.

29a. The Anti-Gifting Tax Shelter Policy was an unlawful initiative promoted and implemented by Duff and his staff at the CRA (including in the Special Audit Project Division of CRA) to effectively 'put an end to' all gifting tax shelter programs in Canada through an unlawful use of CRA's audit and assessment powers, and without legal authority. The policy sought to harm, harass and cause damage to providers of gifting tax shelter programs, and to discourage taxpayers from participating in the programs by the same or similar unlawful means. At the material times as pleaded, the

Anti-Gifting Tax Shelter Policy was wrongfully directed at EquiGenesis, the EQ Programs and the Class Members by Duff and other CRA employees with the intent of harming EquiGenesis and the Class Members, and such harm resulted.

30. Duff and other CRA employees are public officers who willfully injured members of the public through actions and/or omissions that were intentionally in excess of their powers and/or were deliberate failures to discharge the statutory duties they owed to the plaintiffs.

CRA'S POLICIES RELATING TO TAX DONATION STRUCTURES

31. In the ten years EquiGenesis has been involved in what CRA describes as 'tax donation structures' CRA's policies have significantly changed and evolved. These changes in policies have informed the wrongful conduct of CRA and its employees against the plaintiffs.

31a. CRA had a long-standing policy across the country to allow a taxpayer's claim for charitable donation tax credits made for a gifting tax shelter in the initial assessment and then, after subsequently auditing the tax shelter, issue a reassessment, if deemed necessary.

32. In December of 2003 CRA issued a Fact Sheet in which it noted, appropriately, that donation "schemes" which result in an income tax credit greater than the price actually paid, may be disallowed by CRA at a later date.

33. In November of 2004, CRA issued a further Fact Sheet to "remind" investors that they should be "aware of the risks associated with participating in certain tax shelter donation arrangements" and noted that it would "challenge any arrangement that does not comply with the Income Tax Act and will audit the tax returns of investors with respect to their participation in such an arrangement".

34. In November of 2005, CRA issued a Taxpayer Alert, not a Fact Sheet, and reminded potential investors “to exercise caution with respect to certain donation arrangements” and reiterated the statements made in the earlier fact sheets.

35. In August of 2007, CRA’s policy with respect to taxpayers who participated in “tax shelter gifting arrangements” changed significantly, evidenced by the issuance of a new Taxpayer Alert. In that Alert, CRA indicated that it “plans to audit all tax shelter gifting arrangements” and warned that any taxpayer who participated in such a program is likely to “receive a tax bill”. This change in policy was made notwithstanding that there had been no legislative amendments, and, unbeknownst to the plaintiffs, was being unlawfully promoted and implemented by Duff and other CRA employees further to Duff’s Anti-Gifting Tax Shelter Policy. This Alert signals the beginning of a concerted effort by Duff, his staff and the CRA to discourage participation in gifting tax shelter arrangements, regardless of whether the structure was permissible or not under the *ITA*. This Alert is also of note because it is one of only two alerts since 2005 that CRA has ever published in a number of foreign languages when it began to make such alerts available online.

36. A Taxpayer Alert issued in December of 2008 warned taxpayers to avoid “all schemes that promise donation receipts for three to four times the cash payment”. In this Alert CRA noted that taxpayers “may be able to avoid penalties or prosecution” if they “choose to correct” their “tax affairs before [CRA] begin[s] any audit action or investigation”.

37. On September 15, 2010, an article was published in the Globe and Mail which reported that Duff, referred to as the manager of the Tax Shelter Audit Section at the CRA, was quoted as saying “if you participate in a gifting tax shelter, you will be audited” and further added “we are methodically going through them all”. The article stated that CRA had targeted alleged bogus charitable donations since 2003 and had been concerned about so-called “gifting tax shelters” for years. It was reported CRA had launched what was described as a special audit project in 2003. This audit project

was reported as one of the largest in the agency's history and was described as involving a "small army" of officials who tracked thousands of contributions. The article went on to quote Duff as saying that "the premise behind bogus gift taxing shelters is simple – investors receive a charitable tax receipt for an amount that exceeds the investors' actual donation".

38. The policy described by Duff in the newspaper article was reiterated by CRA in the Tax Alert it published on December 23, 2010, in which it stated that if "you donate to a gifting Tax Shelter, you <u>will</u> be audited". [Emphasis added]

39. On October 30, 2012, CRA, <u>at Duff's direction or influence,</u> issued a Press Release (the "October 2012 Press Release") in which it announced that:

> Starting with the 2012 tax year, the CRA will put on hold the assessment of returns for individuals where a taxpayer is claiming a credit by participating in a gifting tax shelter scheme. This will avoid the issuance of invalid refunds and discourage participation in these abusive schemes. Assessments and refunds will not proceed until the completion of the audit of the tax shelter, which may take up to two years. All gifting tax shelter schemes are audited and the CRA has not found any that comply with Canadian tax laws. A taxpayer whose return is on hold will be able to have their return assessed if they remove the claim for the gifting tax shelter receipt in question.

<u>39a. The foregoing initiative to audit all gifting tax shelter arrangements and put assessments on hold was promoted and implemented at the material times by Duff and Duff's staff without lawful authority and further to Duff's Anti-Gifting Tax Shelter Policy.</u>

INITIAL CRA AUDIT OF THE EQ 2003 AND 2004 PROGRAMS

40. CRA began its initial review of the EQ 2003 and 2004 Programs on or about March of 2005. As part of the review, EquiGenesis was asked to provide specific documents and

asked to address and answer specific questions regarding the structure of the programs offered by EquiGenesis. EquiGenesis promptly complied with both requests.

41. Following the submission of the requested information, CRA informed EquiGenesis that it was going to formally audit the EQ 2003 and 2004 Programs. In March 2006, the audit file with respect to the EQ 2003 and 2004 Programs was transferred to the London office of CRA.

42. The audit file was received by Guy Alden ("Alden") a CRA auditor, who promptly began his audit of the EQ 2003 and 2004 programs. As part of the audit process, many, if not all, of the participants in those two programs were asked by Alden to complete detailed questionnaires, and some were contacted by phone to answer certain questions. All of the participants and EquiGenesis promptly complied with all of CRA's requests.

43. Through June to September 2006, EquiGenesis, on its own behalf and on behalf of its investors, had various discussions and meetings with representatives of CRA, including Alden, during which time statements were made to EquiGenesis that the auditor saw "no reason to reassess" the EQ 2003 and 2004 Programs. Alden noted that while there were certain areas of concern, there was no specific basis for a reassessment.

44. Despite the auditor's comments, in the fall of 2006 EquiGenesis was advised for the first time by the Audit Branch, that CRA Head Office was "tending towards wanting to reassess" the EQ 2003 and 2004 Programs.

44a. Prior to the reassessments being issued, the auditor and his superior met with Duff in Ottawa. At the meeting, the auditor and his superior provided their positions to Duff that there was no basis to reassess. Unbeknownst to the plaintiffs at the time, the auditor and his superior had been overruled by Duff at the meeting. Duff had instructed the auditor to reassess regardless of the auditor's conclusions. Duff and his staff at Head Office made the decision to reassess the EQ 2003 and 2004 Programs in

furtherance of Duff's Anti-Gifting Tax Shelter Policy, without proper review or assessment of the EQ 2003 and 2004 Programs.

45. In March 2007, the Audit Branch of CRA began issuing initial proposal letters ("Proposal Letters") proposing to deny all donation credits and income tax deductions in respect of the EQ 2003 Program.

46. Following the receipt of these Proposal Letters, EquiGenesis retained counsel to dispute the proposed reassessments. Counsel began to file notices of objection pursuant to s. 165 of the *ITA* in response to the Notices of Reassessment that were issued commencing in May 2007 and Notices of Objection were filed within the appropriate time frame, as required.

47. In early February 2008, the Audit Branch of CRA issued initial Proposal Letters again proposing to deny all donation credits and income tax deductions in respect of the EQ 2004 Program.

48. As with the EQ 2003 Program, EquiGenesis had received similar assurances from the Audit Branch that there appeared to be no basis for any reassessment of the EQ 2004 Program except perhaps dealing with a minor issue relating to the evaluation of trading software license.

49. Beginning on or about April 2008 and up to December 2008, further notices of reassessment for the 2004, 2005 and 2006 taxation years were issued for the EQ 2003 Program and the first notices of reassessment were issued commencing in April 2009 for the EQ 2004 Program. EquiGenesis again retained counsel to dispute the reassessments and to file Notices of Objection as required, on a timely basis, on behalf of participants.

EQ 2005 AND 2006 PROGRAMS

50. The EQ 2005 and 2006 Programs were audited during the period from 2008 to early 2009. On or about January 28, 2009, Alden, the CRA tax avoidance officer assigned to the file wrote to each of the participants in the EQ 2005 and 2006 Programs notifying that the audits for the EQ 2005 and 2006 Programs had been terminated and no reassessments would be proposed or issued.

50a. Duff was aware at the time of the CRA auditor's decision to not reassess the EQ 2005 and 2006 Programs and acquiesced to that decision.

50b. Notwithstanding that the other EQ Programs at issue (namely the EQ 2003, 2004 and 2009 Programs) were substantially similar to the EQ 2005 and 2006 Programs that CRA determined not to reassess, and EquiGenesis would subsequently make efforts to the knowledge of the defendants to ensure that the other EQ Programs were substantially similar to the EQ 2005 and 2006 Programs (as pleaded below), Duff and his staff, unbeknownst to the plaintiffs at the time, continued to maliciously target the other EQ Programs, EquiGenesis and the Class Members in furtherance of Duff's Anti-Gifting Tax Shelter Policy. By so doing, Duff and his staff continued to subject EquiGenesis and the Class Members to an unlawful and abusive use of CRA audit and assessment powers.

51. EquiGenesis placed great reliance on the news that the EQ 2005 and 2006 Programs would not be reassessed. No new programs had been developed or sold by EquiGenesis in 2007 and 2008 while waiting for the resolution of CRA's position with respect to these programs.

52. With the news that the EQ 2005 and 2006 Programs were not to be re-assessed, EquiGenesis immediately reinstated its business based upon the successful design of the EQ 2005 and 2006 Programs and began to develop and market the EQ 2009 Program.

53. The news that the EQ 2005 and 2006 Programs would not be reassessed was further relied upon and seen as confirmation by EquiGenesis that the structure of these Programs was fundamentally sound from a tax perspective and did not breach any provisions of the *ITA*. This was further confirmed by discussions with Alden subsequent to the issuing of the January 28, 2009 letters.

54. On or about September 3, 2009, following the receipt of the EQ 2005 and 2006 Programs termination of audit letter, EquiGenesis met with Alden to discuss the basis upon which the EQ 2005 and 2006 Programs had passed audit and, in light of this development, to further discuss possible amendments to the EQ 2003 and 2004 Programs which might help resolve outstanding issues raised by those audits.

55. At that meeting, Alden and EquiGenesis also discussed the general strengths of the structures of the EQ Programs and whether or not it was possible that Alden would be able to perform a "pre-audit" of the EQ 2009 Program. Alden agreed to inquire from Head Office regarding the possibility of performing a "pre-audit" and later advised that Duff had refused to grant him the authority to perform the "pre-audit".

55a. Unbeknownst to the plaintiffs at the time, Duff's decision and/or involvement in influencing the decision to not permit the pre-audit or advance tax ruling was made in furtherance of Duff's Anti-Gifting Tax Shelter Policy and not for legitimate purposes.

EQ 2003 AND 2004 PROGRAM AMENDMENTS

56. In October 2009, EquiGenesis reported to the participants in the EQ 2003 and 2004 Programs that, after having given careful consideration to the issues raised by CRA in the audits of the EQ 2003 and 2004 Programs, in light of the EQ 2005 and 2006 Programs successfully passing audit and following extensive discussions with counsel, it had concluded that the EQ 2003 and 2004 Programs were materially similar from a tax perspective to the EQ 2005 and 2006 Programs. EquiGenesis further reported that it had approached CRA directly to discuss amending the EQ 2003 and 2004 Programs which would assist in addressing issues raised by the original audits and which might lead to a resolution of the outstanding issues initially raised by the auditor.

57. In or around November 2009, an advisor to EquiGenesis contacted a senior official at CRA's Head Office Appeals in Ottawa to discuss the proposed amendments to the EQ 2003 and 2004 Programs and asked whether or not Head Office Appeals would consider reversing the original reassessments based on the proposed amendments and results of the audits of the EQ 2005 and 2006 Programs.

58. The CRA Head Office Appeals official advised EquiGenesis that it was reasonable to conclude that CRA Appeals would revoke the reassessments for the EQ 2003 and 2004 Programs if it was demonstrated that the issues raised by the auditor relating to those programs had been addressed.

59. Based on these discussions with CRA officials, which indicated the amendment strategy would be an appropriate option to pursue, it was proposed to the investors that the amendments proceed.

60. EquiGenesis retained counsel and advisors to deal with the CRA appeals process for the EQ 2003 and 2004 Programs and, in particular, to ensure that the amendment process for those programs proceeded appropriately, in a timely manner and would resolve the issues previously raised in the audits relating to those programs.

~~61. The amendments which were implemented ensured, among other things, a predictable annual rate of income for the charities and provided an enforceable security package in favour of the charities to support the contractual entitlements owing to each charity on maturity of their investment contracts. These amendments to the EQ 2003 and 2004 Programs were required largely due to a failure of the money manager to yield the positive results that had initially been expected, in accordance with its represented returns. This led to the desire to amend the Programs to generate a better and more consistent flow of cash to the charities, and the need to secure the contractual return owing to the charities which was previously not delivered by the initial money manager. As part of the amendment arrangements, the initial money manager was replaced with an investment manager with an international reputation and track record.~~

61. ~~62.~~ As a result of these amendments EquiGenesis was able to adjust the structure of the EQ 2003 and 2004 Programs to match the essential elements of the structure of the EQ 2005 and 2006 Programs which CRA had decided not to reassess.

62. ~~63~~. On or about March 26, 2010, the proposed amendments to the EQ 2003 and 2004 Programs were put to a formal vote of the limited partners, who overwhelmingly voted in favour of these amendments. Following the vote, the EQ 2003 and 2004 Programs were amended in accordance with the feedback received from Alden and CRA Appeals Head Office. The amendments were implemented in two phases over a period of several months. ~~The first phase replaced the money manager, provided the charities with a predictable income stream and registered security in favour of the charities to protect their endowment investment entitlements on maturity. The second phase provided additional invested capital and security for both the lender and the charities.~~

63. ~~64.~~ Despite being aware of the amendments to the EQ 2003 and 2004 Programs, in or about April 2010, CRA began issuing notices of reassessment for the 2007 and 2008 taxation years for EQ 2003 and 2004 participants and Notices of Objection were filed on behalf of the affected participants.

EQ 2003 AND 2004 PROGRAM APPEALS

64. ~~65.~~ During the same period of time, from January 2010 up to and including May 2010, the Appeals file relating to the EQ 2003 and 2004 Programs was transferred to a series of CRA branch offices including, to the knowledge of the plaintiffs, Winnipeg, Toronto Central and Scarborough before it ultimately went to the London Appeals Branch. Despite the transfers, nothing was done on the file for the EQ 2003 and 2004 Appeals.

65. ~~66.~~ By July 2010, both phases of the EQ 2003 and 2004 Program amendments had been successfully completed and closed.

66. ~~67.~~ In July of 2010, a representative of the London Tax Services Office, who had received the file in May, notified EquiGenesis that she had forwarded the EQ 2003 and 2004 Program Appeal files to Head Office in Ottawa advising that she lacked the technical expertise and skill to manage the file.

67. ~~68.~~ Throughout the summer of 2010, notwithstanding the transfer and the repeated requests from EquiGenesis, nothing was done with respect to appeals for EQ 2003 and 2004 Programs. In September of 2010, more than three years after the reassessments for the 2003 taxation year had been issued, EquiGenesis was advised by Head Office Appeals in Ottawa that a senior appeals manager and an appeals officer in Head Office had been appointed to take over the review of the file. CRA Head Office Appeals further advised that due to the numerous delays in processing the appeal, the file was being given "priority" by the Head Office of the Appeals Branch.

68. ~~69.~~ Throughout the Fall of 2010, counsel for EquiGenesis was in regular contact with CRA Head Office Appeals who advised on several occasions that while the file was complicated they "expected to complete their analysis and have a preliminary review by the end of November" and repeatedly assured EquiGenesis that the file was being treated as "a priority".

69. At all material times, Duff and other CRA employees referred to herein were or became aware of the events and facts as pleaded in paragraphs 64 and 66-68, including the inordinate delays that were ensuing.

EQ 2009 PROGRAM AUDIT

70. In or about October 2010, Alden, the same senior tax auditor who had dealt with the EQ 2003, 2004, 2005 and 2006 Programs contacted EquiGenesis to begin the audit of the EQ 2009 Program. The EQ 2009 program was essentially identical to the EQ 2005 and 2006 Programs which had passed audit and complied with all Canadian tax laws.

There had not been any substantive amendments to the *ITA* in the intervening period or since.

71. As had occurred with the audits of the EQ 2003, 2004, 2005 and 2006 Programs, Alden and, this time, another CRA auditor who would eventually replace Alden, attended at EquiGenesis' offices to perform the audit. The audit of the EQ 2009 program continued for many months and was not completed until the fall of 2011. As part of the audit, Alden and his colleague interviewed a number of randomly selected participants in the EQ 2009 Program and sought and received substantial assistance from EquiGenesis.

72. On or around March 24, 2010, EquiGenesis submitted an application for an Advance Tax Ruling to the CRA Income Tax Rulings Directorate in Ottawa. On November 17, 2010, EquiGenesis had a meeting with the CRA Tax Rulings Branch to review the structure of a new program it wished to launch, the structure of which was based primarily on the approved EQ 2005 and 2006 Programs. EquiGenesis felt that a tax ruling was necessary given the very public position taken by CRA that all charitable tax shelters will be audited and reassessed.

73. In late November of 2010, CRA contacted EquiGenesis to advise them that their tax ruling application would no longer be considered due to a change in policy which CRA had announced on November 29, 2010, in which it stated that it will no longer entertain any tax ruling applications for charitable donation tax structures. The Taxpayer Alert issued by CRA on December 23, 2010~~, referred to above,~~ confirmed the position that CRA was taking against such charitable donation tax programs.

74. By January 2011, as it had become clear that the EquiGenesis 2003 and 2004 Appeal files had received little or no attention, EquiGenesis contacted Head Office Appeals and sought to have the CRA auditor who had performed the original audits of the EQ 2003 and 2004 Programs and had declined to reassess the EQ 2005 and 2006 Programs included in the appeals process.

75. In February 2011, ~~that~~ the CRA audit officer, Alden, was asked by Head Office Appeals to review the EQ 2003 and 2004 Programs as well as the 2010 amendments of those programs and attend a meeting at Head Office Appeals in late March to discuss his findings.

76. On March 25, 2011, a meeting was held at the Appeals Branch with Alden as well as various members of CRA Head Office Appeals, Audit and the Department of Justice, among others, to review the EQ 2003 and 2004 Programs. At this meeting, Alden was asked to prepare a detailed report of his findings (which essentially concluded that there should be no reassessment of the programs) to be delivered to Justice and Head Office Appeals. The Department of Justice was also asked to review the legal issues and to provide Head Office Appeals with an opinion. Duff and his staff attended the March 25, 2011 meeting, and were at all material times aware of these facts.

76a. At the latest by the March 25, 2011 meeting, Duff and his staff were aware of the efforts that EquiGenesis had made regarding the amendments to the EQ 2003 and 2004 Programs, and the reliance that EquiGenesis was placing on the defendants as set out at paragraphs 51-54, 56-62 and 65. Duff and his staff were advised by Alden at the March 25th meeting of the significant costs that EquiGenesis had incurred in its efforts to implement the amendments to the EQ 2003 and 2004 Programs. These and other matters were raised by the auditor at the March 25, 2011 meeting.

77. On March 31, 2011, EquiGenesis met with Alden at his request. The purpose of the meeting was to clarify certain remaining factual matters regarding the amending of the EQ 2003 and 2004 Programs and to discuss the meeting Mr. Alden had attended in Ottawa with the Appeals Branch.

78. At that meeting, Alden made it clear to EquiGenesis that in his view, and he had expressed this view to the Appeals Branch, Duff and Duff's staff in the March 25th meeting in Ottawa, the reasons originally raised in the CRA Proposal Letters, which formed the basis for the original reassessments of the EQ 2003 and 2004 Programs, were no longer valid and that some of the initial determinations had been based on

inaccurate or incomplete factual assumptions. He also advised that his conclusions were not just based upon the amendments made to the Programs but were also based upon the conduct of the parties throughout the unfolding of the transactions which he believed must be taken into consideration.

~~79. In particular, Alden pointed to the following important facts:~~

~~(a) the enforcement of the loans by the lender against defaulting investors;~~

~~(b) the voluntary repayment by one investor of his original donation loans in full;~~

~~(c) the annual payments to the charities made by non-defaulting participants from their own resources of substantial interest on their donation loans;~~

~~(d) the Bankruptcy Court's decision to enforce the loans;~~

~~(e) the evidence in 2006 of the general partners' intention to replace the initial money manager with another new money manager well before the audits had been completed and the results were known.~~

~~80. It was also confirmed by Alden that the primary legal basis relied upon to originally reassess the EQ 2003 and 2004 Programs was an Australian case which has never been followed in any subsequent Canadian tax cases and had facts which bore no resemblance to those in the EQ 2003 and 2004 Programs.~~

79. ~~81.~~ Alden also advised EquiGenesis that following his meeting with Appeals, it was clear to him that not only had Appeals done "very little work" on the file but also that they were not sufficiently prepared to review the issues in detail and did not understand the factual basis of the EQ 2003 and 2004 Program structures.

~~82. EquiGenesis was advised by Alden that when Appeals were told in the March 25th meeting of the fact that one of the investors had paid off his donation loan in full, a participant of the meeting responded that "it had to be a trick".~~

80. ~~83~~. Throughout the period from April until July of 2011, EquiGenesis had various meetings with Alden as part of an ongoing dialogue to provide him with all the information and documentation he required to finalize his analysis and his report relating to the EQ 2003 and 2004 Programs together with the amendment process undertaken in 2010.

81. ~~84.~~ In August 2011, Alden delivered a detailed report of his findings to the Department of Justice and to Head Office Appeals as well as to EquiGenesis. The report makes it clear that, in his view, there was no basis for the reassessments to stand ("the Audit Report"). In or around the same time, Duff and his staff were provided with a copy of the Alden report.

82. ~~85.~~ Notwithstanding having received the Audit Report, Head Office Appeals advised EquiGenesis that it still required a legal opinion from the Department of Justice before any decision would be made on the EQ 2003 and 2004 Program Appeals.

83. ~~86.~~ On August 26, 2011, counsel for EquiGenesis approached the Department of Justice to discuss the file. The Department of Justice refused to discuss the file on the basis they required express authority from CRA to discuss the issues. EquiGenesis, through their counsel, followed up with Appeals to request the authority be granted. No response was forthcoming. Instead, EquiGenesis was advised that Justice would require until November to complete its opinion. Throughout September, counsel for EquiGenesis argued with Appeals that the Justice opinion was no longer necessary given the clear findings of the Audit Report. Requests were made to reverse the original reassessments in accordance with the Audit Report's conclusions. Once again no meaningful answer was provided to the plaintiffs by the CRA.

84. ~~87.~~ On or about October 5, 2011, counsel for EquiGenesis was advised that Head Office Appeals had suspended its request for an opinion from the Department of Justice and had instead approached the Compliance Programs Branch, which included the Audit Branch, and specifically Duff and his staff, to see if they agreed with the

conclusions of the Audit Report. Counsel for EquiGenesis was then advised that an answer from Audit would be forthcoming in or about a week.

85. The decision to involve Duff and his staff in the CRA appeals process for the EQ 2003 and 2004 Programs was unlawful and without authority in the circumstances. Unbeknownst to the plaintiffs at the time, Duff either made or influenced the decision to involve himself in the Appeal process in furtherance of his Anti-Gifting Tax Shelter Policy, and/or the individuals in Appeals were complicit in same. At all material times, Duff and the CRA Appeals employees involved knew, or were reckless or willfully blind to the fact, that, *inter alia*, Duff would conduct himself unfairly and was biased against the plaintiffs in furtherance of Anti-Gifting Tax Shelter Policy (and had effectively pre-determined pursuant to the Anti-Gifting Tax Shelter Policy and without proper basis that the EQ Programs were to be reassessed), and his involvement in the appeals process would result in harm to EquiGenesis and the Class Members. The decision to involve Duff in the appeals was outside of CRA's policies of ensuring fair and impartial appeals.

86. ~~88.~~ On or about October 17, 2011, counsel for EquiGenesis was informed that Appeals had been told by Duff that he and his branch would need approximately another month to review the file and respond to Appeal's request as to whether or not they agreed with Alden's Audit Report.

87. ~~89.~~ Around the same time, Alden and his colleague had concluded their audit of the EQ 2009 program, and Alden advised EquiGenesis that he was satisfied with the results of the audit, and that he saw no issues which gave him any concern. In fact, Alden noted that the EQ 2009 Program was superior to the EQ 2005 and 2006 Programs which had previously passed audit. Alden submitted his report concerning the EQ 2009 Programs to Head Office sometime near the end of 2011. Duff was either provided with a copy of the Alden report concerning the EQ 2009 Programs, or was aware of the essential facts of Alden's recommendations in and around the same time.

88. ~~90.~~ On or about October 25, 2011, EquiGenesis was advised by Appeals that if Head Office Audit agreed with the Auditor's Report, Appeals would close the file on the EQ 2003 and 2004 Appeals. At all material times, Duff and other CRA employees were aware of this fact. The decision from Head Office Audit, however, was not forthcoming and Head Office Appeals was non-committal as to specific timing.

89. ~~91.~~ In early November, EquiGenesis' counsel expressed serious concerns about the Appeals process, in particular, the continual time delays, to Anne-Marie Lévesque ("Lévesque"), who is the Assistant Commissioner in Charge of Appeals and works out of the Ottawa Head Office Branch of CRA. He met with her on November 2, 2011 to discuss the status of the appeals of the EQ 2003 and 2004 Programs. She undertook and agreed to check into the matter and to contact John Crowley, the then Director General of Appeals.

90. ~~92.~~ During the week of November 7, 2011, EquiGenesis was told by a manager in the Appeals Directorate in Ottawa to "be patient" as the appeals were "working through the system" and noted that the fact that the auditor had provided such a positive report for EquiGenesis was "clearly to [EquiGenesis'] benefit".

91. ~~93.~~ On or about November 18, 2011, EquiGenesis was told there would be a meeting between the Audit Branch and the Appeals Branch the following week to discuss the Audit Report and that EquiGenesis would be immediately advised of the status of the issues thereafter.

92. ~~94.~~ Notwithstanding this representation, EquiGenesis heard nothing from anyone at CRA and was given no update as to the status of the outstanding issues relating to the appeals. All the calls made on behalf of EquiGenesis to Appeals to follow-up on the results of the meeting scheduled for November 23, 2011 were ignored. Finally, on or about November 30, 2011, EquiGenesis was advised by the Appeals officers on the file that Duff had completed his review of the Audit Report and had determined that he did "not agree with the audit report". When attempts were made to determine the basis upon which Duff disagreed with the Audit Report no answer was forthcoming. As a

result, counsel for EquiGenesis immediately requested a meeting with Head Office Appeals and Duff to try to learn the basis on which he disagreed with the Audit Report. A tentative date for the meeting with Appeals was set for December 21, 2011.

92a. Duff submitted his views and positions regarding the EQ 2003 and 2004 Program appeals in furtherance of his Anti-Gifting Tax Shelter Policy, and in order to improperly influence the outcome of the appeals against the plaintiffs and Class Members.

93. ~~95.~~ On December 21, 2011, a meeting was held in Ottawa with EquiGenesis and senior representatives from the Appeals and Audit Branches. Duff attended the meeting along with his superior from Head Office Audit, Francois Ranger (Director) and another officer. At that meeting Duff, who was asked to state on what basis he disagreed with the Audit Report simply noted firstly, that he "does not like deals". When asked to elaborate he said that he did not like the "circular nature of the transactions" in the EQ 2003 and 2004 Programs; and that he did not believe the charities derived any real value from the programs. At the meeting, EquiGenesis and its advisors addressed all three of these issues. However, it was clear at the meeting that neither the Appeals officers nor Duff were willing to engage in any meaningful dialogue on the issues.

94. ~~96.~~ At the end of the meeting, John Crowley, the Director General of the Appeals Branch, asked the Department of Justice to provide a legal opinion, on or before January 31, 2012 specifically addressing the legal validity of the gifts made. Crowley also advised EquiGenesis again that he would make the file "a priority" and would move it forward quickly.

95. ~~97.~~ EquiGenesis did not get an update until February 6, 2012, when EquiGenesis again contacted Appeals and was told that the opinion from Justice had just been received and that it was lengthy and detailed and that Appeals would need until at least the end of February to review the opinion and discuss it internally.

96. ~~98.~~ Various calls were made to the Appeals Branch during February and March 2012. Assurances were continually given to EquiGenesis that while it was difficult to provide a precise timeline, the file was nevertheless being given priority by Appeals.

97. ~~99.~~ On March 16, 2012, Lévesque emailed EquiGenesis and noted that matters "were well in hand" and that she was planning a meeting with the Appeals team to discuss the "resolution of the objections".

98. ~~100.~~ Finally, on March 23, 2012, after several emails to Lévesque, counsel to EquiGenesis received an email from Lévesque on March 23, 2012 confirming that she had met with Crowley and Appeals on Wednesday, March 21, 2012, and that a decision letter would be issued to EquiGenesis by April 9, 2012.

99. ~~101.~~ Much to the surprise of EquiGenesis and notwithstanding the numerous assurances made, including the delivery of the Audit Report, the numerous meetings held, the provision of documentation to Appeals and the various factual and legal submissions made by EquiGenesis over the years, on April 5, 2012, Appeals delivered a letter (the "Appeals Letter") outlining their intention to simply confirm the original reassessments relating to the EQ 2003 and 2004 Programs. The Appeals Letter was simplistic given the protracted review process of over five years, and did not articulate any sound basis in law or fact to confirm its conclusions.

100. ~~102.~~ A meeting was then arranged with Lévesque and Crowley for June 2012 to once again review the issues relating to the EQ 2003 and 2004 Programs with Appeals and EquiGenesis.

101. ~~103.~~ On May 25, 2012, a submission letter was prepared and delivered to Lévesque on behalf of EquiGenesis responding to the issues raised in the April 5, 2012 Appeals Letter, in which the substantive flaws of that letter were addressed. As well, the submission letter raised the serious concerns of EquiGenesis that the manner in which

the Appeals Branch has conducted its review of the disputed reassessments has been in breach of procedural fairness and its own protocols.

102. ~~104.~~ On June 28, 2012, EquiGenesis and one of its advisors met with Lévesque, John Crowley and Milled Azzi of Appeals for approximately three hours to review all of the issues raised in the Appeals Letter.

103. ~~105.~~ At the end of that meeting, Lévesque expressly represented to EquiGenesis that the Appeals Branch would review and address all of the issues raised at the June 28, 2012 meeting. Lévesque represented and committed that Appeals would deliver a new letter on a priority basis, although she noted that it would take several months for the new letter. She also expressly committed to EquiGenesis that she would review the letter herself before it is released to EquiGenesis.

104. ~~106.~~ On July 18, 2012, an advisor to EquiGenesis had a telephone conversation with Lévesque in which she admitted that the April 5, 2012 Appeals Letter was unacceptable and that the new letter would provide a proper analysis of the issues relating to the EQ 2003 and 2004 Programs.

105. ~~107.~~ On July 31, 2012, that same advisor for EquiGenesis had a lunch meeting with Lévesque, where she again stated that she was very disappointed in the Appeals Letter and that she understood why EquiGenesis would be “outraged” by the lack of any content in the letter. She indicated that clear instructions had been given to the individuals involved in drafting the new letter that it needed to provide a proper, substantive reply. Lévesque also committed that the letter would be delivered by the end of August or September of 2012 and would be reviewed by her before being released.

106. ~~108.~~ In the meantime, a Notice of Objection was filed for a participant relating to the EQ 2009 Program.

107. ~~109.~~ By September 2012, EquiGenesis had received nothing further from Appeals, and began following up with Lévesque with respect to the progress being made on the new letter from Appeals. On or about September 20, 2012, having received no answer from Lévesque, EquiGenesis was advised by the Head of the Appeals Branch that Appeals had asked for a further legal opinion from the Department of Justice and that that opinion would not be ready until October 15, 2012. EquiGenesis once again protested the delay in a futile attempt to see progress being made on the Appeal file.

108. ~~110.~~ On September 26, 2012, Lévesque advised EquiGenesis that Appeals needed more time to "ensure that we have fully considered all the elements provided by your client in this matter. They are doing the best they can and I invite you to continue to communicate with the lead appeals officers for further updates". In a follow-up to this email, Appeals noted that the Justice Department could not shorten the anticipated timeframe for receiving the legal opinion and that Appeals would need further time after receiving that opinion on October 15 to review it and to provide its own decision.

109. ~~111.~~ On or about September 28, 2012, EquiGenesis was told that nothing would be sent to them until approximately November 15, 2012. On or about the same date, EquiGenesis was also told that Crowley, who had been dealing with the EquiGenesis file on an on-going basis, would be retiring on October 15, 2012 and his replacement would be taking over the file at that time.

110. ~~112.~~ On October 16, 2012, EquiGenesis was able to confirm with Appeals that the Justice opinion had been received and that Appeals was still expecting to meet the November 15, 2012 deadline.

111. ~~113.~~ CRA then issued the October 2012 Press Release, referred to above, announcing it would, effective for the 2012 tax year, stop assessing any income tax returns where a tax payer is claiming a credit in connection with "a gifting tax shelter scheme" by putting them on hold. In the words of CRA, "this will avoid the issuance of invalid refunds and discourage participation in these abusive schemes".

112. ~~114.~~ As the October 2012 Press Release was clearly intended by CRA to discourage investors from investing in any gifting tax shelter “schemes”, EquiGenesis sought, through its advisors, to have a discussion with CRA reviewing the applicability of the October 2012 Press Release to the EquiGenesis charitable donation programs. It was pointed out to CRA that the end of the year was the busiest selling season for EquiGenesis and that the press release had raised a lot of questions and created uncertainty in the investor community as to its application. EquiGenesis also advised CRA that this was having a significantly detrimental effect on its business.

113. ~~115.~~ In the October 2012 Press Release, CRA stated that “all gifting tax shelter schemes are audited and the CRA has not found any that comply with Canadian tax laws”. This statement was false as the EQ 2005 and 2006 Programs were audited in detail and were not reassessed and the audits were terminated.

114. Duff and his staff authorized, participated in and/or were instrumental in drafting and releasing the October 2012 Press Release.

115. Duff authorized, permitted or acquiesced in the making of the misstatement in the October 2012 Press Release in furtherance of his Anti-Gifting Tax Shelter Policy. By so doing, Duff wrongfully sought to discourage participants in the EquiGenesis programs and intended, or was reckless or willfully blind to the fact, that EquiGenesis and/or the Class Members would be harmed. Duff and his staff did nothing to subsequently correct the misstatement, and harm resulted.

116. Duff and other CRA employees at Duff’s direction abused and exceeded their authority in promoting and implementing the initiative to stop assessing any income tax returns for gifting tax shelter programs, contrary CRA’s long-standing policy to allow a taxpayer’s claim for charitable donation tax credits made for a gifting tax shelter in the initial assessment and then, after subsequently auditing the tax shelter, issue a reassessment, if deemed necessary (described above). This was in direct violation of CRA’s statutory duty to assess income tax returns with “all due dispatch”.

117. ~~116.~~ On or about December 12, 2012, EquiGenesis sought confirmation from CRA's Aggressive Tax Planning Division that the EquiGenesis 2012 charitable donation program (the "EQ 2012 Program") was not included in the category of gifting arrangements which were the subject of the October 2012 Press Release. EquiGenesis specifically highlighted certain key elements listed in the October 2012 Press Release which were indicators of the "abusive schemes" which CRA sought to target and which did not apply to the EQ 2012 Program.

~~117. For example, the EQ 2012 Program, although it had obtained both Federal and Quebec tax shelter identification numbers, was not a "tax shelter" within the meaning of the Income Tax Act. In the EquiGenesis 2012 Program no donor received a tax receipt for any amount larger than their actual cash donation amount, nor had any charitable organization that participated in the EquiGenesis programs since 2005 had its charitable status revoked by CRA, nor had any third party penalties been assessed against any of the promoters or tax payers of the EquiGenesis programs. As well, EquiGenesis reminded CRA that the EQ 2005 Program and EQ 2006 Program had each been audited by CRA Tax Avoidance and no adjustments were made to any of the participants' assessments as a result of those audits. These facts were presented to CRA as evidence of the inapplicability of the substance of the October 2012 Press Release to the current EquiGenesis programs. On the basis of these facts, EquiGenesis requested a confirmation that the EQ 2012 Program is not included in the category of gifting arrangements which are the subject of the October 2012 Press Release.~~

118. ~~118.~~ On or about December 14, 2012, in response to EquiGenesis' request for the confirmation, a member of the Aggressive Tax Planning Division (the department which was responsible for issuing the October 2012 Press Release) who works directly for Duff, responded by email noting that "we are not able to give a definitive answer at this time whether or not the EquiGenesis Program will be included in the Interception Project announced in the CRA News Release of October 30/12". Duff directed his staff to not provide a meaningful answer in furtherance of his Anti-Gifting Tax Shelter Policy and not for legitimate purposes, knowing and intending that EquiGenesis and/or

its customers would be harmed if the clarification was not provided, and such harm resulted.

119. ~~119.~~ On November 13, 2012, the new Director General of Appeals confirmed to EquiGenesis that Appeals still expected to meet the November 15 deadline that it had set on or about September 28, 2012 for providing a response to the issues raised during the June 28th meeting in Ottawa. Despite this promise, the CRA did not meet the deadline. Further, Head Office Appeals, including Lévesque, steadfastly ignored numerous calls and emails made to the Appeals Branch and refused to provide EquiGenesis with any indication of the status of the file or the decision that had been expected on November 15, 2012.

120. ~~120.~~ On December 5, 2012, Milled Azzi ("Azzi"), a Director of Head Office Appeals contacted EquiGenesis and indicated that he was returning the calls that EquiGenesis had made to Lévesque regarding the status of the review. In this call, Azzi indicated that the Appeals Branch would require additional time to complete the review because of the "tricky" issues involved, the fact that EquiGenesis had requested a comprehensive response to the issues raised in the June 28th meeting and, accordingly, indicated that because of the upcoming holidays the review would not be complete until the New Year. During the conversation, when pressed by counsel to EquiGenesis for a specific commitment to a date, after having faced continual delays, Azzi first commented that, in the event the timing delays are unsatisfactory, EquiGenesis is always free to "take the matter to court". Finally, after further discussion, a commitment was eventually made to a January 18, 2013 deadline to provide the results of the review to EquiGenesis.

121. ~~121.~~ On January 18, 2013, Appeals issued its letter outlining the basis upon which it had "concluded" that the reassessments "should be confirmed". This revised letter, which Lévesque had promised would be a detailed and fully reasoned review of the reassessments, did little more than simply restate the earlier April letter which Lévesque had admitted was unacceptable. The fact that the letter seemed to be in draft

form and considering that it has numerous spelling errors, typos and a lack of any discernible attempt at formatting, suggests that it is very unlikely that Lévesque had actually reviewed this letter prior to it being sent EquiGenesis, despite having undertaken to do so at the June 2012 meeting with EquiGenesis.

122. ~~122.~~ It is readily apparent from the January 18, 2013 letter that CRA employees had once again failed to fully or fairly consider the facts and law applicable to the EQ 2003 and 2004 Programs which have been presented on numerous occasions to CRA. That letter raised theoretical issues and ignored pivotal facts relating to the EQ 2003 and 2004 Programs. It also failed to properly apply these facts to the relevant law to arrive at a carefully reasoned analysis supporting its conclusions. The January 18, 2013 letter completely ignored the Audit Report, a report which the CRA itself commissioned, and failed to present any cogent alternative analysis to outline on what rational basis it concluded that the Audit Report, its findings, analysis and conclusions are incorrect. This demonstrates that the CRA employees involved have failed to properly consider the EQ Programs in a fair and impartial manner, have acted in bad faith and in a biased and high-handed fashion and have consequentially deprived EquiGenesis and the plaintiffs of natural justice and due process. CRA has also failed to live up to their statutory and common law duties.

123. ~~123.~~ On or about January 15, 2013, EquiGenesis contacted the CRA Audit officer replacing Alden, since Alden had retired from CRA. That audit officer had assisted Alden in his audit of the 2009 Program and is now responsible for carriage of that audit file. The purpose of the call was to inquire as to the status of the audit in view of the fact that the 2009 taxation year would soon be reaching its statutory limitation period for issuing reassessments. The audit officer advised that she had been told by Duff to draft a proposal letter to all participants of the EQ 2009 Program proposing to issue reassessments. At the time of the call the officer was not aware on what basis the proposal letter would be written.

123a. Duff wrongfully directed that the reassessments of the EQ 2009 Programs commence and progress in furtherance of Duff's Anti-Gifting Tax Shelter Policy, without proper review or assessment of the EQ 2009 Program.

124. On or about March 15, 2013, the first proposal letters were mailed by CRA proposing to reassess all income tax credits and deductions claimed by participants in the EQ 2009 Program. The EQ 2009 Program proposal letters, much like the April 5, 2012 and January 18, 2013 Appeals letters for the EQ 2003 and 2004 Programs, fail to provide any reasonable or sound basis in fact or in law for the planned issuance of the reassessments to the EQ 2009 Program participants.

MISFEASANCE IN PUBLIC OFFICE

125. These acts and omissions of CRA, through Duff and other CRA employees, set out in detail above, were intentional breaches of CRA's statutory and legal obligations. At all material times, the defendant's agents and employees unlawfully exercised their powers in the manner and ways pleaded above in order to intentionally injure the plaintiffs.

126. The plaintiffs reasonably expected that CRA would take reasonable care to prevent, or at least to actually and diligently discourage such conduct by its employees. The defendant CRA has failed to do so and is vicariously liable for the misconduct of its employees.

127. By inordinately delaying and then ultimately reassessing the EQ 2003, 2004 and 2009 Programs, without regard to the facts and law applicable to the EQ Programs, CRA and Duff ignored their statutory obligations, ignored CRA's own protocols, ignored the Audit Report CRA had commissioned as well as other internal procedures, protocols and recommendations. In so doing, CRA's own statutory requirements, stated protocols, policies and procedures were disregarded in furtherance of its improper targeting of EquiGenesis and the Class Members. The process undertaken by the Audit and Appeals Branches was tainted by an institutional bias and by a

predisposition of the CRA employees that permitted no impartial or fair review of the facts or the law in relation to the EQ Programs.

128. Further, Duff and other CRA employees, acting individually or collectively, in respect of which CRA is responsible, wrongfully delayed the review and appeals process in direct violation of their statutory obligation to resolve appeals with "all due dispatch" and in direct violation of the plaintiffs' rights to "complete, accurate, clear and timely information". The defendants and individuals as pleaded have steadfastly refused to provide the plaintiffs with an informed and reasoned basis for the reassessments. The defendants' actions were done in bad faith, recklessly or maliciously and with the express intent of harming the Class Members and EquiGenesis' reputation and diminishing or eradicating EquiGenesis' business of designing and marketing tax effective charitable donation programs, rather than for a legitimate purpose.

129. The defendants have purposely and maliciously ignored their statutory obligations and misused the audit and assessment powers granted to them by statute in order to pursue a course of action that was in complete disregard of legislative intent and statutory provisions. They did so with the knowledge that as public officers, they did not have the authority to exercise their powers for such an improper purpose and knowing and, in fact, intending that their acts and/or omissions would injure the plaintiffs.

130. CRA has failed to exercise its administrative power for the public good but rather exercised its power for the ulterior and improper purpose of discouraging potential and existing clients from participating in EquiGenesis' legitimate and proper charitable tax donation programs.

131. CRA, through Duff and other CRA employees, has an obligation to discharge its public duties by acting in good faith which includes interpreting and enforcing the statute according to its intent and purpose.

132. CRA, through Duff and others including at Duff's direction, had, as a primary objective, the ending of all charitable tax donation programs regardless of whether or

not they actually violated the provisions of the *ITA* and in the absence of legislative amendments supporting this objective (the Anti-Gifting Tax Shelter Policy). In order to achieve this objective, CRA and Duff developed a policy to target current and potential participants in what CRA has since classified as "gifting tax shelter schemes". Their intent was to 'send a message' to the public and achieve through the illegal and improper actions of the Audit and the Appeals Branches an objective which had no authority in law or by reason of legislative amendment.

133. Even if CRA employees, including Duff and others were acting in what they believed were the best interest of the public, they knew that they wrongfully exceeded their authority, deliberately engaged in conduct they knew to be inconsistent with the obligations of their office and acted with a conscious disregard for the interests of the plaintiffs who were consequentially and significantly harmed.

134. In furtherance of their improper objective the defendants sought to harm or destroy EquiGenesis' legitimate charitable donations programs on the basis that they just "did not like" them (the Anti-Gifting Tax Shelter Policy), the defendants made intentional misrepresentations and misleading statements to the plaintiffs which the plaintiffs later relied upon to their detriment.

135. By declining to reassess the EQ 2005 and 2006 programs, and having encouraged EquiGenesis to amend the EQ 2003 and 2004 Programs to more closely follow the structure of the EQ 2005 and 2006 programs, the defendants harmed the plaintiffs. EquiGenesis relied upon these representations and in good faith amended the EQ 2003 and 2004 Programs and committed and expended significant resources and incurred substantial costs in making these amendments.

136. EquiGenesis also placed significant reasonable reliance on the approach of CRA to the EQ 2005 and 2006 Programs in designing and marketing the EQ 2009 Program. CRA and its employees made these actions and representations to EquiGenesis with the knowledge that EquiGenesis would reasonably rely on these representations to structure subsequent programs. EquiGenesis did in fact reasonably rely on these

representations to develop and market the EQ 2009 Program. Notwithstanding its actions and representations, and the fact that CRA was aware that the EQ 2009 Program is substantively similar to the EQ 2005 and 2006 Programs, CRA has commenced an audit of the EQ 2009 Program and has recently begun to issue proposal letters to participants notifying of CRA's intention to reassess those investors who participated in the EQ 2009 Program. It has done so in complete disregard for the findings and conclusions of the auditor who was charged with auditing the EQ 2009 Program and who concluded there was no basis for any reassessments.

137. At all material times the defendants:

   a. intentionally exercised their statutory authority for the improper purposes set out above; or

   b. had actual knowledge that their actions or omissions were beyond statutory authority; or

   c. conducted themselves with reckless indifference or willful blindness to the lack of statutory authority for their actions.

138. At all material times the defendants:

   a. intended to cause losses to the plaintiffs or had targeted malice; or

   b. knew their conduct would result in harm to the plaintiffs or had untargeted malice; or

   c. were recklessly indifferent or willfully blind to the foreseeable harm that would result from their actions, or had reckless untargeted malice.

138a. Duff's misfeasance was carried out by Duff and/or by other CRA employees at Duff's direction, authorization and permission (collectively or otherwise) including, *inter alia,* by:

a) abusing and exceeding his authority in wrongfully influencing the audits and reassessments of the EQ 2003, 2004 and 2009 Programs, and directing that the reassessments of the EQ 2003, 2004 and 2009 Programs commence and progress in furtherance of Duff's Anti-Gifting Tax Shelter Policy, and without proper review or assessment of the Programs;

b) abusing and exceeding his authority in intentionally subjecting the plaintiffs and Class Members to an unlawful, arbitrary and abusive use of CRA's audit and assessment powers and delay, including in the CRA appeals process for the EQ 2003 and 2004 Programs, in furtherance of his Anti-Gifting Tax Shelter Policy and not for legitimate purposes while, *inter alia*, (i) deliberately disregarding CRA's duties to conduct assessments and appeals with all due dispatch, (ii) deliberately disregarding CRA's decisions to not reassess the substantially similar EQ 2005 and 2006 Programs, (iii) deliberately disregarding EquiGenesis' efforts to amend and implement other EQ Programs so as to be substantially similar to the EQ 2005 and 2006 Programs that were not reassessed, (iv) deliberately disregarding and rejecting internal CRA auditor reports and recommendations that were favourable to EquiGenesis and the EQ Programs, including the Alden report and Alden's recommendations, (v) deliberately disregarding and rejecting requests made by EquiGenesis for advance tax rulings for the EQ Programs, and/or (vi) wrongfully having effectively pre-determined pursuant to the Anti-Gifting Tax Shelter Policy that the EQ Programs were to be reassessed;

c) abusing and exceeding his authority in maliciously disregarding the costs that the plaintiffs and Class Members were incurring and damages that were being suffered;

d) abusing and exceeding his authority in promoting publically and internally at the CRA the unlawful Anti-Gifting Tax Shelter Policy;

e) abusing and exceeding his authority in improperly influencing the outcome of the appeals for the EQ 2003 and 2004 Programs against the plaintiffs and Class

Members in furtherance of his Anti-Gifting Tax Shelter Policy, and without proper review or assessment of the Programs;

f) abusing and exceeding his authority in his involvement with and promoting of the October 2012 Press Release in furtherance of his Anti-Gifting Tax Shelter Policy (which violated CRA's a long-standing policy to allow a taxpayer's claim for charitable donation tax credits made for a gifting tax shelter in the initial assessment and then, after subsequently auditing the tax shelter, issue a reassessment, if deemed necessary);

g) abusing and exceeding his authority in authorizing, permitting or acquiescing in the making of the false statement in the October 2012 Press Release;

h) deliberately failing to perform his duties in office in furtherance of his Anti-Gifting Tax Shelter Policy; and

i) abusing and exceeding his authority by giving undue consideration to irrelevant political factors;

all of which occurred in circumstances where Duff and/or the CRA employees at Duff's direction knew, or were reckless or willfully blind to the fact, that such wrongful conduct was occurring, and intended to harm EquiGenesis and the Class Members (and such harm resulted).

138b. The misfeasance by the CRA employees in Appeals (Levesque, Crowley and Azzi) was carried out by these individuals and/or in conjunction with Duff (collectively or otherwise) including, *inter alia,* by:

a) abusing and exceeding their authority in permitting the transfer of the EQ 2003 and 2004 appeals files to a multitude of CRA branch offices (including to Winnipeg, Toronto Central, Scarborough, London and then to Head Office in Ottawa) and to various CRA employees, while little or nothing was being done on the appeals files;

b) abusing and exceeding their authority by deliberately causing or permitting inordinate delay for approximately three years (January 2010 through January 2013), despite repeated protests by EquiGenesis (including to Levesque, Crowley and Azzi), and despite that the plaintiffs were repeatedly advised by the same individuals that the files were being given 'priority';

c) abusing and exceeding their authority in deliberately causing insufficient work and attention to be given to the EQ 2003 and 2004 appeals files over the three year period;

d) abusing and exceeding their authority in intentionally subjecting the plaintiffs and Class Members to an unlawful, arbitrary and abusive use of CRA's powers and delay in furtherance of the Anti-Gifting Tax Shelter Policy and not for legitimate purposes while, *inter alia*, (i) deliberately disregarding CRA's duties to conduct appeals with all due dispatch, (ii) deliberately disregarding CRA's decisions to not reassess the substantially similar EQ 2005 and 2006 Programs, (iii) deliberately disregarding EquiGenesis' efforts to amend and implement other EQ Programs so as to be substantially similar to the EQ 2005 and 2006 Programs that were not reassessed (while aware that EquiGenesis was relying on representations by Appeals that it was reasonable to conclude that CRA Appeals would revoke the reassessments for the EQ 2003 and 2004 Programs if it was demonstrated that the issues raised by the auditor relating to those programs had been addressed), (iv) deliberately disregarding internal CRA auditor reports and recommendations that were favourable to EquiGenesis and the EQ Programs, including the Alden report and Alden's recommendations and/or (v) wrongfully having effectively pre-determined pursuant to the Anti-Gifting Tax Shelter Policy that the EQ Programs were to be reassessed;

e) abusing and exceeding their authority in maliciously disregarding the costs that the plaintiffs and Class Members were incurring and damages that were being suffered;

f) abusing and exceeding their authority in requesting opinions from the Department of Justice, suspending the requests in favour of involving the Compliance Programs Branch and re-requesting the opinions and thereby causing inordinate delay;

g) abusing and exceeding their authority in involving Duff and his staff in the appeals process in or around October 2011, knowing that Duff would conduct himself unfairly and was biased against the plaintiffs in furtherance of the Anti-Gifting Tax Shelter Policy (and that Duff had effectively pre-determined

pursuant to the Anti-Gifting Tax Shelter Policy and without proper basis that the EQ Programs were to be reassessed);

h) abusing and exceeding their authority in deliberately failing to ensure an appropriate, fair and impartial appeals process;

i) abusing and exceeding their authority in deliberately failing to ensure that proper and sufficient reasons were provided for the Appeals decision (including in the Appeals letters), given that Levesque had acknowledged that the Appeals Letter was unacceptable, expressed disappointment and outrage regarding the Appeals Letter and had indicated that a new letter would be provided that would set out a proper analysis of the issues relating to the appeals (which did not occur); and

j) abusing and exceeding their authority in deliberately failing to ensure that there was a proper, full and fair consideration of the facts and law applicable to the EQ 2003 and 2004 Programs, which were presented on numerous occasions to CRA.

all of which occurred in circumstances where they knew, or were reckless or willfully blind to the fact, that such wrongful conduct was occurring, and intended to harm EquiGenesis and the Class Members (and such harm resulted).

INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS

139. By pursing the reassessments of the EQ 2009 programs after validating the substantially similar EQ 2005 and 2006 Programs, by issuing the false and misleading press release of October 12, 2012, which CRA knew was either false and misleading, or in alternative, had no application to the facts of the current EQ Programs, which were specifically based upon the EQ 2005 and 2006 Programs and which audits had been terminated with no assessments issued, which interfered with taxpayers by discouraging their investments in programs offered by EquiGenesis and by wrongfully delaying the processing of the plaintiffs’ appeals of the EQ 2003 and 2004 Programs, the defendants wrongfully and intentionally interfered with EquiGenesis’ economic interests.

140. The defendants pursued this course of conduct by an unlawful means, for an improper purpose and with the intention to injure the plaintiffs and the defendants intended the natural consequences that they knew would arise from their deliberate actions.

141. The defendants wrongfully interfered with the actions of EquiGenesis' current and potential clients with the clear intention to "chill" or discourage investors from entering into EquiGenesis' programs thereby significantly diminishing and damaging EquiGenesis' business and reputation and causing it to incur significant economic losses. The wrongful conduct was directed at the EquiGenesis' clients including by the misfeasance pleaded herein, knowing that EquiGenesis had an economic interest with the clients, and intending that EquiGenesis be harmed. Particulars of the damages arising from the wrongdoing are pleaded below.

141a. The defendants directed wrongful conduct including by the misfeasance pleaded herein, at EquiGenesis knowing that the Class Members had an economic interest with EquiGenesis, including in participating in EquiGenesis' programs. The defendants intended to cause loss to the Class Members, and such harm resulted.

NEGLIGENT SUPERVISION

141b. The defendants owed a duty to the plaintiffs and Class Members to take reasonable care to ensure that its officers and employees properly assess and respond to appeals with all due dispatch.

141c. The defendants owed a duty to the plaintiffs and Class Members to appropriately supervise its officers and employees to ensure that they act lawfully in the exercise of CRA's statutory powers, and lawfully discharge their duties to administer and enforce the *ITA*. The CRA supervises its officers and is obliged to be involved in their operations and conduct.

141d. The CRA knew or ought to have known that Duff, his staff and other CRA employees including in Appeals were not conducting themselves lawfully and in accordance with their statutory powers in respect of the assessments and appeals at issue and as set out at paragraphs 138a and 138b above (the misfeasance).

141e. It was foreseeable that the CRA's failure to supervise its officers in the exercise of their statutory powers in respect of the assessments and appeals at issue would harm the plaintiffs and Class Members.

141f. The failures of CRA, Duff, his staff and other CRA employees were repeatedly brought to the attention of CRA representatives including by the plaintiffs. For example, *inter alia*:

a) At the December 21, 2011 meeting attended by Duff's superior, Francois Ranger from Head Office Audit (Director) and other senior CRA officers, representatives of EquiGenesis raised, *inter alia*, concerns regarding the CRA processes to date and the inordinate delays that were occurring. EquiGenesis raised concerns that the Alden report and Alden's recommendations were being improperly disregarded. At that meeting, Duff demonstrated, *inter alia*, his improper conduct and bias in furtherance of his Anti-Gifting Tax Shelter Policy and unwillingness to engage in any meaningful dialogue on the issues, as pleaded above;

b) In February, March and May 2012, EquiGenesis raised concerns with CRA officials regarding the manner in which the Appeals Branch had conducted its review of the disputed reassessments, and that there had been breaches of procedural fairness and CRA's own protocols;

c) The plaintiffs raised concerns in December 2012 with officials in CRA's Aggressive Tax Planning Division regarding the October 2012 Press Release and the false statement contained therein;

k) The plaintiffs repeatedly raised concerns with various Appeals officials in April through July 2012 regarding the failure of Appeals to provide proper and sufficient reasons for the Appeals decision (including in the Appeals letters), and its repeated failures to provide a proper, full and fair consideration of the

facts and law applicable to the EQ 2003 and 2004 Programs (which the plaintiffs had presented on numerous occasions to CRA); and

l) the plaintiffs repeatedly raised with various Appeals officials in February through December 2012 the inordinate delays that were occurring in the delivery of the Appeals decision.

141g. The CRA breached its duties to the plaintiffs and Class Members by, *inter alia*, failing to supervise its officers and employees, failing to properly conduct the assessments and appeals with all due dispatch and failing to take corrective action that would have prevented the harm at issue. Alternatively, the CRA breached its duties to the plaintiffs by failing to have proper procedures or controls in place to have prevented such improper activities and conduct.

NEGLIGENCE

141h. In the alternative, if the conduct as set out at paragraphs 138a and 138b above (the misfeasance) was not intentionally done, the same conduct was done negligently, or recklessly or with willful blindness as to the consequences, in breach of the defendants' duty to properly conduct assessments and appeals with all due dispatch.

141i. The CRA, Duff, and the CRA employees involved in all material respects failed to discharge their duties.

141j. The duties were breached by the conduct, actions and omissions of Duff and/or the CRA employees at Duff's direction, authorization and permission (collectively or otherwise) including, *inter alia*, by:

a) wrongfully influencing the audits and reassessments of the EQ 2003, 2004 and 2009 Programs, and directing that the reassessments of the EQ 2003, 2004 and 2009 Programs commence and progress in furtherance of Duff's Anti-Gifting Tax Shelter Policy, and without proper review or assessment of the Programs;

b) subjecting the plaintiffs and Class Members to an unlawful, arbitrary and abusive use of CRA's audit and assessment powers and delay, including in the

appeals process while, *inter alia*, (i) disregarding CRA's duties to conduct assessments and appeals with all due dispatch, (ii) disregarding CRA's decisions to not reassess the substantially similar EQ 2005 and 2006 Programs, (iii) disregarding EquiGenesis' efforts to amend and implement other EQ Programs so as to be substantially similar to the EQ 2005 and 2006 Programs that were not reassessed, (iv) disregarding and rejecting internal CRA auditor reports and recommendations that were favourable to EquiGenesis and the EQ Programs, including the Alden report and Alden's recommendations, (v) disregarding and rejecting requests made by EquiGenesis for advance tax rulings for the EQ Programs, and/or (vi) wrongfully having effectively pre-determined pursuant to the Anti-Gifting Tax Shelter Policy that the EQ Programs were to be reassessed;

c) disregarding the costs that the plaintiffs and Class Members were incurring and damages that were being suffered;

d) promoting publically and internally at the CRA the unlawful Anti-Gifting Tax Shelter Policy;

e) improperly influencing the appeals for the EQ 2003 and 2004 Programs;

f) participating in and promoting the October 2012 Press Release;

g) authorizing, permitting or acquiescing in the making of the false statement in the October 2012 Press Release;

h) failing to perform their duties in office; and

i) giving undue consideration to irrelevant political factors;

all of which occurred in circumstances where Duff and/or the CRA employees at Duff's direction knew or ought to have known, or were reckless or willfully blind to the fact, that such conduct was occurring.

141k. The duties were breached as a result of the conduct, actions and omissions of the CRA employees in Appeals (including to Levesque, Crowley and Azzi) and/or in conjunction with Duff (collectively or otherwise) including, *inter* alia, by:

a) permitting the transfer of the EQ 2003 and 2004 appeals files to a multitude of CRA branch offices (including to Winnipeg, Toronto Central, Scarborough,

London and then to Head Office in Ottawa) and to various CRA employees, while little or nothing was being done on the appeals files;

b) causing or permitting inordinate delay for approximately three years (January 2010 through January 2013), despite repeated protests by EquiGenesis (including to Levesque, Crowley and Azzi), and despite that the plaintiffs were repeatedly advised by the same individuals that the files were being given 'priority';

c) causing insufficient work and attention to be given to the EQ 2003 and 2004 appeals files over the three year period;

d) subjecting the plaintiffs and Class Members to an unlawful, arbitrary and abusive use of CRA's powers and delay while, *inter alia*, (i) disregarding CRA's duties to conduct appeals with all due dispatch, (ii) disregarding CRA's decisions to not reassess the substantially similar EQ 2005 and 2006 Programs, (iii) disregarding EquiGenesis' efforts to amend and implement other EQ Programs so as to be substantially similar to the EQ 2005 and 2006 Programs that were not reassessed (while aware that EquiGenesis was relying on representations by Appeals that it was reasonable to conclude that CRA Appeals would revoke the reassessments for the EQ 2003 and 2004 Programs if it was demonstrated that the issues raised by the auditor relating to those programs had been addressed), (iv) disregarding internal CRA auditor reports and recommendations that were favourable to EquiGenesis and the EQ Programs, including the Alden report and Alden's recommendations and/or (v) wrongfully having effectively pre-determined pursuant to the Anti-Gifting Tax Shelter Policy that the EQ Programs were to be reassessed;

e) disregarding the costs that the plaintiffs and Class Members were incurring and damages that were being suffered;

f) requesting opinions from the Department of Justice, suspending the requests in favour of involving the Compliance Programs Branch and re-requesting the opinions, thereby causing inordinate delay;

g) wrongfully involving Duff and his staff in the appeals process in or around October 2011, knowing that Duff would conduct himself unfairly and was biased against the plaintiffs in furtherance of Anti-Gifting Tax Shelter Policy

(and that Duff had effectively pre-determined pursuant to the Anti-Gifting Tax Shelter Policy and without proper basis that the EQ Programs were to be reassessed);

h) failing to ensure an appropriate, fair and impartial appeals process;

i) failing to ensure that proper and sufficient reasons were provided for the Appeals decision (including in the Appeals letters); and

j) failing to ensure that there was a proper, full and fair consideration of the facts and law applicable to the EQ 2003 and 2004 Programs, which were presented on numerous occasions to CRA;

all of which occurred in circumstances where they knew, or were reckless or willfully blind to the fact, that such wrongful conduct was occurring.

141l. Given these facts, it was foreseeable that the harm pleaded below would ensue.

TORT OF ABUSE OF PROCESS

141m. The defendants, by their actions, including as set out at paragraphs 138a and 138b above (the misfeasance), subjected the plaintiffs and Class Members to an abusive series of CRA audit and assessments proceedings in furtherance of Duff's unlawful Anti-Gifting Tax Shelter Policy.

142n. Such actions on the part of Duff and those at his direction include, *inter alia*:

a) wrongfully influencing the audits of the EQ Programs (other than the EQ 2005 and 2006 Programs) and directing that the reassessments of the EQ 2003, 2004 and 2009 Programs commence and progress in furtherance of his Anti-Gifting Tax Shelter Policy, and without proper review or assessment of the Programs;

b) promoting publically and internally at the CRA the unlawful Anti-Gifting Tax Shelter Policy;

c) influencing the decision to not permit pre-audit or advance tax rulings for the EQ Programs in furtherance of the Anti-Gifting Tax Shelter Policy and not for legitimate purposes;

c) improperly influencing the outcome of the appeals for the EQ 2003 and 2004 Programs against the plaintiffs and Class Members in furtherance of his Anti-Gifting Tax Shelter Policy, and without proper review or assessment of the Programs;

d) participating in and promoting the October 2012 Press Release; and

e) authorizing, permitting or acquiescing in the making of the false statement in the October 2012 Press Release.

141o. Such actions on the part of the CRA employees in Appeals include, *inter alia*:

a) wrongfully involving Duff and his staff in the CRA appeals process for the EQ 2003 and 2004 Programs, knowing that Duff would conduct himself unfairly and was biased against the plaintiffs in furtherance of Anti-Gifting Tax Shelter Policy (and that Duff had effectively pre-determined pursuant to the Anti-Gifting Tax Shelter Policy and without proper basis that the EQ Programs were to be reassessed); and

b) delivering the Appeal letters while failing to ensure that proper and sufficient reasons were provided, and despite representations by Levesque that there was to be a proper analysis of the issues relating to the appeals (which did not occur).

141p. As a result of the defendants' conduct, the plaintiffs and Class Members have incurred damages, as pleaded below.

DAMAGES

142. As a result of the conduct of the defendants and CRA employees as pleaded, Gordon and the Class Members have paid, or will be required to pay to the CRA substantial amounts of interest and penalties.

143. These interest and penalty liabilities would not have been incurred had the CRA followed its published protocols and processes and had carried out the review process in a "complete, professional, and impartial" way and complied with its obligations to

resolve objections with "all due dispatch" and had not refused to review and consider the material facts and law applicable to the EQ Programs.

144. As a result of the conduct of the defendants and CRA employees as pleaded, Gordon and the Class Members lost opportunities and potential earnings as they relied on the CRA's representations that the EQ 2005 and 2006 Programs complied with the law and therefore rightly believed that the virtually identical EQ 2009 Program would also therefore comply with the laws that remained unchanged.

145. As a result of the course of conduct pursued by the defendants and CRA employees, EquiGenesis has lost significant profits, business and business opportunities. At all material times, the defendants and CRA employees knew that EquiGenesis was the only corporation in Canada selling its unique, proprietary, tax effective, investment and corresponding optional charitable donation programs from 2003 to 2006. EquiGenesis sold in excess of six thousand units in 2004 and, by reason of the CRA's actions in auditing and improperly reassessing the EQ 2003 and 2004 Programs in 2007 and 2008, it developed and sold no programs for 2007 and 2008. EquiGenesis then sold approximately 1110 units in 2009, 990 units in 2010, 1730 units in 2011 and 550 units in 2012. EquiGenesis is no longer developing or selling any more donation programs similar to those marketed from 2003 to 2012.

146. As a result of the conduct of the defendants and CRA employees as pleaded, EquiGenesis has suffered a loss of its goodwill and its reputation. The relentless, targeted and lengthy pursuit of EquiGenesis' clients has irrevocably damaged EquiGenesis' long-standing reputation as an industry leader in the development of innovative and successful tax effective investment strategies, including ancillary charitable donation programs.

147. As a result of the actions of the defendants and CRA employees, EquiGenesis has incurred special damages, including but not limited to fees paid to consultants, lawyers and accountants in connection with the CRA's audit and appeals process.

147a. As a result of the conduct of the defendants and other CRA employees, EquiGenesis and the Class Members suffered damages and incurred losses arising from the unnecessary and inordinate delays that ensued throughout the course of the material events.

147b. As a result of the conduct of the defendants and other CRA employees, EquiGenesis suffered damages and incurred losses arising from EquiGenesis' efforts to amend and implement other EQ Programs so as to be substantially similar to the EQ 2005 and 2006 Programs that were not reassessed, including in reliance on the defendants and CRA employees (as pleaded above).

AGGRAVATED, EXEMPLARY AND PUNITIVE DAMAGES

148. As employees of the CRA, the named individuals are public officers appointed to discharge a public duty and receive compensation for doing so. They pursued the course of action outlined above in the exercise or purported exercise of their office. These individuals and CRA acted in that manner with the knowledge that they were acting invalidly and they either dishonestly disregarded their duty and/or failed in their attempts to honestly perform their duties.

149. The defendants and CRA employees knew ~~or ought to have known~~ that they had no legal power to do what they did and they knew at the time that their actions would cause damage to the plaintiffs. The course of action pursued by the defendants and CRA employees in the audit, reassessment and appeals of the plaintiffs' programs was deliberate, callous and with reckless disregard to the consequences and the foreseeable injuries it would cause to the plaintiffs.

150. The defendants' wrongful delay and misrepresentations also aggravated the damages that the plaintiffs suffered.

151. The high-handed, arbitrary and highly reprehensible misconduct of the defendants and CRA employees departed from the standard required of public officials and is

deserving of condemnation and punishment and as such renders them liable to pay punitive and exemplary damages.

152. Full particulars of the plaintiffs' damages and full particulars of the damages for each member of the class will be provided before the common issues trial of this action. Should this action not be certified as a class action, full particulars of these damages for the plaintiffs will be provided before the trial of this action.

152a The plaintiffs plead and rely on, without limitation, the following:

a) *Income Tax Act*, R.S.C. 1985, c 1 (5th Supp);

b) *Canada Revenue Agency Act*, SC 1999, c 17; and

c) *The Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, as amended.

PLACE OF TRIAL

153. The Plaintiffs propose this action be tried at the City of Toronto, in the Province of Ontario.

~~March 26, 2013~~

July 19, 2013

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Court File No. CV-13-477053-00-CP

EQUIGENESIS CORPORATION ET AL. v. **CANADA REVENUE AGENCY ET AL.**

Plaintiffs | Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

(Proceeding commenced at Toronto)

AMENDED STATEMENT OF CLAIM

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