Court File No. CV-17-11822-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

KSV KOFMAN INC. IN ITS CAPACITY AS RECEIVER AND MANAGER OF CERTAIN PROPERTY OF SCOLLARD DEVELOPMENT CORPORATION, MEMORY CARE INVESTMENTS (KITCHENER) LTD., MEMORY CARE INVESTMENTS (OAKVILLE) LTD., 1703858 ONTARIO INC., LEGACY LANE INVESTMENTS LTD., TEXTBOOK (525 PRINCESS STREET) INC. AND TEXTBOOK (555 PRINCESS STREET) INC.

Plaintiff

- and -

JOHN DAVIES AND AEOLIAN INVESTMENTS LTD.

Defendants

FACTUM OF THE PLAINTIFF

(Motion for *Mareva* Injunction – Returnable June 7, 2017)

June 6, 2017

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FACTUM OF THE MOVING PARTY

PART I - OVERVIEW

1. In this action, KSV Kofman Inc. ("**KSV**") – the court-appointed receiver and manager of certain property of the Receivership Companies (as defined below) – is seeking the return of tens of millions of dollars that the defendants, John Davies ("**Davies**") and Aeolian Investments Ltd. ("**Aeolian**" and, together with Davies, the "**Defendants**"), misappropriated from the Receivership Companies.

2. While KSV's investigation is still ongoing and the full magnitude of the Receivership Companies' losses are still not fully known, what is known is that millions of dollars effectively disappeared under Davies' watch and were diverted from the Receivership Companies (and the

respective real estate development projects in which the funds were required to be invested) through related corporations and a network of other non-arm's length parties that Davies controls to, *inter alia*, himself, his family members and other parties related to him, including Aeolian.

3. The Defendants' conduct has exposed the Receivership Companies to significant liabilities in the form of claims for damages and losses from their creditors, including the investors whose funds they misappropriated.

4. The scope, duration and nature of the scheme (all of which are described below), speak to the Defendants' inappropriate conduct and Davies' regular practice of transferring funds through corporate structures he controlled, without regard for separate corporate identity and the Receivership Companies' contractual and other legal obligations.

5. Since the commencement of the receivership proceeding in January 2017, the Defendants have engaged in a course of conduct to liquidate assets and put them beyond the reach of the Receivership Companies and their creditors.

6. KSV, on behalf of the creditors of the Receivership Companies, will suffer irreparable harm if a worldwide *Mareva* injunction is not granted in the form sought in this motion. Moreover, the balance of convenience, and the interests of justice, favour the granting of this relief.

PART II – FACTS

Parties

7. The plaintiff, KSV, is the court-appointed receiver and manager of certain property of Scollard Development Corporation ("**Scollard**"), Memory Care Investments (Kitchener) Ltd. ("**Kitchener**"), Memory Care Investments (Oakville) Ltd. ("**Oakville**"), 1703858 Ontario Inc. ("**Burlington**"), Legacy Lane Investments Ltd. ("**Legacy Lane**"), Textbook (525 Princess Street) Inc. ("**525 Princess**") and Textbook (555 Princess Street) Inc. ("**555 Princess**"), (collectively, the "**Receivership Companies**"). KSV was appointed receiver and manager of certain property of the Receivership Companies pursuant to orders of the Ontario Superior Court (Commercial List) of Justice dated February 2, 2017, April 28, 2017 and May 2, 2017. Each of the Receivership Companies in respect of which KSV has been appointed receiver and manager was advanced monies on a secured basis by various trust corporations, which monies had been raised from investors through syndicated mortgages for particular real estate development projects specific to the respective Receivership Companies. In particular:

(a) Scollard is a company incorporated pursuant to the laws of Ontario. It was advanced monies on a secured basis by Scollard Trustee Corporation ("**Scollard Trust Co.**"), which monies had been raised from investors through a syndicated mortgage for a particular real estate development project specific to Scollard. The sole officer and director of Scollard is Davies.

(b) Kitchener is a company incorporated pursuant to the laws of Ontario. It was advanced monies on a secured basis by MC Trustee (Kitchener) Ltd. ("**Kitchener**

Trust Co."), which monies had been raised from investors through a syndicated mortgage for a particular real estate development project specific to Kitchener. The sole officer and director of Kitchener is Davies.

(c) Oakville is a company incorporated pursuant to the laws of Ontario. It was advanced monies on a secured basis by 2223947 Ontario Limited ("**Oakville/Burlington/Legacy Lane Trust Co.**"), which monies had been raised from investors through a syndicated mortgage for a particular real estate development project specific to Oakville. The sole officer and director of Oakville is Davies.

(d) Burlington is a company incorporated pursuant to the laws of Ontario. It was advanced monies on a secured basis by Oakville/Burlington/Legacy Lane Trust Co., which monies had been raised from investors through a syndicated mortgage for a particular real estate development project specific to Burlington. The sole officer and director of Burlington is Davies.

(e) Legacy Lane is a company incorporated pursuant to the laws of Ontario. It was advanced monies on a secured basis by Oakville/Burlington/Legacy Lane Trust Co., which monies had been raised from investors through a syndicated mortgage for a particular real estate development project specific to Legacy Lane. The sole officer and director of Legacy Lane is Davies.

(f) 525 Princess is a company incorporated pursuant to the laws of Ontario. It was advanced monies on a secured basis by Textbook Student Suites (525 Princess

Street) Trustee Corporation ("**525 Trust Co.**"), which monies had been raised from investors through a syndicated mortgage for a particular real estate development project specific to 525 Princess. The only officers and directors of 525 Princess are Davies and Walter Thompson ("**Thompson**").

(g) 555 Princess is a company incorporated pursuant to the laws of Ontario. It was advanced monies on a secured basis by Textbook Student Suites (555 Princess Street) Trustee Corporation ("**555 Trust Co.**" and together with Scollard Trust Co., Kitchener Trust Co., Oakville/Burlington/Legacy Lane Trust Co., 525 Trust Co., the "**Trust Companies**"), which monies had been raised from investors through a syndicated mortgage for a particular real estate development project specific to 555 Princess. The only officers and directors of 555 Princess are Davies and Thompson.[1]

8. The defendant, Davies, is an individual residing in King City, Ontario. He was, at all material times, a director and officer of the Receivership Companies.[2]

9. The defendant, Aeolian, is a company incorporated pursuant to the laws of Ontario. Aeolian's mailing address is Davies' personal residence in King City, Ontario. Davies is also Aeolian's sole director and officer. Aeolian is directly owned by Davies' spouse and children: Judith Davies, Sarah Davies and Jessica Davies.[3]

[1] Fourth Report of KSV Kofman Inc as Receiver and Manager of Certain Property of Scollard Development Corporation, Memory Care Investments (Kitchener) Ltd, Memory Care Investments (Oakville) Ltd, 1703858 Ontario Inc, Legacy Lane Investments Ltd, Textbook (525 Princess Street) Inc and Textbook (555 Princess Street) Inc dated May 16, 2017 ("**Fourth Report**"), Motion Record, Tabs 2 and 2A.
[2] Fourth Report, Motion Record, Tabs 2 and 2A.
[3] Fourth Report, Motion Record, Tab 2.

The Loan Agreements

10. Under the loan agreements between the respective Receivership Companies and the applicable Trust Companies (the "**Loan Agreements**"), the funds advanced from the Trust Companies to the Receivership Companies were to be used to purchase real property and to pay the soft costs associated with the specific real estate development projects (the "**Projects**") for which the funds were invested and advanced.[4]

11. In raising the monies from investors, the Receivership Companies covenanted that they would not, without the consent of the applicable Trust Company (subject to certain limited exceptions), "use the proceeds of any Loan Instalment for any purposes other than the development and construction of the project on the Property".[5]

Prohibited Management Fees

12. Contrary to the Loan Agreements and the Receivership Companies' contractual and legal obligations, and as described in more detail below, Davies caused the Receivership Companies to improperly pay millions of dollars in management fees to Aeolian, his family and other related parties, notwithstanding that the Receivership Companies never entered into any management services agreements.[6]

13. Specifically, Davies caused Scollard, Oakville, Kitchener, Burlington, Legacy Lane, and a non-Receivership Company that Davies controls, McMurray Street Investments Inc. ("**McMurray**"), to transfer $4.069 million in prohibited management fees to Aeolian:

[4] Fourth Report, Motion Record, Tabs 2 and 2A.
[5] Fourth Report, Motion Record, Tabs 2 and 2A.
[6] Fourth Report, Motion Record, Tab 2.

(a) Scollard transferred $1,244,000 to Aeolian;

(b) Oakville transferred $1,112,000 to Aeolian;

(c) Kitchener transferred $506,000 to Aeolian;

(d) Burlington transferred $592,000 to Aeolian;

(e) Legacy Lane transferred $341,000 to Aeolian; and

(f) McMurray transferred $274,000 to Aeolian.[7]

14. These payments are all prohibited under the Loan Agreements.[8]

Further Potentially Improper Management Fees

15. Pursuant to Section 7.02(c) of the Loan Agreements with 525 Princess and 555 Princess, ordinary course payments to shareholders for amounts related to the management, development and operation of the Property are permitted, provided such payments are reasonable in relation to the services rendered.[9]

16. Davies caused 525 Princess and 555 Princess to transfer to Aeolian (purportedly in respect of management fees) amounts that appear to be unreasonable, particularly given that these Receivership Companies never entered into any management agreements with Aeolian and

[7] Fourth Report, Motion Record, Tabs 2 and 2K, 2M, 2N, 2O, 2P and 2Q.
[8] Fourth Report, Motion Record, Tabs 2 and 2A.
[9] Fourth Report, Motion Record, Tabs 2 and 2A.

the Projects for which the funds were advanced have achieved very limited progress (they both remain in the pre-construction phase).[10]

Improper Transfers to TSI, TSSI and MCIL

17. Contrary to the Loan Agreements and the Receivership Companies' contractual and legal obligations, Davies caused certain of the Receivership Companies to improperly transfer millions of dollars to Textbook Suites Inc. ("**TSI**"), Textbook Student Suites Inc. ("**TSSI**") and Memory Care Investments Ltd. ("**MCIL**"), the parent companies of Kitchener, Oakville, Burlington, 525 Princess and 555 Princess, all three of which are owned, in part, by Aeolian.[11]

18. These funds were transferred to TSI, TSSI and MCIL by cheque. The memo line on each of the cheques indicated that payment was a "loan", notwithstanding that:

(a) none of these "loans" were documented;

(b) no interest has been received by any of the applicable Receivership Companies on account of any such "loan"; and

(c) the relevant Loan Agreements do not permit the applicable Receivership Companies to make these "loans".[12]

[10] Fourth Report, Motion Record, Tabs 2, 2G and 2H.
[11] Fourth Report, Motion Record, Tab 2.
[12] Fourth Report, Motion Record, Tabs 2 and 2A.

Improper Dividends

19. Davies also caused certain Receivership Companies to improperly pay significant dividends to Aeolian. Specifically, Davies caused 525 Princess and 555 Princess to each pay $250,000 in dividends to Aeolian.[13]

20. While the payment of dividends is permitted under the Loan Agreements in certain circumstances, dividends are only to be paid from the "excess proceeds after the [real estate development property] has been acquired". In each instance, Davies caused the dividends to be paid immediately after 525 Princess and 555 Princess received the funds from the applicable Trust Company at a time when 525 Princess and 555 Princess had no profits. Further, as a result of the payment of dividends and the payments to related parties, 525 Princess and 555 Princess essentially had no further monies to advance their respective Projects, which, as noted, are still in the pre-construction phase.[14]

21. These dividend distributions caused or contributed to 525 Princess and 555 Princess becoming insolvent (if they were not already insolvent at the time of payment).[15]

Improper Payments to Davies' Family Members

22. Davies also caused certain of the Receivership Companies to make further payments directly to his spouse and children for services purportedly rendered by them in connection with the Projects. However, the plaintiff is aware of no such services having been provided. To the extent these services were not provided, or the payments in respect of any services that were

[13] Fourth Report, Motion Record, Tabs 2, 2G and 2H.
[14] Fourth Report, Motion Record, Tabs 2 and 2A.
[15] Fourth Report, Motion Record, Tab 2.

provided are unreasonable, these payments are prohibited under the applicable Loan Agreements and constitute a breach of the Loan Agreements.[16]

Improper Inter-Company Transfers and Transfers to Affiliates

23. In further contravention of the Loan Agreements, Davies routinely caused the Receivership Companies to improperly transfer monies between entities and to affiliates, including over $17 million to and among the Receivership Companies and certain non-Receivership Companies that Davies controls, including Textbook Ross Park Inc., Textbook (445 Princess Street) Inc., Textbook (774 Bronson Avenue) Inc. and McMurray.[17]

24. Davies also caused the Receivership Companies to improperly transfer monies to Lafontaine Terrace Management Corporation ("**Lafontaine**") and Memory Care Investments (Victoria) Ltd. ("**MC Victoria**") – two non-Receivership Companies in respect of which Davies is the sole director and officer. Specifically:

(a) Scollard, Legacy Lane, Burlington and Oakville improperly transferred a total of $324,000 to Lafontaine; and

(b) Legacy Lane improperly transferred $15,000 to MC Victoria.[18]

25. These transfers are prohibited under the applicable Loan Agreements and constitute a breach of the Loan Agreements.[19]

Misappropriation of Funds to Finance the Purchase of the Ottawa Property

[16] Fourth Report, Motion Record, Tabs 2, 2A, and 2G-Q.
[17] Fourth Report, Motion Record, Tabs 2, 2A, and 2G-Q.
[18] Fourth Report, Motion Record, Tabs 2, 2K and 2N.
[19] Fourth Report, Motion Record, Tabs 2 and 2A.

26. Davies also improperly diverted further funds from 555 Princess and Kitchener (and the respective Projects in which the funds were required to be invested) to a non-Receivership Company that he controls, Textbook (256 Rideau St.) Inc. ("**Rideau**"), to finance Rideau's purchase of real property municipally described as 256 Rideau Street, Ottawa, Ontario and 211 Besserer Street, Ottawa, Ontario (collectively, the "**Ottawa Property**").[20]

27. The Ottawa Property was purchased by Rideau on or around November 6, 2015 for $11 million.[21]

28. Immediately prior to Rideau's purchase of the Ottawa Property, on October 27, 2015, Davies caused 555 Princess to improperly transfer $1.39 million to Rideau, and he caused Kitchener to improperly transfer $111,000 to Rideau, both by way of cheque. The cheques were both signed by Davies.[22]

29. The funds were transferred from 555 Princess and Kitchener to Rideau for no consideration, for an illegitimate business purpose and in contravention of the relevant Loan Agreements. Despite the fact that the funds were required to be used for specific Projects to be respectively undertaken by 555 Princess and Kitchener, Davies caused the funds to be transferred to Rideau with complete disregard for the separate corporate identities of 555 Princess, Kitchener and Rideau and the contractual and legal obligations of the parties, which had the result of moving assets away from the creditors of both 555 Princess and Kitchener, thereby causing them to suffer a loss.[23]

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[20] Fourth Report, Motion Record, Tabs 2, 2H, 2O and 2U.
[21] Fourth Report, Motion Record, Tabs 2 and 2U.
[22] Fourth Report, Motion Record, Tabs 2, 2H, 2O and 2U.
[23] Fourth Report, Motion Record, Tabs 2, 2A, 2H, 2O and 2U.

30. Following Rideau's acquisition of the Ottawa Property, Davies caused a further $61,200 to be improperly transferred to Rideau from 555 Princess, 525 Princess and Burlington by way of cheques, each of which was also signed by Davies. Specifically:

(a) $2,200 was transferred by Burlington to Rideau on November 5, 2015;

(b) $36,000 was transferred by 555 Princess to Rideau on December 17, 2015;

(c) $7,000 was transferred by 555 Princess to Rideau on May 31, 2016; and

(d) $16,000 was transferred by 525 Princess to Rideau on June 20, 2016.[24]

31. Despite the fact that these funds were required to be used for the specific Projects to be respectively undertaken by 555 Princess, 525 Princess and Burlington, the $61,200 was transferred to Rideau for no consideration, in contravention of the relevant Loan Agreements and for what appears to be an illegitimate business purpose.[25]

32. On May 16, 2016, KSV (in its capacity as receiver and manager of 555 Princess, 525 Princess, Kitchener and Burlington) sought an order, on an *ex parte* basis, for the issuance and registration of Certificates of Pending Litigation on title to the Ottawa Property (the "**CPLs**"). On May 17, 2017, the Court granted the order (the "**CPL Order**") and the CPLs were registered on title. Neither Davies nor Rideau, nor any other party, has since contested the CPL Order or the registration of the CPLs on title.[26]

[24] Fourth Report, Motion Record, Tabs 2, 2G, 2H, 2Q and 2U.
[25] Fourth Report, Motion Record, 2, 2A, 2G, 2H, 2Q and 2U.
[26] Fourth Report, Motion Record, Tabs 2 and 2U.

Further Improper Conduct involving Non-Receivership Companies

33. In addition to the above, Davies also engaged in further misconduct with respect to other companies he controls that are not currently subject to the receivership proceeding.

34. For instance, Davies caused McMurray – a company he controlled that entered into a loan agreement with 7743718 Canada Inc. (the "**McMurray Trust Co.**") pursuant to which it was advanced monies that had been raised from investors through a syndicated mortgage for a particular real estate development project specific to McMurray – to improperly transfer $935,000 to Moscowitz Capital Mortgage Fund II ("**Moscowitz**").[27]

35. Moscowitz is not a mortgagee on the relevant real property owned by McMurray; however, it is a mortgagee on Davies' personal residence, which he jointly owns with his spouse (who is a shareholder in Aeolian).[28]

36. McMurray's Loan Agreement with the McMurray Trust Co. prohibits these payments.[29]

Restrictions and Limitations regarding KSV's Fourth Report

37. As set out in more detail in section 1.2 of KSV's Fourth Report, KSV has not performed an audit of the financial information addressed in its Fourth Report which serves as an evidentiary basis for this motion. Further, while KSV has had a limited number of discussions with Davies and corresponded with him on a limited basis regarding certain of the matters addressed in the Fourth Report, KSV has not spoken to or had any communications with certain

[27] Fourth Report, Motion Record, Tabs 2 and 2P.
[28] Fourth Report, Motion Record, Tabs 2 and 2T.
[29] Fourth Report, Motion Record, Tabs 2 and 2A.

other relevant parties (such as Thompson) regarding the matters addressed in the Fourth Report.[30]

38. KSV has also not had access to the books, records and bank statements of TSI, TSSI or MCIL. Further, the books and records of the Receivership Companies (amongst other entities controlled by Davies) are not well maintained.[31]

39. Davies has also not had the opportunity to respond to KSV's Fourth Report and potentially explain the issues discussed therein. However, no party (including Davies) has contested or disputed any of the findings in KSV's First Report dated April 5, 2017, which addressed issues similar to those discussed in KSV's Fourth Report, and KSV can think of no commercial or legitimate purpose for the above-noted transfers and payments that occurred in contravention of, among other things, the Receivership Companies' obligations under the terms of the applicable Loan Agreements.[32]

PART III – ISSUES

40. The issues to be decided on this motion are: (1) whether the plaintiff has met the test for a worldwide injunctive order freezing the Defendants' assets, and (2) whether the requirements of Rule 40.03 ought to be dispensed with given the exceptional circumstances of this case.

[30] Fourth Report, Motion Record, Tab 2.
[31] Fourth Report, Motion Record, Tab 2.
[32] Fourth Report, Motion Record, Tab 2.

PART IV – LAW & ARGUMENT

The Test for a *Mareva* Injunction

41. Rule 40.01 of the *Rules of Civil Procedure* provides that an interlocutory injunction under section 101 of the *Courts of Justice Act* may be obtained on a motion to a judge by a party to a proceeding or an intended proceeding.[33]

42. Interim *Mareva* orders are granted with a view to freezing and preserving the assets of parties to ensure that the assets are available for execution in satisfaction of any judgment adverse to the parties. While the general principle remains that a party to a proceeding may not obtain execution before judgment, the *Mareva* injunction doctrine is a limited exception to this rule.[34]

43. In order to obtain a *Mareva* injunction, the moving party must establish that:

(a) it has a strong *prima facie* case. While *Mareva* injunctions are generally granted in the context of fraud, proof of fraud is not a prerequisite for obtaining a *Mareva* injunction. Such an Order may be granted where there is a strong *prima facie* case of breach of fiduciary duty (or another cause of action) and all of the other elements of the test for obtaining a *Mareva* injunction have been satisfied;[35]

(a) there is a real and genuine risk that the defendant will put his assets beyond the reach of his creditors for the purpose of avoiding judgment;

(b) the moving party will suffer irreparable harm; and

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[33] *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 40.01; *Courts of Justice Act*, RSO 1990, c C43, ss 101(1), (2).
[34] *Chitel v Rothbart* (1982), 39 OR (2d) 513, 1982 CarswellOnt 508 at paras 30–32 (CA), Book of Authorities, Tab 1.
[35] *Lambrou v Voudouris*, 2015 ONSC 998, 2015 CarswellOnt 1929 at para 5, Book of Authorities, Tab 2.

(c) the balance of convenience favours the moving party.[36]

44. In addition, general guidelines to be considered on a motion for a *Mareva* injunction include that the moving party should, among other things:

(a) make full and frank disclosure of all matters in its knowledge that are material for the Court to know (which the plaintiff submits it has done);

(b) give particulars of the claim against the defendants, stating the ground and amount of the claim, and fairly stating the points made against it by the defendants (which the plaintiff also submits it has done);

(c) give some grounds for believing that the defendants have assets in the jurisdiction (which the plaintiff has done);

(d) give some grounds for believing that there is a risk of the assets being removed or dissipated before the judgment is satisfied or why a *Mareva* injunction is necessary to prevent a fraud on the court or the adversary (which the plaintiff has also done); and

(e) give an undertaking as to damages (unless the Court orders otherwise).[37]

Worldwide Mareva Injunction

45. The above general test has been modified with respect to worldwide *Mareva* injunction motions. While the above-noted guidelines include "assets in the jurisdiction" as a factor for

[36] *Jajj v 100337 Canada Ltd (cob BJ International/BJ Supermarket)*, 2014 ONSC 557, 2014 CarswellOnt 1216 at para 131, Book of Authorities, Tab 3, citing *Chitel v Rothbart*, *supra* note 34 at para 56, Book of Authorities, Tab 1; and *Aetna Financial Services Ltd v Feigelman*, [1985] 1 SCR 2, 1985 CarswellMan 19 [***Feigelman***], Book of Authorities, Tab 4.

[37] *Chitel v Rothbart*, *supra* note 34 at para 44, Book of Authorities, Tab 1. See also *Feigelman*, *supra* note 36, Book of Authorities, Tab 4.

consideration, worldwide *Mareva* injunctions may also be granted in respect of assets outside the jurisdiction, whether or not the defendant has assets within the jurisdiction. Worldwide *Mareva* injunctions are granted on the basis that the Court asserts unlimited jurisdiction *in personam* against any person who is properly made a party to proceedings in the jurisdiction.[38]

46. Canadian courts have awarded worldwide *Mareva* injunctions in several cases, the most oft-cited of which is the BC case of *Mooney v Orr*. As stated in *Mooney v Orr*, in reliance on English and Australian authorities, the Court has the authority to restrain a party who is properly subject to the jurisdiction of the Court from transferring or dealing with assets, including assets *ex juris*, where necessary to prevent the frustration of an order or possible future order of the Court:

> The reasons for extending *Mareva* injunctions to apply to foreign assets are valid in British Columbia no less than in England and Australia—the notion that a court should not permit a defendant to take action designed to frustrate existing or subsequent orders of the court, and the practical consideration that in this day of instant communication and paperless cross-border transfers, the courts must, in order to preserve the effectiveness of their judgment, adapt to new circumstances. Such adaptability has always been, and continues to be, the genius of the common law…Where an applicant seeks to enjoin the transfer of assets worldwide, one grafts onto these conditions the further requirement that there exist assets ex juris, the disposition or concealment of which would be likely to frustrate any judgment obtained against the defendant. [39]

47. Ontario Courts have also granted worldwide *Mareva* injunctions. One example can be found in the case of *Innovative Marketing Inc v D'Souza*, where, in addition to ordering a

[38] *SFC Litigation Trust (Trustee of) v Chan*, 2017 ONSC 1815, 2017 CarswellOnt 4336 at paras 27–45 (Div Ct) [***Sino Forest***], Book of Authorities, Tab 5.
[39] *Mooney v Orr* (1994), 98 BCLR (2d) 318, 1994 CarswellBC 488 at paras 11, 13 (BCSC), Book of Authorities, Tab 6.

worldwide *Mareva* injunction, the Court also ordered the defendant to submit to examinations under oath, with respect to the nature, value, and location of his assets worldwide.[40]

48. Another more recent example can be found in the case of *Cosimo Borrelli, in his capacity as trustee of the SFC Litigation Trust v Allen Tak Yuen Chan*, where the Order of the Honourable Mr. Justice Hainey of the Commercial List confirming a worldwide *Mareva* injunction against the defendant (which was originally granted on an *ex parte* basis) was upheld by the Divisional Court on appeal.[41]

49. The less the value of the defendant's assets in the jurisdiction, the greater the necessity for taking protective measures in relation to those assets outside the jurisdiction. Although it is not necessary to prove that the defendant does not have assets in the jurisdiction, the less the value of those assets, the more likely the Court is to grant relief with extra-territorial effect.[42]

50. Further, recent jurisprudence has called for the expansion of the jurisdiction of Canadian courts in matters of private international law to reflect the "globalization of commerce and the mobility of both people and assets".[43] Indeed, as the Divisional Court noted in *Cosimo Borrelli, in his capacity as trustee of the SFC Litigation Trust v Allen Tak Yuen Chan*, "*Mareva* injunctions have been granted on a worldwide basis with increasing frequency in our global economy".[44]

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[40] *Innovative Marketing Inc v D'Souza*, 155 ACWS (3d) 672, 2007 CarswellOnt 1131 (Sup Ct J Comm List), Book of Authorities, Tab 7.
[41] *Sino Forest*, *supra* note 38, Book of Authorities, Tab 5.
[42] *Mooney v Orr*, *supra* note 39 at paras 8, 13, Book of Authorities, Tab 6.
[43] See *Pro Swing Inc v Elta Golf Inc*, 2006 SCC 52, 2006 CarswellOnt 7203 at paras 1, 15, 78–79 [***Pro Swing Inc***], Book of Authorities, Tab 8, where McLachlin CJC (dissenting, but not on this issue) referred to several Supreme Court authorities for the rationale for extending the limits of the court's jurisdiction to enforce foreign non-monetary judgments. She commented that comity, order and fairness do not exclude the courts from enforcing foreign non-monetary judgments, and in the context of modern private international law, may require it. The majority of the Court in *Pro Swing Inc* concluded that was not the right case to extend the jurisdiction, but all of the justices agreed that the "time is ripe to review the traditional common law rule" in light of changing global commercial realities.
[44] *Sino Forest*, *supra* note 38 at para 38, Book of Authorities, Tab 5.

51. In order to limit the effects of the Order on non-parties outside the jurisdiction, the Order for a worldwide *Mareva* injunction should be conditioned by a proviso to the following effect, which proviso is included in the draft Order in the plaintiff's motion record:

> "[I]nsofar as this Order purports to have any effect outside of the territorial jurisdiction of this Court, no person shall be affected by it or concerned by the terms of it until this Order is declared enforceable or registered or enforced by a foreign court of competent jurisdiction for that purpose, unless that person is:
>
> (a) a party to this action or any agent of a party to this action; or
>
> (b) a person who is subject to the judicial jurisdiction of this Court, who has received written notice of this Order within the territorial jurisdiction of this Court." [45]

Application of the Test for a Mareva Injunction

The Plaintiff Has Established a Strong Prima Facie Case of Fraud and Breach of Fiduciary Duty, Amongst Other Causes of Action

52. The facts set out above establish a strong *prima facie* case of fraud, amongst other causes of action, against the Defendants, as well as a strong *prima facie* case of breach of fiduciary duty, amongst other causes of action, as against Davies.

53. A *prima facie* case is established when, on the balance of probabilities, it is likely that the moving party will ultimately succeed. A strong *prima facie* case involves a higher level of assurance at the interlocutory stage that it is likely that the moving party will ultimately succeed. The requirement of showing a strong *prima facie* case does not go so far as to require the plaintiff to actually prove its case. If this were true, a trial would be superfluous and the interim or interlocutory motion would move from being an examination of the strength of the case to an actual determination of the merits of the case. Rather, the question of whether the plaintiff has

[45] *Cussons v Slobbe* (1996), 66 ACWS (3d) 342, 1996 CarswellBC 2104 at para 6 (BCSC), Book of Authorities, Tab 9.

shown a strong *prima facie* case means: if the court had to finally decide the matter on its merits, on the basis of the material before it, would the plaintiff likely succeed?[46]

Fraud

54. To establish the tort of civil fraud, a plaintiff must satisfy the following elements:

(a) a false representation made by the defendant;

(b) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness);

(c) the false representation caused the plaintiff to act; and

(d) the plaintiff's actions resulted in a loss.[47]

55. The facts set out above, as supported by the plaintiff's evidence, establish a strong *prima facie* case of fraud against the Defendants. Among other things, the Defendants:

(a) concealed the relationships between themselves and other related, non-arm's length parties;

(b) directed and caused prohibited payments and transfers to be made by the Receivership Companies to such related, non-arm's length parties, including payments and transfers for which no goods or services of value were provided; and

[46] *Quizno's Canada Restaurant Corp v 1450987 Ontario Corp* (2009), 176 ACWS (3d) 1016, 2009 CarswellOnt 2280 at para 40 (Sup Ct J), Book of Authorities, Tab 10.
[47] *Bruno Appliance and Furniture Inc v Hryniak*, 2014 SCC 8, 2014 CarswellOnt 642 at paras 17–21, Book of Authorities, Tab 11.

(c) diverted funds (which were effectively trust funds) from the Receivership Companies to shell corporations and a network of non-arm's length parties to obtain secret profits for their own benefits.

56. All of the above caused detriment and deprivation to the Receivership Companies and their creditors.

Breach of Fiduciary Duty

57. To establish breach of fiduciary duty, the plaintiff must establish that:

(a) Davies was a fiduciary who owed fiduciary duties to the Receivership Companies; and

(b) Davies breached the fiduciaries duties he owed to the Receivership Companies, including by, for instance, concealing or failing to advise of material facts, making a secret profit or acting in a conflict of interest.

Davies was a Fiduciary of the Receivership Companies

58. Certain categories of relationships are considered to give rise to fiduciary obligations because of their inherent purpose or their presumed factual or legal incidents. These categories are often referred to as *per se* fiduciary relationships.[48]

59. There is no doubt that directors and officers, such as Davies, are in a *per se* fiduciary relationship with the companies in respect of which they are directors and officers, which, in this instance, is all of the Receivership Companies. The fiduciary duty of directors and officers to the

[48] *Galambos v Perez*, 2009 SCC 48, 2009 CarswellBC 2787 at para 36, Book of Authorities, Tab 12.

corporation originated in the common law as a duty to act in the best interests of the corporation. The fiduciary duty of the directors to the corporation is a broad concept. It is not confined to short-term profit or share value. The content of this duty varies with the situation at hand. At a minimum, it requires the directors to ensure that the corporation meets its statutory obligations. But, depending on the context, there are often other requirements. In any event, the fiduciary duty owed by directors and officers is mandatory; they must look to what is in the best interests of the corporation. [49]

60. The fiduciary duties of directors and officers have also been codified under the incorporating and governing statute of the Receivership Companies, specifically, the *Business Corporations Act*, RSO 1990, c B 16 (the "**OBCA**"). In particular, section 134(1) of the OBCA provides:

> **134** (1) Every director and officer of a corporation in exercising his or her powers and discharging his or her duties to the corporation shall,
>
> (a) act honestly and in good faith with a view to the best interests of the corporation; and
>
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.[50]

61. By virtue of Davies' role as a director and officer of each of the Receivership Companies, he was a fiduciary and owed them each fiduciary duties to, among other things, act honestly, in good faith and in their best interests. Further, as the sole officer and director of Scollard, Kitchener, Oakville, Burlington and Legacy Lane, these duties were only heightened given that

[49] *BCE Inc v 1976 Debentureholders*, [2008] 3 SCR 560 at paras 37–38, Commercial List Book of Authorities, Tab 1.
[50] *Business Corporations Act*, RSO 1990, c B 16, s 134(1).

these entities were especially vulnerable to the unilateral exercise of Davies' discretion and power.

Davies Breached his Fiduciary Duties

62. The law is clear that, as a director and officer, acting in a conflict of interest, engaging in self-dealing or making secret profits constitutes a breach of fiduciary duty.[51]

63. Here, Davies abused his positions of authority within the Receivership Companies to divert investor funds to individuals and entities related to him with no rightful entitlement to the funds.

64. In not having due regard for transparency, disclosure, the avoidance of self-dealing and conflicts of interest, or corporate separateness, amongst other things, Davies breached the duties he owed the Receivership Companies. He effectively operated each of the Receivership Companies as his own personal corporation and treated their assets as his own. This resulted in his failure to act in good faith and in the best interests of the Receivership Companies, including by attempting to enrich himself and parties related to him at the expense of the Receivership Companies and their creditors.

65. Davies' actions caused the Receivership Companies to suffer significant losses, given that they parted with substantial amounts of money for effectively no consideration and no valid business reason.

66. The facts set out above establish a strong *prima facie* case of breach of fiduciary duty as against Davies, based on, among other things, his conflict of interest, self-dealing, dishonest

[51] See, for instance, *Canadian Aero Service Ltd v O'Malley*, [1974] SCR 592, 1973 CarswellOnt 236, Book of Authorities, Tab 13.

conduct and failure to the act in the Receivership Companies' best interests, including by, among other things, causing them to breach the applicable Loan Agreements in improperly diverting funds to his family and other related parties, thereby exposing the Receivership Companies to considerable claims for damages and losses.

The Plaintiff Has Also Established a Strong Prima Facie Case of Conversion and Unjust Enrichment, Amongst Other Causes of Action

67. The facts set out above also establish a strong *prima facie* case of conversion and unjust enrichment, amongst other causes of action, as against the Defendants.

Conversion

68. Conversion is a strict liability tort. It involves a wrongful interference with the goods of another, such as taking, using or destroying goods in a manner inconsistent with the owner's right of possession. An essential element of conversion is that at the time of the conversion or the time of the commencement of the action, the plaintiff either had possession or a right to immediate possession of the good claimed.[52]

69. There is a strong *prima facie* case that the Defendants are liable in conversion. The Receivership Companies were in possession of, or entitled to immediate possession of, the specific and identifiable funds described above. The Defendants intentionally and wrongfully converted the Receivership Companies' funds for uses inconsistent with the Receivership Companies' right of possession and other rights, and thereby deprived the Receivership Companies (and their creditors) of the benefit of the funds, exposing them to significant liabilities.

[52] *Salimijazi v Pakjou*, 176 ACWS (3d) 968, 2009 CarswellOnt 2013 at paras 42–43 (Sup Ct J), Book of Authorities, Tab 14, citing *Boma Manufacturing Ltd v Canadian Imperial Bank of Commerce*.

Unjust Enrichment

70. The Supreme Court of Canada has stated that "the test for unjust enrichment is well established in Canada." The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment.[53]

71. Thus, for recovery to lie, something must have been given by the plaintiff, whether goods, services or money. The thing which is given must have been received and retained by the defendant, and the retention must be without juristic justification.[54]

72. By virtue of the facts set out above, the Defendants have been unjustly enriched: the Receivership Companies transferred millions of dollars to Aeolian, Davies' family members and other related parties; Aeolian and Davies received, retained and/or benefitted from these funds; and there is no apparent juristic reason for this enrichment.

There is a Real, Genuine and Demonstrated Risk of Dissipation of Assets amounting to Irreparable Harm

73. Given the manner in which the funds were extracted from the Receivership Companies and diverted to outside individuals and entities related to Davies, there is a real and genuine risk that the Defendants will liquidate and dissipate assets, making it difficult or impossible for the plaintiff to recover as against them.

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[53] *Garland v Consumers' Gas Co*, 2004 SCC 25, 2004 CarswellOnt 1558 at para 30, Book of Authorities, Tab 15.
[54] *Peel (Regional Municipality) v Canada*, [1992] 3 SCR 762, 1992 CarswellNat 15 at para 39, Book of Authorities, Tab 16.

74. There is also tangible, objective evidence that shortly after the commencement of the receivership proceeding in January 2017, Davies and Aeolian's part owner, Judith Davies, began to liquidate assets. Among other things:

(a) On April 25, 2017, Davies sold his cottage located in Gravenhurst, Ontario for approximately $3 million;[55] and

(b) Davies and his spouse (who owns Aeolian in part) sold their personal residence located in King City, Ontario. Although KSV understands that the transaction has not yet closed, the listing price for the residence was $1.6 million.[56]

75. Given all of Davies' (and his spouse's/Aeolian's) conduct to date, including the alienation of his cottage and their jointly owned personal residence, coupled with all the other circumstances, including the manner in which the Defendants used an elaborate corporate structure of non-arm's length parties that Davies controlled to divert funds from the Receivership Companies, there is a real, genuine and demonstrated risk that the Defendants will put their assets beyond the reach of creditors for the purpose of avoiding judgment.

76. In any event, the law is well-established that the Court can infer from a party's deceitful conduct a sufficient risk of dissipation of assets and that the party will thereby frustrate the enforcement of any judgment the moving party may ultimately obtain.[57] The Court can look to the evidence as a whole relating to the conduct of the parties, which can in itself suggest a real risk that the parties may dissipate or dispose of assets, such as to render the possibility of making

[55] Fourth Report, Motion Record, Tabs 2 and 2W.
[56] Fourth Report, Motion Record, Tabs 2 and 2T.
[57] *Sibley & Associates LP v Ross et al*, 2011 ONSC 2951, 2011 CarswellOnt 4671 at paras 62–67, Book of Authorities, Tab 17; *Zarpac Inc v Susan Lynn Smiley and Michael Voljak* (26 September 2005), Court File No.: 05-CV-297155 PD2 at 2 (Ont Sup Ct J), Book of Authorities, Tab 18; *663309 Ontario Inc v Bauman* (2000), 98 ACWS (3d) 690, 2000 CarswellOnt 2479 at para 41 (Sup Ct J), Book of Authorities, Tab 19, aff'd [2001] OJ No 1213 (Div Ct).

it impossible, or at least significantly more difficult, to trace and realize upon such assets in enforcing any judgment in favor of the moving party.[58]

77. Therefore, even if this Court does not find that there is sufficient evidence of actual dissipation of the Defendants' assets, then it is submitted that, from the evidence of the overall scheme whereby the Defendants misappropriated, diverted and converted funds from the Receivership Companies, the Court can infer a real risk of dissipation of assets by the Defendants.

78. Unless the protective injunction is granted, there is a real risk that the Defendants will further dissipate assets, and that they will persist in their deceitful conduct, in order to frustrate any judgment that may ultimately be obtained against them. This is a foreseeable risk based on, among other things, the facts set out above in support of the establishment of a strong *prima facie* case of fraud, conversion and breach of fiduciary duty (amongst other causes of action).

79. This would cause significant financial harm to the Receivership Companies and their creditors tantamount to irreparable harm given that the damage may not be curable because of the lack of a viable party against which the plaintiff can collect damages.[59]

The Balance of Convenience Favours the Plaintiff

80. The law is clear that the factors leading to irreparable harm are important in considering the balance of convenience.[60] While, as noted, there would be irreparable harm to the Receivership Companies and their creditors if the sought relief is not granted, there will

[58] *Bank of Montreal v Misir* (2004), 135 ACWS (3d) 1136, 2004 CarswellOnt 5366 at paras 35–38 (Sup Ct J Comm List), Book of Authorities, Tab 20.
[59] *Towers, Perrin, Forster & Crosby Inc v Cantin* (1999), 46 OR (3d) 180, 1999 CarswellOnt 4686 at para 75 (Sup Ct J), Book of Authorities, Tab 21.
[60] *Church & Dwight Ltd v Sifto Canada Inc* (1994), 20 OR (3d) 483, 1994 CarswellOnt 1033 at para 20 (Gen Div), Book of Authorities, Tab 22.

comparatively be little harm to the Defendants if interim relief is granted. Importantly, it is open to the Defendants to move to vary the injunction order at any time if any prejudice or harm should arise.

81. The balance of convenience, therefore, favours the plaintiff.

The Defendants' Assets *Ex Juris*

82. The test for a worldwide *Mareva* injunction further requires the existence of assets *ex juris*. However, evidence of the existence of the Defendants' assets need not be specific: indeed it may in some cases be unreasonable to expect a party seeking an injunction to have precise evidence of the assets of his adversary in litigation.[61] In this case, there is evidence that Davies and/or his family, either directly or indirectly, own a property in Arizona in the United States.[62]

An Undertaking as to Damages Ought Not to be Required

83. Given the exceptional circumstances of this case, including, among other things, KSV's status as the court-appointed receiver and manager of the Receivership Companies (which appointment was necessitated by the Defendants' improper conduct causing or contributing to the Receivership Companies' insolvency), an undertaking as to damages should not be required.

84. Rule 40.03 specifically contemplates the Court foregoing the requirement for an undertaking:

> 40.03 On a motion for an interlocutory injunction or mandatory order, the moving party shall, *unless the court orders otherwise*, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to

[61] *Revenue and Customs Commissioners v Cozens*, [2011] EWHC 2782, 2011 WL 5105121 at para 41, Book of Authorities, Tab 23.
[62] Fourth Report, Motion Record, Tab 2.

> the responding party for which the moving party ought to compensate the responding party [emphasis added].[63]

85. While the requirement for an undertaking will generally only be dispensed with in exceptional circumstances, and the plaintiff acknowledges that its status as a court-appointed receiver may not be sufficient in and of itself to dispense with this requirement, courts have dispensed with the requirement for an undertaking where the plaintiff has a compelling case, does not have the financial means to make such an undertaking and/or other special circumstances exist that justify foregoing the requirement.[64]

86. The plaintiff submits that, given the exceptional circumstances present here, including the strength of its case, the limited funds it has to advance the receivership proceeding, and its status as a court-appointed officer whose mandate is effectively funded by the very creditors from which the Defendants misappropriated funds, an undertaking ought not to be required.

87. In light of all of the above, it is submitted that the plaintiff has satisfied the test for obtaining a worldwide freezing order.

PART V – REQUESTED RELIEF

88. The plaintiff respectfully requests an interim *Mareva* injunction in the form of the Order included in the motion record, which is largely consistent with the Commercial List model Order, subject to certain exceptions. In particular, the sought Order differs from the Commercial List model Order in several material respects, including with respect to, among other things:

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[63] *Rules of Civil Procedure*, *supra* note 33, Rule 40.03.

[64] *Sabourin & Sun Group of Companies v Laiken* (2006), 151 ACWS (3d) 686, 2006 CarswellOnt 5787 at para 16, Book of Authorities, Tab 24; *Taseko Mines Ltd v Phillips*, 2011 BCSC 1675, 2011 CarswellBC 3478 at paras 69–70, Book of Authorities, Tab 25; *Benjamin v Toronto Dominion Bank* (2006), 80 OR (3d) 424, 2006 CarswellOnt 1887 (Sup Ct J) at para 53, Book of Authorities, Tab 26; *Delta (Municipality) v Nationwide Auctions Inc* (1979), 100 DLR (3d) 272, 1979 CarswellBC 96 (BCSC), Book of Authorities, Tab 27.

(a) its worldwide nature;

(b) the timing for the Defendants to submit sworn statements describing the nature, value, and location of their assets worldwide and be cross-examined on those statements, which is truncated given the highly time-sensitive nature of the matter and the plaintiff's serious concerns regarding the Defendants' dissipation of assets; and

(c) the dispensing with the requirement for an undertaking as to damages.

89. The *Mareva* injunction sought contemplates that the total value of worldwide assets to be frozen shall not exceed $9,039,740. This number represents the total quantum of funds that the plaintiff has determined, based on its current information (subject to the limitations and restrictions noted in KSV's Fourth Report), were inappropriately removed from the Receivership Companies by Davies and diverted to his family members, Aeolian, TSI, TSSI, MCIL, Lafontaine, MC Victoria and Rideau in the manner set out above, as detailed with more particularity in KSV's Fourth Report.

90. A blackline of the proposed draft Order to the Commercial List model Order is included in the Motion Record.[65]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of June, 2017.

[65] Blackline of Draft Interim Order to Commercial List Model Order, Motion Record, Tab 4.

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SCHEDULE "A" – LIST OF AUTHORITIES

1. *Chitel v Rothbart* (1982), 39 OR (2d) 513, 1982 CarswellOnt 508 (CA).
2. *Lambrou v Voudouris*, 2015 ONSC 998, 2015 CarswellOnt 1929.
3. *Jajj v 100337 Canada Ltd (cob BJ International/BJ Supermarket)*, 2014 ONSC 557, 2014 CarswellOnt 1216.
4. *Aetna Financial Services Ltd v Feigelman*, [1985] 1 SCR 2, 1985 CarswellMan 19.
5. *SFC Litigation Trust (Trustee of) v Chan*, 2017 ONSC 1815, 2017 CarswellOnt 4336 (Div Ct).
6. *Mooney v Orr* (1994), 98 BCLR (2d) 318, 1994 CarswellBC 488 (BCSC).
7. *Innovative Marketing Inc v D'Souza*, 155 ACWS (3d) 672, 2007 CarswellOnt 1131 (Sup Ct J Comm List).
8. *Pro Swing Inc v Elta Golf Inc*, 2006 SCC 52, 2006 CarswellOnt.
9. *Cussons v Slobbe* (1996), 66 ACWS (3d) 342, 1996 CarswellBC 2104 (BCSC).
10. *Quizno's Canada Restaurant Corp v 1450987 Ontario Corp* (2009), 176 ACWS (3d) 1016, 2009 CarswellOnt 2280 (Sup Ct J).
11. *Bruno Appliance and Furniture Inc v Hryniak*, 2014 SCC 8, 2014 CarswellOnt 642.
12. *Galambos v Perez*, 2009 SCC 48, 2009 CarswellBC 2787.
13. *Canadian Aero Service Ltd v O'Malley*, [1974] SCR 592, 1973 CarswellOnt 236.
14. *Salimijazi v Pakjou*, 176 ACWS (3d) 968, 2009 CarswellOnt 2013 (Sup Ct J), citing *Boma Manufacturing Ltd v Canadian Imperial Bank of Commerce*.
15. *Garland v Consumers' Gas Co*, 2004 SCC 25, 2004 CarswellOnt 1558.
16. *Peel (Regional Municipality) v Canada*, [1992] 3 SCR 762, 1992 CarswellNat 15.
17. *Sibley & Associates LP v Ross et al*, 2011 ONSC 2951, 2011 CarswellOnt 4671.
18. *Zarpac Inc v Susan Lynn Smiley and Michael Voljak* (26 September 2005), Court File No.: 05-CV-297155 PD2 (Ont Sup Ct J).
19. *663309 Ontario Inc v Bauman* (2000), 98 ACWS (3d) 690, 2000 CarswellOnt 2479 (Sup Ct J), aff'd [2001] OJ No 1213 (Div Ct).
20. *Bank of Montreal v Misir* (2004), 135 ACWS (3d) 1136, 2004 CarswellOnt 5366 (Sup Ct J Comm List).
21. *Towers, Perrin, Forster & Crosby Inc v Cantin* (1999), 46 OR (3d) 180, 1999 CarswellOnt 4686 (Sup Ct J).
22. *Church & Dwight Ltd v Sifto Canada Inc* (1994), 20 OR (3d) 483, 1994 CarswellOnt 1033 (Gen Div).
23. *Revenue and Customs Commissioners v Cozens*, [2011] EWHC 2782, 2011 WL 5105121.
24. *Sabourin & Sun Group of Companies v Laiken* (2006), 151 ACWS (3d) 686, 2006 CarswellOnt 5787.
25. *Taseko Mines Ltd v Phillips*, 2011 BCSC 1675, 2011 CarswellBC 3478.
26. *Benjamin v Toronto Dominion Bank* (2006), 80 OR (3d) 424, 2006 CarswellOnt 1887 (Sup Ct J).
27. *Delta (Municipality) v Nationwide Auctions Inc* (1979), 100 DLR (3d) 272, 1979 CarswellBC 96 (BCSC).

SCHEDULE "B" – LEGISLATION

***Rules of Civil Procedure*, RRO 1990, Reg 194**

INTERLOCUTORY INJUNCTION OR MANDATORY ORDER

HOW OBTAINED

40.01 An interlocutory injunction or mandatory order under section 101 or 102 of the *Courts of Justice Act* may be obtained on motion to a judge by a party to a pending or intended proceeding.

WHERE MOTION MADE WITHOUT NOTICE

Maximum Duration

40.02 (1) An interlocutory injunction or mandatory order may be granted on motion without notice for a period not exceeding ten days.

Extension

(2) Where an interlocutory injunction or mandatory order is granted on a motion without notice, a motion to extend the injunction or mandatory order may be made only on notice to every party affected by the order, unless the judge is satisfied that because a party has been evading service or because there are other exceptional circumstances, the injunction or mandatory order ought to be extended without notice to the party.

(3) An extension may be granted on a motion without notice for a further period not exceeding ten days.

Labour Injunctions Excepted

(4) Subrules (1) to (3) do not apply to a motion for an injunction in a labour dispute under section 102 of the Courts of Justice Act.

UNDERTAKING

40.03 On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party.

FACTUMS REQUIRED

40.04 (1) On a motion under rule 40.01, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing.

(4) Revoked: O Reg 394/09, s 18.

***Courts of Justice Act*, RSO 1990, c C43**

INTERLOCUTORY ORDERS

INJUNCTIONS AND RECEIVERS

101. (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

TERMS

(2) An order under subsection (1) may include such terms as are considered just.

KSV KOFMAN INC. in its capacity as Receiver and Manager of Certain Property of Scollard Development Corporation, et al.
Plaintiff

v.

JOHN DAVIES et al.

Defendants

Court File No: CV-17-11822-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE PLAINTIFF
(Motion for *Mareva* Injunction – Returnable June 7, 2017)

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