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 August 30, 2017)

August 18, 2017

BENNETT JONES LLP
3400 One First Canadian Place
P.O. Box 130
Toronto ON M5X 1A4

Sean Zweig (LSUC#57307I)
Phone: (416) 777-6254
Email: zweigs@bennettjones.com

Jonathan Bell (LSUC#55457P)
Phone: (416) 777-6511
Email: bellj@bennettjones.com

Facsimile: (416) 863-1716

Lawyers for the Plaintiff

PART I - OVERVIEW

1. Interlocutory injunctive relief is required.

2. KSV Kofman Inc. ("**KSV**") – the court-appointed receiver and manager of certain property of the Receivership Companies (as defined below) – has a strong *prima facie* case of fraud, amongst other causes of action, against the defendants and intended defendants (collectively, the "**Defendants**") in connection with their role in a syndicated mortgage investment ("**SMI**") scheme. The scheme has all of the hallmarks of a Ponzi scheme as its continuance was dependent upon the raising of ever increasing sums of new money.

3. Each of the Receivership Companies' real estate development projects faced a liquidity crisis from the outset and they were doomed to fail. The Receivership Companies relied almost exclusively on additional funds being raised from new investors (frequently in new projects) to pay for the ongoing interest commitments to earlier investors (in other projects) and to fund the other development costs for the existing development projects. Had there not been new financings that raised additional funds from new investors, which funds were loaned to other Receivership Companies to fund pre-existing liabilities, the Receivership Companies would have defaulted on their obligations.

4. It is expected that the investors whose funds were advanced to the Receivership Companies are likely to lose the majority of their money as a result of the Defendants' unlawful actions, with collective losses expected to exceed $45 million.

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. 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 on this motion. The balance of convenience, and the interests of justice, favour the granting of this relief.

PART II – FACTS

Parties

6. 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 of Justice (Commercial List) dated February 2, April 28 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 SMIs 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 Mr. 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 Mr. 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 Mr. 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 Mr. 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 Mr. 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 Mr. Davies and Walter Thompson ("**Mr. 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 Mr. Davies and Mr. Thompson.[1]

7. The defendant, John Davies ("**Davies**"), is an individual residing in King City, Ontario. He was, at all material times, a director and officer of the Receivership Companies.[2] He was also, at all material times, the trustee and/or representative of the Davies Family Trust (the "**Family Trust**"), together with the proposed defendants, Judith Davies ("**Ms. Davies**") and Gregory Harris

[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 June 6, 2017 ("**Fourth Report**"), Motion Record, Tabs 2 and 2A.

[2] Fourth Report, Motion Record, Tabs 2 and 2A.

("**Mr. Harris**"). Mr. Davies was also, at all material times, the sole trustee and/or representative of the Davies Arizona Trust (the "**Arizona Trust**" and collectively with the Family Trust, the "**Trusts**").[3]

8. The proposed defendant, Ms. Davies, is an individual residing in King City, Ontario. She is Mr. Davies' spouse. She was, at all material times, the trustee and/or representative of the Family Trust, together with Mr. Davies and Mr. Harris.[4]

9. The Family Trust and the Arizona Trust are trusts that were established by or at the direction of Mr. Davies in or around 2003 and 2013, respectively. The beneficiaries of the Family Trust are Mr. Davies, Ms. Davies and the Davies' children: Jessica Deborah Davies, Sarah Ramona Davies, Andrew John Davies and Walter Robert Jackson Davies (collectively, the "**Davies Children**"), as well as any future children and issue of Mr. Davies. The beneficiaries of the Arizona Trust are exclusively the Davies Children; however, as the sole trustee of the Arizona Trust, Mr. Davies may, among other things, distribute trust property to other persons and entities for the use and benefit of a beneficiary. As the sole trustee of the Arizona Trust, Mr. Davies also has broad powers under the Irrevocable Trust Agreement, including the power to, among other things, sell or convey real property (*e.g.*, the real property municipally described as 35411 N. 66th Place, Carefree, Arizona, USA, 85377 (the "**Arizona Property**") which is owned by Mr. Davies in his capacity as the sole trustee of the Arizona Trust) in the manner and on the terms and conditions Mr. Davies, as sole trustee, deems appropriate.[5]

---

3 Sixth 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 July 12, 2017 ("**Sixth Report**"), Motion Record, Tabs 3, 3I and 3J.

4 Sixth Report, Motion Record, Tabs 3 and 3I.

5 Sixth Report, Motion Record, Tabs 3, 3H, 3I and 3J.

10. The defendant, Aeolian Investments Ltd. ("**Aeolian**"), is a company incorporated pursuant to the laws of Ontario. Aeolian's mailing address is Mr. and Ms. Davies' personal residence in King City, Ontario. Aeolian is directly owned by Ms. Davies and the Davies Children, and Mr. Davies is the company's sole director and officer.[6] Aeolian is a direct or indirect shareholder of each of the Receivership Companies. Specifically, Aeolian is a direct shareholder of Scollard and Legacy Lane. Aeolian is a shareholder of Memory Care Investments Ltd. ("**MCIL**"), which is a shareholder of Kitchener, Oakville and Memory Care Investments Burlington Ltd. ("**MC Burlington**"), which wholly owns Burlington. Aeolian is also a shareholder of Textbook Suites Inc. ("**TSI**") and Textbook Student Suites Inc. ("**TSSI**"), which are shareholders of 525 Princess and 555 Princess.[7]

11. The proposed defendant, Mr. Harris, is an individual residing in King City, Ontario. He is a licensed Ontario lawyer in private practice. He acted as legal counsel to all of the Receivership Companies and other related entities. He is also the trustee and/or representative of the Family Trust, together with Mr. Davies and Ms. Davies.[8] On this motion, relief is only being sought as against Mr. Harris in his capacity as a trustee and/or representative of the Family Trust.

The Loan Agreements

12. 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

---

6 Fourth Report, Motion Record, Tab 2.
7 Sixth Report, Motion Record, Tab 3.
8 Sixth Report, Motion Record, Tabs 3 and 3I.

the soft costs associated with the specific real estate development projects (the "**Projects**") for which the funds were invested and advanced.[9]

13. 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".[10]

The Syndicated Mortgage Investment Scheme

14. For each of the Receivership Companies' Projects, the applicable Receivership Company raised monies from investors through SMI offerings, which were sourced by Tier 1 Transaction Advisory Inc. and/or related entities (collectively, "**Tier 1**").

15. The SMIs never made commercial sense.

16. Of the SMI monies raised, approximately 30% of the proceeds was immediately used to pay fees to Tier 1, amounts due to agents who sold the SMI products to investors, professional costs and to fund a one-year interest reserve (the "**Initial Costs**").[11]

17. To support the amounts raised, the Receivership Companies retained an appraiser, Michael Cane Consultants ("**Cane**"), to provide an "estimated hypothetical market value of the subject site, *assuming it could be developed*" (emphasis added). These appraisals were based on several assumptions, such as: (i) development costs, as estimated by the applicable Receivership Company

---

[9] Fourth Report, Motion Record, Tabs 2 and 2A.
[10] Fourth Report, Motion Record, Tabs 2 and 2A.
[11] Supplement to the Sixth 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 August 8, 2017 ("**Supplement to Sixth Report**"), Supplementary Motion Record, Tab 1.

and as set out in the applicable Project pro forma, remaining consistent with the budget; (ii) the necessary planning approvals being obtained in a timely manner; and (iii) the development being commenced in a timely manner.[12]

18. Importantly, certain of the Project pro formas on which the appraisals were based contained materially inaccurate and misleading information. For instance, certain of the pro formas:

(a) reflected an equity injection by the respective Receivership Company, but in no case was such an equity contribution ever made;

(b) failed to account for a significant portion of the Initial Costs; and

(c) did not reflect the payment of dividends, which, as described in more detail below, were paid from the initial SMI advances for each of 525 Princess and 555 Princess.[13]

19. Investors were led to believe that the advances from the Trust Corporations to the Receivership Companies would be used for, and fully secured against, specific real property with a first ranking security interest. Each initial SMI fundraise significantly exceeded the purchase price of the real property, meaning that the loans from the Trust Corporations to the Receivership Companies were each under-secured from the day they were made. Further, contrary to the representations made to investors, in some instances the Receivership Companies borrowed funds on a first ranking secured basis against the real property *after* raising the SMIs. Additionally, the

---

12 Supplement to Sixth Report, Supplementary Motion Record, Tab 1.
13 Supplement to Sixth Report, Supplementary Motion Record, Tab 1.

amounts invested were routinely used for other properties where the investors did not have a security interest.[14]

20. From the outset, the development projects undertaken by the Receivership Companies had virtually no prospect of success due to, among other things, a lack of equity capital, the significant Initial Costs, the use of monies to fund expenses on other unrelated projects, and the amounts paid to related parties out of the SMI advances, including to affiliates of, and persons related to, Mr. Davies and others.[15]

21. In fact, certain (and perhaps all) of the Receivership Companies were insolvent from the date of the first SMI advance. This was largely due to, among other things, the heavy Initial Costs and, as described in more detail below, the front-end loading of excessive dividends, management fees and other undue payments to Mr. Davies, related parties and others.[16]

22. Mr. Davies asserts in the affidavit he swore on July 27, 2017 in opposition to this motion (the "**Davies Affidavit**") that he believes the projects would have all been successfully completed and each loan would have been repaid had Tier 1 not been replaced as trustee of the Trust Corporations by Grant Thornton Limited ("**GT**").[17] This is demonstrably false. At the time GT was appointed trustee of the Trust Corporations, each of the Projects was significantly over-levered as the value of the debt substantially exceeded the value of the real property and none of the Receivership Companies had any capital or access to capital to further advance its project.[18]

---

14 Supplement to Sixth Report, Supplementary Motion Record, Tab 1.
15 Supplement to Sixth Report, Supplementary Motion Record, Tab 1.
16 Supplement to Sixth Report, Supplementary Motion Record, Tab 1.
17 Affidavit of John Davies sworn July 27, 2017 (the "**Davies Affidavit**"), para. 7.
18 Supplement to Sixth Report, Supplementary Motion Record, Tab 1.

23. Among other things, the Receivership Companies were unable to raise new funds given that they needed fresh (and increased) property appraisals to do so and, by at least October 20, 2016 (prior to GT's appointment), Cane had concerns standing behind the existing appraisals. As noted by Mr. Cane in an email he sent to Mr. Davies on October 20, 2016:

> "As my reports are based on specific development timeframes, all of which appear to have lapsed, I am not able to give a guarantee of current value. As i have said to you in the past and provided you with a list of all the assignments i have done and asked for an update on timing of development, which i have not received, I am now concerned that these appraisals, which i assume are being used to provide support for financing, are now out of date and irrelevant to current day situation."

24. As Mr. Davies admitted on cross-examination, the Receivership Companies could also not obtain new appraisals from Cane as the Receivership Companies could not afford them.[19]

25. The cash balance of each of the Receivership Companies on the date GT was appointed trustee of the Trust Corporations is provided below:[20]

(unaudited; $) Entity	Bank Balance as at Oct. 27, 2016
525 Princess	7,657
555 Princess	7,663
Scollard	1,868
Kitchener	233
Oakville	359
Burlington	83
Legacy Lane	25
Total	17,888

19 Transcript of Cross-Examination of John Davies conducted on August 9, 2017 (the "**Davies Transcript**"), Qs. 347-354, Supplementary Motion Record, Tab 2.

20 Supplement to Sixth Report, Supplementary Motion Record, Tab 1.

26. Clearly by the time of GT's appointment, the scheme could not be perpetuated any longer. The Receivership Companies had a collective cash balance of only $17,888.

Improper Dividends

27. Mr. Davies caused certain Receivership Companies to improperly pay significant dividends to Aeolian, amongst other parties. Specifically, Mr. Davies caused 525 Princess and 555 Princess to each pay $250,000 in dividends to Aeolian (for a total of $500,000) while an additional $1.5 million in dividends was paid by 525 Princess and 555 Princess to the other shareholders of 525 Princess and 555 Princess.[21]

28. 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, Mr. 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 had insufficient funds to advance their respective Projects, which are still in the pre-construction phase.[22]

29. Although Mr. Davies asserts in the Davies Affidavit that the dividends were "authorized" and "paid responsibly",[23] these dividend payments caused or contributed to 525 Princess and 555 Princess becoming insolvent (if they were not already insolvent at the time of payment).[24] For

[21] Fourth Report, Motion Record, Tabs 2, 2G and 2H.
[22] Fourth Report, Motion Record, Tabs 2 and 2A.
[23] Davies Affidavit, paras. 28-32.
[24] Fourth Report, Motion Record, Tab 2.

instance, with respect to 525 Princess, it raised a total of $6.387 million from investors, comprised of $5.854 million on December 16, 2015 and an additional $533,000 on January 22, 2016. This amount was 263% greater than the purchase price of the real property. By January 28, 2016, 525 Princess had a cash balance of approximately $111,000 and had not spent any money on development activity.

30. Notwithstanding that it could not advance the Project, 525 Princess managed to pay from the SMI proceeds a $250,000 dividend to Aeolian and an additional $750,000 in dividends to the other shareholders, for a total outlay of $1 million in dividends.[25] As Mr. Davies confirmed on cross-examination, these dividends were paid at a time when 525 Princess was facing cash constraints.[26]

31. Further, as Mr. Davies noted in email correspondence sent to Mr. Singh around the time of these dividend payments (or "shareholder bonuses"):

> "In the most recent advances for 555 and 525 the amount of the raises after all fees, *shareholder bonuses* and other deductions netted a relatively small surplus...The size of the recent Tier 1 raises hasn't been large enough to leave us sufficient cash after payment of all deductions to operate the company. Bronson is the same situation. The quantum of the anticipated net Tier 1 raise on Bronson is close to the closing costs and the bonus leaving Textbook little additional cash to pay our expenses... We owe consultants for 555 and 525 as well as almost 9 months of work on Shoppers Drug Mart site. The Brock U site is in predevelopment mode. We need cash for consultants to continue work in earnest or work will stop. Add payroll office expenses etc.... the issue is the land raises are so large that these is insufficient surplus proceeds to fund operations at the present level. We need to keep our foot on the pedal and advance the projects as quickly as we can or they'll languish. After all deductions from the most recent raises there isn't enough to fund the working drawing, planning, engineering and approvals operations underway. We need a couple of raises with $2 or $3 million surplus cash to catch up."[27] (emphasis added)

---

[25] Supplement to Sixth Report, Supplementary Motion Record, Tabs 1 and 1E.
[26] Davies Transcript, Qs. 242-243, Supplementary Motion Record, Tab 2.
[27] Supplement to Sixth Report, Supplementary Motion Record, Tabs 1 and 1E.

Management Fees in Direct Contravention of Loan Agreements

32. Contrary to the Loan Agreements and the Receivership Companies' contractual and legal obligations, and as described in more detail below, Mr. Davies caused the Receivership Companies to also improperly pay, directly and/or indirectly, 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 with these parties.[28]

33. Specifically, Mr. Davies caused Scollard, Oakville, Kitchener, Burlington, Legacy Lane, and a non-Receivership Company that Mr. Davies controls, McMurray Street Investments Inc. ("**McMurray**"), to transfer $3.887 million in management fees to Aeolian in direct contravention of the applicable Loan Agreements:

(a) Scollard transferred $1,248,000 to Aeolian;

(b) Oakville transferred $1,137,000 to Aeolian;

(c) Kitchener transferred $481,000 to Aeolian;

(d) Burlington transferred $433,000 to Aeolian;

(e) Legacy Lane transferred $316,000 to Aeolian; and

(f) McMurray transferred $272,000 to Aeolian.[29]

---

28 Fourth Report, Motion Record, Tab 2.

29 Sixth Report, Motion Record, Tabs 3 and 3C. These amounts are based on Aeolian's financial records, as detailed in the Sixth Report. The total amount is approximately $182,000 less than the amount referenced in the Fourth Report. A schedule reconciling the differences is provided in Appendix "C" to the Sixth Report

34. Although the representative of the Trust Companies, Raj Singh ("**Mr. Singh**"), and/or others may have had knowledge of some or all of these payments, no formal written consent was provided[30] and such payments are prohibited under the Loan Agreements.[31] In any event, even if Mr. Singh or the Trust Companies did provide formal written consent as required by the Loan Agreements, which is not supported by the evidence tendered by Mr. Davies, such consent would only increase the Receiver's serious concerns regarding Mr. Singh's conduct and his participation in the scheme.[32]

Further Improper Management Fees

35. 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, but only if such payments are reasonable in relation to the services rendered.[33]

36. Mr. 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 the Projects for which the funds were advanced have achieved very limited progress (as noted, they both remain in the pre-construction phase).[34]

---

[30] Davies Transcript, Q. 205., Supplementary Motion Record, Tab 2.
[31] Fourth Report, Motion Record, Tabs 2 and 2A.
[32] Supplement to Sixth Report, Supplementary Motion Record, Tab 1.
[33] Fourth Report, Motion Record, Tabs 2 and 2A.
[34] Fourth Report, Motion Record, Tabs 2, 2G and 2H.

37. Although Mr. Singh and/or others may have had knowledge of some or all of these payments, no formal written consent was provided[35] and such payments are also prohibited under the Loan Agreements unless they are reasonable in relation to the services provided.[36]

The Management Fees are Disproportionate to the Development Progress on the Projects

38. In all cases, the development management fees paid in respect of Mr. Davies are disproportionate to the development progress on the Projects.[37]

39. At paragraph 17 of the Davies Affidavit, Mr. Davies states that 57% of the budgeted development management fees across all projects have been paid[38] - notwithstanding that construction has not commenced on any of the Receivership Companies, nor has construction financing been secured. Many of the projects require changes in zoning. For example, the project contemplated to be developed by 525 Princess was intended to be a 12-storey building. It is presently zoned to be no more than four storeys. In the best-case scenario, each of the Projects is years from completion, including Burlington, Oakville and Kitchener, which are at the most advanced stages of the development process. Based on the stage of development of the Receivership Companies, there is no basis upon which nearly 60% of the development management fees should have been paid to date.[39]

40. Mr. Davies states in the Davies Affidavit that the development management fees as a percentage of total project costs ranged from 2% (e.g. for Scollard) to 6% (e.g. for Burlington and Kitchener).[40] Development management fees appear to have been paid to affiliates of Mr. Davies

---

35 Davies Transcript, Q. 205.
36 Fourth Report, Motion Record, Tabs 2 and 2A.
37 Supplement to Sixth Report, Supplementary Motion Record, Tab 1.
38 Davies Affidavit, para. 17.
39 Supplement to Sixth Report, Supplementary Motion Record, Tab 1.
40 Davies Affidavit, para. 16.

and others on an accelerated basis, prior to being earned. For instance, Scollard's Project had total anticipated project costs of approximately $73.2 million and total anticipated development management fees of approximately $1.8 million. Of the total capital raised to date by Scollard ($15.946 million), $846,000 was, according to Mr. Davies, used to pay development management fees.[41] However, assuming a correlation between the rate at which project costs are incurred and management fees earned, the earned management fees should have only been approximately $400,000.[42]

41. Expediting the payment of management fees in this way is particularly difficult to comprehend given the admitted cash flow pressures that were being faced by each of the Projects at the time the management fees were being paid to Aeolian and Mr. Davies' associates.

42. The issue of the premature (or unearned) payment of development management fees was raised by Mr. Singh in an email to Mr. Davies dated March 19, 2013, where Mr. Singh stated:

> "I am not concerned about the quantum of the development fee (I am assuming this is fair market rates and will take your word for it). What I am concerned about [is] my complete reliance on you that construction financing will be successfully raised and the projects will be successful. The development fees being paid out prior to this is an extreme worry and makes me very uncomfortable. This allows $3.2M of development fees to be withdrawn ahead of even knowing if construction financing can be arranged at all (a discussion that has come up several times)"[43] (emphasis added).

Improper Inter-Company Transfers and Transfers to Affiliates

43. In further contravention of the Loan Agreements, Mr. 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

---

41 Davies Affidavit, Exhibit "J".
42 Supplement to Sixth Report, Supplementary Motion Record, Tab 1.
43 Supplement to Sixth Report, Supplementary Motion Record, Tabs 1 and 1H.

Companies that Mr. Davies controls, including Textbook Ross Park Inc., Textbook (445 Princess Street) Inc., Textbook (774 Bronson Avenue) Inc. and McMurray.[44]

44. Although Mr. Davies asserts in the Davies Affidavit that the "the umbrella nature of the [enterprise] allowed available cash to be deployed through intercompany loans to projects which were short on funds",[45] such intercompany loans are not permitted under the Loan Agreements and the Receiver is aware of no legitimate or reasonable commercial basis for such intercompany loans.[46]

45. Importantly, Davies also appears to have been aware of the inappropriate nature of such intercompany loans, yet he continued to cause such loans to be made. For instance, on May 24, 2016, Mr. Harris (legal counsel to the Receivership Companies) sent an email to Mr. Davies wherein he expressly advised Mr. Davies that:

> "you don't want to be obtaining financing from [Scollard] and then using it to further fund interest payments for other projects."

46. In response to this correspondence, Mr. Davies advised Mr. Harris that:

> "[Scollard] is a good story. Lots of sales. Investors will want this loan. <u>The net $1.7 million from a $2.4 million [Scollard] raise will fund 6 months of interest on all projects</u>. I don't see an alternative and time will soon become a factor given the summer slowdown"[47] (emphasis added).

47. In the Davies Affidavit, Mr. Davies admits that "cash flow demands to keep the projects moving forward through pre-development stages (design costs, planning approvals, engineering, background studies and staff costs) had to be balanced with the obligation to keep investor interest payments current. To strike this balance, the Davies Developers made intercompany loans from

---

44 Fourth Report, Motion Record, Tabs 2, 2A, and 2G-Q.

45 Davies Affidavit, para. 31.

46 Fourth Report, Motion Record, Tab 2; Sixth Report, Motion Record, Tab 3; and Supplement to Sixth Report, Supplementary Motion Record, Tab 1.

47 Supplement to Sixth Report, Supplementary Motion Record, Tabs 1 and 1I.

projects that had recently received a cash infusion or had cash on hand, to projects in need of funding for development costs or interest payments".[48]

48. Effectively, funds from one group of investors were regularly used to pay another group of investors on completely separate and distinct projects, contrary to the terms of the Loan Agreements.

49. Mr. Davies admitted on cross-examination that there was tremendous pressure placed on the Receivership Companies to meet the interest payments from the beginning and the way he would alleviate that pressure was by raising more money through new financings, generally from other projects.[49] This is confirmed in the email correspondence between Mr. Davies and his associates around the times of the new fund raises. For instance, in an email from Mr. Davies to Mr. Singh, copying Mr. Harris, dated March 27, 2014, Mr. Davies stated:

> "We do not have cash resources to fund Whitby ($2 million) and all of our other commitments...without receiving Oakville and McMurray raises, we can't afford to fund the $1.5 million (plus land deposit) to take Whitby forward over the next 4 months. Like Scollard last year, now that we're incurring huge interest costs because of the $13 million raise, we need new funding. Raising McMurray AFTER Whitby doesn't help us. We need the McMurray raise proceeds as soon as you can get them." (emphasis added)

50. In an email from Mr. Davies to Mr. Singh dated August 25, 2014, Mr. Davies stated:

> "we're completely tapped out of cash and we were expecting $13.6 million to close on the 15th. There are around $300,000 of interest payments due on October 1st on a number of projects and the money to fund that was coming out of the $13.6 raise...We have no flexibility on this, Raj....We have no flexibility whatsoever. We need to close the full $13.6 million on the 15th or we're seriously fucked."[50] (emphasis added)

---

48 Davies Affidavit, Exhibit Q.
49 Davies Transcript, Qs. 156-159, Supplementary Motion Record, Tab 2.
50 Supplement to Sixth Report, Supplementary Motion Record, Tabs 1 and 1K.

51. In an email from Mr. Davies to Peter Matukas of Harris LLP, copying Mr. Harris, dated January 28, 2016 (regarding McMurray interest payments), Mr. Davies noted:

> "We're not in a position to make the interest payments this month. We are awaiting some positive word from two groups that have been looking at providing additional financing for the project for some time."[51] (emphasis added)

52. In an email from Mr. Singh to Mr. Davies copying Mr. Harris dated April 29, 2016 (which was sent after they received an HST rebate cheque in the amount of $55,000 for Scollard's Project that would help fund interest payments for McMurray's Project), Mr. Singh noted:

> "God is looking out for us!"[52]

53. On cross-examination, Mr. Davies admitted that they were in dire financial straits at the time Mr. Singh sent the above-noted email.[53]

54. Notwithstanding the improper use of intercompany loans from one company to fund the obligations of another company, funds were raised from a group of later investors and used for the benefit of an earlier, different group of investors in another project.[54]

55. This practice of raising additional funds and making intercompany loans to avoid defaulting on interest payments has the hallmarks of a Ponzi scheme.

Improper Transfers to TSI, TSSI, MCIL, Lafontaine and MC Victoria

56. Mr. Davies also caused certain of the Receivership Companies to improperly transfer millions of dollars to TSI, TSSI and MCIL, the parent companies of Kitchener, Oakville,

---

51 Supplement to Sixth Report, Supplementary Motion Record, Tabs 1 and 1K.
52 Supplement to Sixth Report, Supplementary Motion Record, Tabs 1 and 1K.
53 Davies Transcript, Qs. 240-241, Supplementary Motion Record, Tab 2.
54 Supplement to Sixth Report, Supplementary Motion Record, Tab 1.

Burlington, 525 Princess and 555 Princess, all three of which are owned, in part, by Aeolian.[55] While, on cross-examination, Mr. Davies maintained that these entities were inside the purported "umbrella enterprise" (a concept he relies on to justify the intercompany transfers),[56] the Trust Companies have no direct connection to these entities and no direct ability to take recourse against them.

57. 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) none of these "loans" were secured;

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

(d) the relevant Loan Agreements do not permit the applicable Receivership Companies to make these "loans".[57]

58. Mr. Davies also caused certain 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 Mr. Davies is the sole director and officer, and which are owned, in part, by Mr. Davies and/or Aeolian. Specifically:

---

55 Fourth Report, Motion Record, Tab 2.
56 Davies Transcript, Qs., 115-141, Supplementary Motion Record, Tab 2.
57 Fourth Report, Motion Record, Tabs 2 and 2A.

(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.[58]

59. Although Mr. Singh and/or others may have had knowledge of some or all of these inter-company transfers, they are prohibited under the applicable Loan Agreements and constitute a breach of the Loan Agreements.[59]

Misappropriation of Funds to Finance the Purchase of the Ottawa Property

60. Mr. 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 controlled, Generx (Byward Hall) Inc. (formerly Textbook (256 Rideau St.) Inc.) ("**Rideau**"), which is also now in receivership, 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**").[60]

61. The Ottawa Property was purchased by Rideau on or around November 6, 2015 for $11 million.[61]

62. Immediately prior to Rideau's purchase of the Ottawa Property, on October 27, 2015, Mr. Davies caused 555 Princess to improperly transfer $1.39 million to Rideau, and he caused

58 Fourth Report, Motion Record, Tabs 2, 2K and 2N.
59 Fourth Report, Motion Record, Tabs 2 and 2A.
60 Fourth Report, Motion Record, Tabs 2, 2H, 2O and 2U.
61 Fourth Report, Motion Record, Tabs 2 and 2U.

Kitchener to improperly transfer $111,000 to Rideau, both by way of cheque. The cheques were both signed by Mr. Davies.[62]

63. Although Mr. Davies asserts in the Davies Affidavit and maintained on cross-examination that Rideau was also a part of the purported "umbrella enterprise",[63] the Trust Companies have no direct connection to Rideau and no direct ability to take recourse against it. Further, the funds were transferred from 555 Princess and Kitchener to Rideau for no consideration, with no security, 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, Mr. 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 both 555 Princess and Kitchener, thereby causing them to suffer a loss.[64]

64. Following Rideau's acquisition of the Ottawa Property, Mr. 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 Mr. 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

---

62 Fourth Report, Motion Record, Tabs 2, 2H, 2O and 2U.
63 Davies Transcript, Qs. 115-116, Supplementary Motion Record, Tab 2.
64 Fourth Report, Motion Record, Tabs 2, 2A, 2H, 2O and 2U.

(d) $16,000 was transferred by 525 Princess to Rideau on June 20, 2016.[65]

65. 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.[66]

Further Improper Conduct involving Non-Receivership Companies

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

67. For instance, Mr. Davies caused McMurray, a non-Receivership Company that was financed through a similar SMI structure,[67] to improperly transfer $935,000 to Moskowitz Capital Mortgage Fund II ("**Moskowitz**").[68]

68. Moskowitz is not a mortgagee on the real property owned by McMurray; however, it is a mortgagee on Mr. and Ms. Davies' personal residence.[69]

69. McMurray's Loan Agreement with the McMurray Trust Co. prohibits these payments.[70]

---

65 Fourth Report, Motion Record, Tabs 2, 2G, 2H, 2Q and 2U.
66 Fourth Report, Motion Record, Tabs 2, 2A, 2G, 2H, 2Q and 2U.
67 Mr. Davies controls McMurray. Like the Receivership Companies, McMurray entered into a loan agreement with a trust company, 7743718 Canada Inc., pursuant to which McMurray was advanced monies that had been raised from investors through a syndicated mortgage for a particular real estate development project specific to McMurray.
68 Fourth Report, Motion Record, Tabs 2 and 2P.
69 Fourth Report, Motion Record, Tabs 2 and 2T.
70 Fourth Report, Motion Record, Tabs 2 and 2A.

Procedural History of this Matter: The Initial Interim Order, the Extension of the Order, and the Expansion of the Order

70. On June 7, 2017, the plaintiff moved for, and this Honourable Court granted, an interim Mareva injunction, on an *ex parte* basis, as against Mr. Davies in his personal capacity and Aeolian (the "**Initial Interim Order**"). In its endorsement, the Court noted, among other things, that it was satisfied that "there is a strong *prima facie* case that Mr. Davies and his family's corporation [*i.e.*, Aeolian] misappropriated a significant amount of the investors' funds that were supposed to go to the development of properties. Moreover, Mr. Davies...is actively selling his assets – including his cottage and home."[71]

71. On June 13, 2017, in compliance with the Initial Interim Order and as described in more detail below, the Royal Bank of Canada ("**RBC**") froze Aeolian's bank account and produced Aeolian's banking records, including bank statements, cheques and deposits, relating to its account with RBC (the "**RBC Records**"). The RBC Records revealed that Aeolian's bank account had, as of May 31, 2017 (*i.e.*, the date of the most recent account statement), a closing balance of $45.69.[72]

72. On June 14, 2017, Mr. Davies, in his personal capacity and on behalf Aeolian, produced a sworn affidavit describing the nature, value, and location of his and Aeolian's assets worldwide, pursuant to the terms of the Initial Interim Order (the "**Davies Asset/Liability Affidavit**").[73]

---

[71] Sixth Report, Motion Record, Tab 3.
[72] Sixth Report, Motion Record, Tab 3.
[73] Sixth Report, Motion Record, Tabs 3, 3D and 3E.

73. On June 16, 2017, Mr. Davies, in his personal capacity and on behalf Aeolian, was cross-examined on the Davies Asset/Liability Affidavit, pursuant to the terms of the Initial Interim Order.[74]

74. On June 16, 2017, the Initial Interim Order was extended for 30-days by this Honourable Court, on the consent of Mr. Davies and Aeolian (the "**Extended Interim Order**").[75]

75. On July 14, 2017, Mr. Davies swore and produced an affidavit in response to the Receiver's Reports and in opposition to the return of the Receiver's motion seeking, among other things, interlocutory injunctive relief as against him and Aeolian.

76. On July 17, 2017, the Extended Interim Order was further extended (to allow for a scheduled hearing process) and expanded (to capture Ms. Davies and the trustees of the Trusts) by this Honourable Court, on the consent of the parties (the "**Expanded Interim Order**").[76]

77. In accordance with the terms of the Expanded Interim Order, Mr. Davies, in his capacity as the trustee of both Trusts, Ms. Davies, in her personal capacity, and Mr. Harris, in his capacity as trustee of the Davies Family Trust, produced asset and liability statements.[77]

78. On July 27, 2017, Mr. Davies swore and produced the Davies Affidavit to supplement the affidavit he swore on July 14, 2017 in opposition to the Receiver's motion seeking injunctive relief (collectively, the "**Davies Affidavits**").

---

74 Sixth Report, Motion Record, Tabs 3 and 3H.
75 Sixth Report, Motion Record, Tab 3.
76 Supplement to Sixth Report, Supplementary Motion Record, Tabs 1 and 1A.
77 Supplement to Sixth Report, Supplementary Motion Record, Tabs 1 and 1B.

Transfers from Aeolian to Mr. Davies, Ms. Davies, the Family Trust, the Arizona Trust and Others

79. Based on the plaintiff's review of the RBC Records, Aeolian's receipts and disbursements, and the other evidence in this matter, it has become clear that millions of dollars of the Receivership Companies' funds were not only improperly transferred to Aeolian and Mr. Davies but also to Ms. Davies and the Trusts. Specifically:

(a) over $2.5 million was transferred from Aeolian directly to Ms. Davies;

(b) approximately $1.3 million was used to pay charges to an American Express card used by Mr. and Ms. Davies to fund their personal and other expenses;

(c) more than $200,000 was spent on car payments for Mr. Davies and/or his family members; and

(d) over $1.8 million went from Aeolian to purchase and renovate the Arizona Property, which is owned by Mr. Davies in his capacity as trustee of the Arizona Trust.[78]

The Arizona Property

80. The Arizona Property was purchased by the Arizona Trust for US$1.2 million. The funds used to purchase the Arizona Property came from Aeolian. Subsequently, the BofI Federal Bank placed a US$600,000 mortgage on the Arizona Property. Almost US$2 million was spent to renovate the Arizona Property following its acquisition. Aeolian funded substantially all of the

[78] Sixth Report, Motion Record, Tabs 3 and 3O.

costs to purchase and renovate the Arizona Property (at least in part through the Family Trust and the Arizona Trust), which funds came from the Receivership Companies and related entities. Ms. Davies and Mr. G. Harris, as trustees and/or representatives of the Family Trust, had knowledge of and/or facilitated some or all of these payments.[79]

The Defendants' and Intended Defendants' Disclosed Liabilities and Limited Assets

Aeolian

81. As a result of the transactions described above (and others), there is virtually no money left in Aeolian's bank account. As noted, Aeolian's bank account had, as of May 31, 2017, a closing balance of $45.69. While Aeolian does have shareholdings in various companies, these shareholdings are of no, or an unknown, value, and Aeolian's liabilities exceed $170,000.

Mr. Davies

82. Mr. Davies has not had a personal bank account for a number of years. Rather, Mr. Davies has funded his living expenses over the last five years by receiving development fees from the various Projects through Aeolian, which has served as a source of income throughout this period. In order to pay for living expenses, Mr. Davies has either used an Aeolian bank card, a corporate credit card for another company in respect of which he is a director and officer (i.e., Generex Development Partners) or Ms. Davies has paid the expenses with monies she directly and/or indirectly (*e.g.*, through Aeolian) received from the Receivership Companies and related entities. Ms. Davies never worked for Aeolian or any of the Receivership Companies.[80]

---

[79] Sixth Report, Motion Record, Tabs 3, 3H and 3I.
[80] Sixth Report, Motion Record, Tab 3.

Ms. Davies

83. Based on Ms. Davies' sworn asset and liability statement, and the evidence she gave on cross-examination, Ms. Davies appears not to have an active personal bank account or any material assets. Her asset and liability statement discloses personal assets of approximately $20,000 with liabilities of over $1.45 million.[81]

Incompleteness of the Initial Davies Asset/Liability Affidavit

84. During the cross-examination on the Davies Asset/Liability Affidavit, it became clear that Mr. Davies' and Aeolian's initial disclosure was incomplete and failed to disclose certain material assets and liabilities of Aeolian. For instance, Mr. Davies admitted that Aeolian's shareholdings in several companies were not disclosed in the Davies Asset/Liability Affidavit, including (but not necessarily limited to) its shareholdings in the following entities (potentially amongst others):

(a) Scollard;

(b) Oakville;

(c) Burlington;

(d) Kitchener;

(e) Legacy Lane;

(f) TSSI;

(g) MCIL; and

(h) 2375219 Ontario Ltd.[82]

---

81 Supplement to Sixth Report, Supplementary Motion Record, Tabs 1 and 1B.

82 Sixth Report, Motion Record, Tabs 3 and 3H.

85. Davies also admitted that certain liabilities of Aeolian were not disclosed, specifically, an unsecured liability of $204,800 owing to a lender, Don Mintz and/or 2172427 Ontario Inc., an entity for which Mr. Mintz is a director and officer.[83]

86. Following the cross-examination, in answer to a given undertaking, Mr. Davies delivered revised asset and liability statements for him and Aeolian (the "**Asset and Liability Statements**").[84]

87. It has since become clear that Mr. Davies' Asset and Liability Statements remain materially inaccurate, notwithstanding that they were revised to correct the above-noted deficiencies. For instance, on the most recent cross-examination of Mr. Davies, he testified that, for the past two months, he has been borrowing funds from Edward Thomas to fund his lifestyle and he purportedly has incurred a personal liability of approximately $64,000 for these loans.[85] However, this liability was not disclosed anywhere in the Asset and Liability Statements for Mr. Davies (produced less than two months ago).[86]

The Recent Listing for Sale of Mr. and Ms. Davies' Personal Residence and Other Misconduct

88. Notwithstanding the terms of the Initial Interim Order, the Extended Interim Order and the Expanded Interim Order, which enjoin Mr. Davies from selling, transferring or similarly dealing with any of his assets, and enjoin any and all persons with notice of the Order from facilitating or assisting in any act which has the effect of doing so, Mr. and Ms. Davies recently listed their

---

[83] Sixth Report, Motion Record, Tabs 3 and 3H.
[84] Sixth Report, Motion Record, Tabs 3, 3F and 3G.
[85] Davies Transcript, Qs. 15-27, Supplementary Motion Record, Tab 2.
[86] Supplement to Sixth Report, Supplementary Motion Record, Tabs 1 and 1D-G.

personal residence for sale. The listing agreement with the real estate agent was entered into on or about June 7, 2017 (the date that the Initial Interim Order was first granted). Further, an open house was recently held on or about July 8, 2017 (well after the Extended Interim Order was granted).[87]

89. On July 10, 2017, immediately after learning about the listing and the open house, the Receiver's counsel contacted Mr. Davies' counsel and made inquiries regarding these developments. Mr. Davies' counsel confirmed that the residence is currently listed for sale and that Mr. and Ms. Davies are actively attempting to sell the property.[88]

90. As a result of their efforts, on July 18, 2017, Mr. and Ms. Davies received an offer to purchase the property. Although, at the time of the filing of the Supplement to the Sixth Report, the Receiver understood that the offer had not yet been accepted, on August 16, 2017, counsel to Mr. and Ms. Davies advised that Mr. and Ms. Davies entered into an agreement of purchase and sale, which is conditional upon obtaining court approval to remove the *Mareva* Order from title to the property. Given all of Mr. and Ms. Davies' efforts to date, there are concerns that they may sell the property and further deplete any assets that may be able to satisfy a judgment in this matter. The Receiver also has questions concerning the mortgage on the property.[89]

91. Further, counsel for the Receiver requested that Mr. Davies consent to the Extended Interim Order being registered on title to the Arizona Property. Mr. Davies refused to do so. While he did maintain his previously given undertaking not to sell or encumber the Arizona Property pending the return hearing for this motion, based on his refusal to consent to the registration of the Order,

---

[87] Sixth Report, Motion Record, Tab 3.
[88] Sixth Report, Motion Record, Tab 3.
[89] Supplement to Sixth Report, Supplementary Motion Record, Tab 1.

and all the other conduct of Mr. and Ms. Davies, there are concerns that the already depleted misappropriated assets may well continue to be further transferred to frustrate recovery efforts.[90]

92. Mr. Davies' refusal to register the Order on title to the Arizona Property and Mr. and Ms. Davies' recent efforts to sell their personal residence, coupled with the incomplete and inaccurate nature of the asset and liability statements, are clear breaches of this Honourable Court's Initial Interim Order, Extended Interim Order and Expanded Interim Order, and show a blatant disregard for the authority of this Court and for the rights and interests of the Receivership Companies.

93. Given all of Mr. Davies' conduct to date, including the sale of his family cottage on April 25, 2017 (*after* the commencement of the Receivership Proceedings, but before the granting of the Initial Interim Order), and all of his ongoing and continuing conduct, there is a real and serious risk of further dissipation of assets.

Mr. Davies' Improper Refusal Given During his Cross-Examination

94. During his most recent cross-examination, Mr. Davies was asked how he is paying for his legal fees. He refused to answer the question.[91] Since the cross-examination, Mr. Davies has not provided any further information about how he is funding the litigation and paying for Dentons Canada LLP's representation in this matter.

---

[90] Supplement to Sixth Report, Supplementary Motion Record, Tab 1.
[91] Davies Transcript, Q. 442, Supplementary Motion Record, Tab 2.

PART III – ISSUES

95. The issues to be decided on this motion are:

(a) whether the plaintiff has met the test for a worldwide interlocutory injunctive order freezing the assets of: (i) Mr. Davies in his personal capacity and in his capacity as trustee and/or representative of the Trusts; (ii) Aeolian; (iii) Ms. Davies in her personal capacity and in her capacity as trustee and/or representative of the Family Trust; and (iv) Mr. Harris solely in his capacity as trustee and/or representative of the Family Trust; and

(b) whether the requirements of Rule 40.03 ought to be dispensed with given the exceptional circumstances of this case.

PART IV – LAW & ARGUMENT

The Test for a *Mareva* Injunction

96. 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.[92]

97. Although the plaintiff has not yet formally commenced its action against Mr. Davies in his capacity as trustee and/or representative of the Trusts, Ms. Davies in her personal capacity and in

---

92 *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 40.01; *Courts of Justice Act*, RSO 1990, c C43, ss 101(1), (2).

her capacity as trustee and/or representative of the Family Trust, or Mr. Harris in his capacity as trustee and/or representative of the Family Trust, the plaintiff intends to do so forthwith.[93]

98. 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.[94]

99. 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;[95]

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

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

(d) the balance of convenience favours the moving party.[96]

---

93 In accordance with Rule 26 of the *Rules of Civil Procedure*, KSV will seek leave to add these individuals, and potentially other individuals and entities, as parties to the within action if their consent is not provided before the return of this motion.

94 *Chitel v Rothbart* (1982), 39 OR (2d) 513, 1982 CarswellOnt 508 at paras 30–32 (CA), Book of Authorities, Tab 1.

95 *Lambrou v Voudouris*, 2015 ONSC 998, 2015 CarswellOnt 1929 at para 5, Book of Authorities, Tab 2.

96 *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 55 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.

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

(a) on an *ex parte* motion, 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 notwithstanding that this motion is being brought on notice);

(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).[97]

Worldwide Mareva Injunction

101. 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 consideration, worldwide *Mareva* injunctions may also be granted in respect of assets outside the

---

[97] *Chitel v Rothbart*, *supra* note 55 at para 44, Book of Authorities, Tab 1. See also *Feigelman*, *supra* note 57, Book of Authorities, Tab 4.

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.[98]

102. 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.[99]

103. 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 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.[100]

104. 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

---

98 *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.

99 *Mooney v Orr* (1994), 98 BCLR (2d) 318, 1994 CarswellBC 488 at paras 11, 13 (BCSC), Book of Authorities, Tab 6.

100 *Innovative Marketing Inc v D'Souza* (2007), 155 ACWS (3d) 672, 2007 CarswellOnt 1131 (Sup Ct J Comm List), Book of Authorities, Tab 7.

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.[101]

105. 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.[102] As discussed in more detail below, the Defendants claim to have significant liabilities and virtually no valuable assets in Canada. Their only apparently valuable asset is the Arizona Property, which is located *ex juris* in the United States.

106. 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".[103] 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".[104]

107. 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 supplementary motion record:

---

101 *Sino Forest*, *supra* note 59, Book of Authorities, Tab 5.

102 *Mooney v Orr*, *supra* note 60 at paras 8, 13, Book of Authorities, Tab 6.

103 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.

104 *Sino Forest*, *supra* note 59 at para 38, Book of Authorities, Tab 5.

> "[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."[105]

Application of the Test for a Mareva Injunction

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

108. The facts set out above establish a strong *prima facie* case of fraud, conversion and unjust enrichment, 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, against Mr. Davies.

109. 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

[105] *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?[106]

Fraud

110. 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.[107]

111. The facts set out above, as supported by the plaintiff's evidence (and even the Davies Affidavits), 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, caused and/or facilitated prohibited payments and transfers to be made by the Receivership Companies to such related, non-arm's length parties, including

---

106 *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.

107 *Bruno Appliance and Furniture Inc v Hryniak*, 2014 SCC 8, 2014 CarswellOnt 642 at paras 17–21, Book of Authorities, Tab 11.

payments and transfers for which no goods or services, or no good or service of any material value, were provided;

(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; and/or

(d) knowingly received, retained and used funds, which rightfully belonged to the Receivership Companies.

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

Conversion

113. 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.[108]

114. 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

[108] *Salimijazi v Pakjou* (2009), 176 ACWS (3d) 968, 2009 CarswellOnt 2013 at paras 42–43 (Sup Ct J), Book of Authorities, Tab 12, citing *Boma Manufacturing Ltd v Canadian Imperial Bank of Commerce*.

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.

Unjust Enrichment

115. 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.[109]

116. 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.[110]

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

Mr. Davies' Breach of Fiduciary Duty

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

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

---

109 *Garland v Consumers' Gas Co*, 2004 SCC 25, 2004 CarswellOnt 1558 at para 30, Book of Authorities, Tab 13.
110 *Peel (Regional Municipality) v Canada*, [1992] 3 SCR 762, 1992 CarswellNat 15 at para 39, Book of Authorities, Tab 14.

(b) Mr. 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 and/or acting in a conflict of interest.

Mr. Davies was a Fiduciary of the Receivership Companies

119. 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.[111]

120. There is no doubt that directors and officers, such as Mr. 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 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. [112]

121. The fiduciary duties of directors and officers have also been codified under the incorporating and governing statute of the Receivership Companies, specifically, the *Business*

---

111 *Galambos v Perez*, 2009 SCC 48, 2009 CarswellBC 2787 at para 36, Book of Authorities, Tab 15.

112 *BCE Inc v 1976 Debentureholders*, [2008] 3 SCR 560 at paras 37–38, Commercial List Book of Authorities, Tab 1.

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.[113]

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

Mr. Davies Breached his Fiduciary Duties

123. 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.[114]

124. Here, Mr. 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.

---

113 *Business Corporations Act*, RSO 1990, c B 16, s 134(1).
114 See, for instance, *Canadian Aero Service Ltd v O'Malley*, [1974] SCR 592, 1973 CarswellOnt 236, Book of Authorities, Tab 16.

125. In not having due regard for transparency, disclosure, the avoidance of self-dealing and conflicts of interest, or corporate separateness, amongst other things, and preferring his own self-serving interests over those of the Receivership Companies, Mr. 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.

126. Mr. 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.

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

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

128. Given the manner in which the funds were extracted from the Receivership Companies and diverted to the Defendants, 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.

129. There is also tangible, objective evidence that shortly after the commencement of the receivership proceeding in January 2017, Mr. and Ms. Davies began to liquidate assets, and after the granting of the Initial Interim Order, they continued to do so. Among other things:

(a) On April 25, 2017, Mr. Davies sold the family cottage located in Gravenhurst, Ontario for approximately $3 million;[115] and

(b) Mr. and Ms. Davies attempted to sell their jointly owned personal residence located in King City, Ontario.[116]

130. Most recently, Mr. and Ms. Davies re-listed their personal residence for sale. The listing agreement with the real estate agent was entered into on or about June 7, 2017 (*i.e.*, the date that the Initial Interim Order was granted). Further, an open house was held on or about July 8, 2017 (*i.e.*, well after the Initial Interim Order and the Extended Interim Order, were granted). Further to their efforts, on July 18, 2017, Mr. and Ms. Davies received an offer to purchase the residence and they subsequently entered into a conditional agreement of purchase and sale.

131. Given all of Mr. and Ms. Davies' conduct to date, including the alienation of the family cottage, their attempted sale of their personal residence, their re-listing of their personal residence in contravention of the Court's Orders, 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 Mr. Davies and others controlled to divert funds from the Receivership Companies, as well as Mr. Davies' failure to fully disclose all of his and Aeolian's assets and liabilities in the Davies Asset/Liability Affidavit and subsequently in the revised Asset and Liability Statements, there is

---

115 Fourth Report, Motion Record, Tabs 2 and 2W.
116 Fourth Report, Motion Record, Tabs 2 and 2T.

a real, genuine and demonstrated risk that the Defendants (including Aeolian, the Family Trust, and the Arizona Trust, all three of which Mr. Davies and/or Ms. Davies control) will put their assets beyond the reach of creditors for the purpose of avoiding judgment.

132. 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.[117] 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 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.[118]

133. 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, converted, received and/or retained funds from the Receivership Companies, as well as all the surrounding circumstances (including but not limited to Mr. and Ms. Davies' lack of any personal bank accounts, Mr. Davies' incomplete and inaccurate disclosure of assets and liabilities, and Mr. Davies' refusal to disclose the source of his litigation funding), the Court can infer a real risk of dissipation of assets by the Defendants.

134. Unless the sought 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

117 *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).

118 *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.

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, unjust enrichment and breach of fiduciary duty (amongst other causes of action).

135. This would cause significant financial harm to the Receivership Companies and their creditors tantamount to irreparable harm given that the damage would not be curable because of the lack of a viable party against which the plaintiff can collect damages. The law is clear that "irreparable harm" can be harm "which cannot be cured, usually because one party cannot collect damages from the other."[119]

136. Mr. Davies does not have a bank account. Neither does Ms. Davies. Aeolian's bank account has virtually no money in it. Further, the asset and liability statements reveal that Mr. Davies, Ms. Davies, Aeolian and the Trusts have more liabilities than they do stated assets, notwithstanding that millions were misappropriated from the Receivership Companies and diverted directly to them.[120]

137. Mr. Davies further testified that the Family Trust owns no property, has no assets and no bank account, though it does have an ownership interest in McMurray, which is of no, or an unknown, value.[121]

138. Mr. Davies also testified that although he, in his capacity as trustee of the Arizona Trust, owns the Arizona Property, and notwithstanding the US$1.2 million purchase price and the US$2

---

119 *RJR MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, 1994 CarswellQue 120 at para 64, Commercial List Authorities, Tab 9; *Rexdale Mews Associates Partnership v Kaiser* (1999), 36 CPC (4th) 91, 1999 CarswellOnt 1625 at para 22 (Sup Ct J), Tab 21.

120 Sixth Report, Motion Record, Tabs 3, 3F, 3G and 3H.

121 Sixth Report, Motion Record, Tabs 3 and 3H.

million spent on renovations, it is currently only worth approximately US$1.795 million given the depressed market for real estate in Arizona.[122] While Mr. Davies also testified that the Arizona Trust has a bank account with JP Morgan Chase in the United States, his counsel recently advised that "[t]he current account balance of the Chase account is $62.67 (chequing) and $2.30 (savings)."[123]

139. In short, the harm caused by the Defendants is irreparable given that it will not be curable.

140. It is essential that the sought relief be granted to capture Mr. and Ms. Davies, Aeolian and the Trusts so that whatever funds may remain can be frozen and preserved pending a disposition of this matter on the merits.

The Balance of Convenience Favours the Plaintiff

141. The law is clear that the factors leading to irreparable harm are important in considering the balance of convenience.[124] While, as noted, there would be irreparable harm to the Receivership Companies and their creditors if the sought relief is not granted, there will comparatively be little harm to the Defendants if interlocutory relief is granted. Among other things, no cash has been, or is likely to be, frozen and the Defendants' lifestyle will not be materially impacted by the Order. Rather, the sought Order will simply preserve their personal residence (in which Mr. and Ms. Davies, and certain of their children, currently reside) as well as the Arizona Property (which Mr. Davies has already undertaken not to sell, and which he claims would not be possible to sell in any reasonable timeframe in any event). Importantly, it will also

122 Sixth Report, Motion Record, Tabs 3 and 3H.
123 Sixth Report, Motion Record, Tab 3.
124 *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.

be open to the Defendants to move to vary the injunction order at any time if any prejudice or harm should later arise.

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

The Defendants' Assets Ex Juris

143. 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.[125] In this case, Mr. Davies gave evidence that he owns the Arizona Property (in his capacity as trustee of the Arizona Trust), which he acquired with funds from Aeolian.[126] Mr. Davies also testified that the Arizona Trust has a bank account with JP Morgan Chase in the United States.[127]

An Undertaking as to Damages Ought Not to be Required

144. 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.

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

---

[125] *Revenue and Customs Commissioners v Cozens*, [2011] EWHC 2782, 2011 WL 5105121 at para 41, Book of Authorities, Tab 23.
[126] Sixth Report, Motion Record, Tabs 3 and 3H.
[127] Sixth Report, Motion Record, Tabs 3 and 3H.

> 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 [emphasis added].[128]

146. While the requirement for an undertaking will generally only be dispensed with in exceptional circumstances, 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.[129]

147. 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. As this Honourable Court held when granting the Expanded Interim Order:

> "This is not a case for an undertaking on damages. Plaintiff acts for public investors whose funds are missing. If defendants left themselves vulnerable to even such extraordinary relief as a *Mareva* injunction, then they have to bear the risk of costs incurred during the ensuing investigation of the plaintiff's strong *prima facie* case".[130]

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

---

128 *Rules of Civil Procedure*, *supra* note 53, Rule 40.03.

129 *Sabourin & Sun Group of Companies v Laiken* (2006), 151 ACWS (3d) 686, 2006 CarswellOnt 5787 at para 16 (Sup Ct J), 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.

130 Endorsement of the Honourable Mr. Justice Myers dated July 17, 2017, Appendix "A" to the Supplement to the Sixth Report, Supplementary Motion Record, Tab 1A.

PART V – REQUESTED RELIEF

149. The plaintiff respectfully requests an interim *Mareva* injunction in the form of the Order included in the supplementary 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:

(a) its worldwide nature; and

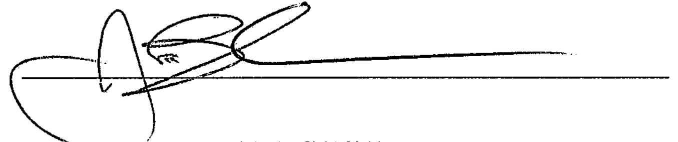
(b) the dispensing with the requirement for an undertaking as to damages.

150. 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 and Sixth Reports), were inappropriately removed from the Receivership Companies by Mr. Davies and diverted to himself, Ms. Davies, his other family members, Aeolian, the Trusts, TSI, TSSI, MCIL, Lafontaine, MC Victoria and Rideau in the manner set out above, as detailed with more particularity in KSV's Fourth Report, Sixth Report and Supplement to the Sixth Report.

151. A blackline of the proposed draft Order to the Commercial List model Order is included in the supplementary motion record.[131]

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of August, 2017.



BENNETT JONES LLP
3400 One First Canadian Place
P.O. Box 130
Toronto ON M5X 1A4

Sean Zweig (LSUC#57307I)
Phone: (416) 777-6254
Email: zweigs@bennettjones.com

Jonathan Bell (LSUC#55457P)
Phone: (416) 777-6511
Email: bellj@bennettjones.com

Facsimile: (416) 863-1716

Lawyers for the Plaintiff

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* (2007), 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 7203.
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. *Salimijazi v Pakjou* (2009), 176 ACWS (3d) 968, 2009 CarswellOnt 2013 (Sup Ct J), citing *Boma Manufacturing Ltd v Canadian Imperial Bank of Commerce*.
13. *Garland v Consumers' Gas Co*, 2004 SCC 25, 2004 CarswellOnt 1558.
14. *Peel (Regional Municipality) v Canada*, [1992] 3 SCR 762, 1992 CarswellNat 15.
15. *Galambos v Perez*, 2009 SCC 48, 2009 CarswellBC 2787.
16. *Canadian Aero Service Ltd v O'Malley*, [1974] SCR 592, 1973 CarswellOnt 236.
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. *Rexdale Mews Associates Partnership v Kaiser* (1999), 36 CPC (4th) 91, 1999 CarswellOnt 1625 (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 (Sup Ct J).
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**

COMMON LAW AND EQUITY

Rules of law and equity

96 (1) Courts shall administer concurrently all rules of equity and the common law.

Rules of equity to prevail

(2) Where a rule of equity conflicts with a rule of the common law, the rule of equity prevails.

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 August 30, 2017)

BENNETT JONES LLP
3400 One First Canadian Place
P.O. Box 130
Toronto ON M5X 1A4

Sean Zweig (LSUC#57307I)
Phone: (416) 777-6254
Email: zweigs@bennettjones.com

Jonathan Bell (LSUC#55457P)
Phone: (416) 777-6511
Email: bellj@bennettjones.com

Facsimile: (416) 863-1716

Lawyers for the Plaintiff