

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

THE SUPERINTENDENT OF FINANCIAL SERVICES

Applicant

- and -

TEXTBOOK STUDENT SUITES (525 PRINCESS STREET) TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (555 PRINCESS STREET) TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (ROSS PARK) TRUSTEE CORPORATION, 2223947 ONTARIO LIMITED, MC TRUSTEE (KITCHENER) LTD., SCOLLARD TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (774 BRONSON AVENUE) TRUSTEE CORPORATION, 7743718 CANADA INC., KEELE MEDICAL TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (445 PRINCESS STREET) TRUSTEE CORPORATION and HAZELTON 4070 DIXIE ROAD TRUSTEE CORPORATION

Respondents

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

IN THE MATTER OF THE RECEIVERSHIP 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.

AND IN THE MATTER OF A MOTION PURSUANT TO SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

Court File No. CV-17-589078-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

BETWEEN:

KINGSETT MORTGAGE CORPORATION

Applicant

- and -

TEXTBOOK (445 PRINCESS STREET) INC.

Respondent

**IN THE MATTER OF THE RECEIVERSHIP OF TEXTBOOK (445 PRINCESS
STREET) INC.**

**AND IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(1) OF THE
BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED, AND
SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED**

Court File No. CV-18-598788-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

BETWEEN:

**GRANT THORNTON LIMITED IN ITS CAPACITY AS THE COURT-APPOINTED
TRUSTEE OF TEXTBOOK STUDENT SUITES (774 BRONSON AVENUE) TRUSTEE
CORPORATION, TEXTBOOK STUDENT SUITES (ROSS PARK) TRUSTEE
CORPORATION AND 7743718 CANADA INC.**

Applicant

- and -

**TEXTBOOK (774 BRONSON AVENUE) INC., TEXTBOOK ROSS PARK INC. and
MCMURRAY STREET INVESTMENTS INC.**

Respondents

**IN THE MATTER OF A MOTION PURSUANT TO SUBSECTION 243(1) OF THE
BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED, AND
SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED**

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

GRANT THORNTON LIMITED, IN ITS CAPACITY AS THE COURT-APPOINTED TRUSTEE OF TEXTBOOK STUDENT SUITES (525 PRINCESS STREET) TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (555 PRINCESS STREET) TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (ROSS PARK) TRUSTEE CORPORATION, 2223947 ONTARIO LIMITED, MC TRUSTEE (KITCHENER) LTD., SCOLLARD TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (774 BRONSON AVENUE) TRUSTEE CORPORATION, 7743718 CANADA INC., KEELE MEDICAL TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (445 PRINCESS STREET) TRUSTEE CORPORATION AND HAZELTON 4070 DIXIE ROAD TRUSTEE CORPORATION, AND KSV KOFMAN INC., IN ITS CAPACITY AS THE COURT-APPOINTED RECEIVER AND MANAGER OF CERTAIN PROPERTY OF SCOLLARD DEVELOPMENT CORPORATION, MEMORY CARE INVESTMENTS (KITCHENER) LTD., MEMORY CARE INVESTMENTS (OAKVILLE) LTD., 1703858 ONTARIO LTD., LEGACY LANE INVESTMENTS LTD., TEXTBOOK (525 PRINCESS STREET) INC., TEXTBOOK (555 PRINCESS STREET) INC., TEXTBOOK (445 PRINCESS STREET) INC., MCMURRAY STREET INVESTMENTS INC., TEXTBOOK (774 BRONSON AVENUE) INC. AND TEXTBOOK ROSS PARK INC.

Plaintiffs

- and -

AEOLIAN INVESTMENTS LTD., JOHN DAVIES IN HIS PERSONAL CAPACITY AND IN HIS CAPACITY AS TRUSTEE OF BOTH THE DAVIES ARIZONA TRUST AND THE DAVIES FAMILY TRUST, JUDITH DAVIES IN HER PERSONAL CAPACITY AND IN HER CAPACITY AS TRUSTEE OF THE DAVIES FAMILY TRUST, GREGORY HARRIS IN HIS PERSONAL CAPACITY AND IN HIS CAPACITY AS TRUSTEE OF THE DAVIES FAMILY TRUST, HARRIS + HARRIS LLP, NANCY ELLIOT, ELLIOT LAW PROFESSIONAL CORPORATION, WALTER THOMPSON, 1321805 ONTARIO INC., BRUCE STEWART, THE TRADITIONS DEVELOPMENT COMPANY LTD., DAVID ARSENAULT, JAMES GRACE, BHAKTRAJ SINGH A.K.A. RAJ SINGH, RS CONSULTING GROUP INC., TIER 1 TRANSACTION ADVISORY SERVICES INC., JUDE CASSIMY, FIRST COMMONWEALTH MORTGAGE CORPORATION, MEMORY CARE INVESTMENTS LTD., TEXTBOOK SUITES INC., TEXTBOOK STUDENT SUITES INC. AND MICHAEL CANE

Defendants

JOINT FACTUM
(returnable November 18, 2019)

Date: November 5, 2019

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*Lawyers for KSV Kofman Inc., in its
capacity as court-appointed Receiver
of the Receivership Companies*

JOINT FACTUM
(returnable November 18, 2019)

PART I - INTRODUCTION

1. This is a motion to approve a settlement with several defendants in ongoing multi-party litigation. The settlement is fair and reasonable in all the circumstances, it is in the best interests of the Trustee Corporations, the Receivership Companies and their respective stakeholders (each as further defined and described herein) and it preserves the fairness of the ongoing litigation to the remaining parties in the action. Accordingly, the Trustee and the Receiver both recommend the settlement be approved pursuant to the terms of the draft Order appended to the Motion Record at Tab C.

PART II - SUMMARY OF FACTS

I. Background

A. The Appointment of GTL as Trustee

2. On October 27, 2016, Grant Thornton Limited (“GTL”) was appointed trustee (in such capacity, the “Trustee”) of eleven entities (collectively, the “Trustee Corporations”) that raised monies from investors (“Investors”) through syndicated mortgage investments (“SMIs”). The Trustee Corporations then advanced these monies on a secured basis pursuant to loan agreements (the “Loan Agreements”) between the Trustee Corporations and various real estate development companies (the “Receivership Companies”).¹ The Trustee Corporations were special purpose

¹ Nineteenth Report to Court of KSV Kofman Inc. as Receiver and Manager of certain property Scollard Development Corporation et al. dated October 29, 2019 (the “Receiver’s 19th Report”), Section 1.0, para. 2.

entities required under their relevant constating agreements to hold the SMIs in trust for the Investors and to act in a fiduciary capacity to administer and enforce the SMIs.² Raj Singh (“**Singh**”) was the sole director, officer and shareholder of all but two of the Trustee Corporations, and he was responsible for, among other things, administering and enforcing the SMIs on behalf of the applicable Trustee Corporations.³

3. Under the Trustee’s appointment Order (the “**Trustee Appointment Order**”), the Trustee is expressly empowered and authorized to initiate, prosecute and continue the prosecution of any and all proceedings on behalf of the Trustee Corporations. The Trustee is also empowered and authorized to settle or compromise any such proceedings. The Trustee Appointment Order further provides that the Trustee is at liberty and authorized and empowered to apply to any court for assistance in carrying out the terms of the Trustee Appointment Order.⁴

B. The Appointment of KSV as Receiver

4. On January 21, 2017, the Trustee brought a motion for an order (the “**Initial Receivership Order**”) appointing KSV Kofman Inc. (“**KSV**”) as receiver and manager (in such capacity, as amended from time to time, the “**Receiver**”) of the real property owned by Scollard Development Corporation (“**Scollard**”) and the assets, undertakings and properties of Scollard acquired for or used in relation to such real property. On February 2, 2017, the Court granted the Initial Receivership Order.⁵

² Twelfth Report to Court of Grant Thornton Limited as Trustee of Scollard Trustee Corporation et al. dated November 1, 2019 (the “**Trustee’s 12th Report**”), paras. 4 and 5, Motion Record, Tab E.

³ Trustee’s 12th Report, para. 5, Motion Record, Tab E.

⁴ Trustee’s 12th Report, Appendix 1 – Appointment Order, Motion Record, Tab E.

⁵ Receiver’s 19th Report, Section 1.0, para. 3.

5. On April 18, 2017, the Trustee brought a motion seeking, among other things, an order amending and restating the Initial Receivership Order to include the real property registered on title as being owned by 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**"), Textbook (555 Princess Street) Inc. ("**555 Princess**") and the assets, undertakings and properties of these entities acquired for or used in relation to their real property (the "**Amended and Restated Receivership Order**"). On April 28, 2017, the Court granted the Amended and Restated Receivership Order. The Amended and Restated Receivership Order was further amended by Court order on May 2, 2017 to address certain clerical errors.⁶

6. On January 3, 2018, KingSett Mortgage Corporation, a secured creditor of Textbook (445 Princess Street) Inc. ("**445 Princess**"), brought a motion for an order (the "**445 Receivership Order**") in a separate court proceeding appointing KSV as Receiver of the real property owned by 445 Princess and the assets, undertakings and properties of 445 Princes acquired for or used in relation to such real property. On January 9, 2018, the Court granted the 445 Receivership Order.⁷

7. On May 17, 2018, the Trustee, as a secured creditor of Textbook (774 Bronson Avenue) Inc. ("**Bronson**"), Textbook Ross Park Inc. ("**Ross Park**"), and McMurray Street Investments Inc. ("**McMurray**"), brought a motion for an order appointing KSV as Receiver of certain property of Bronson, Ross Park and McMurray (the "**Bronson, Ross Park and McMurray Receivership Order**") and, together with the Amended and Restated Receivership Order and the

⁶ Receiver's 19th Report, Section 1.0, para. 4.

⁷ Receiver's 19th Report, Section 1.0, para. 5.

445 Princess Receivership Order, the “**Receivership Orders**”). On May 30, 2018, the Court made the Bronson, Ross Park and McMurray Receivership Order.⁸

8. Under the Receivership Orders, the Receiver is expressly empowered and authorized to initiate, prosecute and continue the prosecution of any and all proceedings on behalf of the companies subject to the Receivership Orders (i.e., the Receivership Companies). The Receiver is also empowered and authorized to settle or compromise any such proceedings. The Receivership Orders further provide that the Receiver is at liberty and authorized and empowered to apply to any court for assistance in carrying out the terms of the Receivership Orders.⁹

II. The Initial Litigation commenced by the Receiver

A. The Initial Claim Against John Davies and Aeolian

9. Following the issuance of the Amended and Restated Receivership Order, the Receiver commenced a review of the receipts and disbursements of the Receivership Companies (the “**Review**”).¹⁰

10. In connection with the Review, the Receiver discovered extensive transfers of money to and from certain of the Receivership Companies to various related entities, including entities

⁸ Receiver’s 19th Report, Section 1.0, para. 7.

⁹ Trustee’s 12th Report, para. 22, Motion Record, Tab E; Receiver’s 19th Report, Section 1.0, para. 8.

¹⁰ Receiver’s 19th Report, Section 1.1, para. 1.

controlled by John Davies (“**Davies**”), who is a director and officer of each of the Receivership Companies, and others.¹¹

11. On June 6, 2017, the Receiver commenced litigation (the “**Initial Litigation**”) against Davies and his holding company, Aeolian Investments Ltd. (“**Aeolian**”), alleging that, among other things, they had misappropriated Investor funds in connection with the SMI scheme.¹²

B. The Mareva Injunction Against Davies and Aeolian

12. On June 7, 2017, the Receiver moved *ex parte* for an interim Mareva injunction as against Davies and Aeolian. That same day, The Honourable Mr. Justice Myers granted the interim Mareva injunction as against Davies and Aeolian (as amended from time to time, the “**Mareva Order**”).¹³

13. On June 13, 2017, in compliance with the Mareva Order, Royal Bank of Canada froze Aeolian’s sole bank account and produced Aeolian’s banking records. The records revealed that although Aeolian had received millions of dollars from the Receivership Companies, Aeolian’s bank account had a closing balance of only \$45.69¹⁴ as at May 29, 2017. The records revealed that millions of dollars of the Receivership Companies’ funds were transferred to Aeolian and, from Aeolian, to Davies’s spouse, Judith Davies (“**Ms. Davies**”) and two family trusts (the “**Trusts**”). Some of these funds were used to purchase a property located at 35410 North 66th

¹¹ Receiver’s 19th Report, Section 1.1, para. 2, and Appendix “C” - Fourth Report to Court of KSV Kofman Inc. as Receiver and Manager of certain property Scollard Development Corporation et al. dated June 6, 2017 (the “**Receiver’s 4th Report**”), section 1.0, para. 5, and section 3.0.

¹² Receiver’s 19th Report, Section 1.1, para. 3.

¹³ Receiver’s 19th Report, Appendix “D” - Sixth Report to Court of KSV Kofman Inc. as Receiver and Manager of certain property Scollard Development Corporation et al. dated July 12, 2017 (the “**Receiver’s 6th Report**”), section 1.0, paras. 8-9.

¹⁴ All references to dollars in this Factum are in Canadian currency unless otherwise noted.

Place, Carefree, Arizona, 85377 (the “**Arizona Real Property**”), which was held in the name of one of the Trusts (the Arizona Trust).¹⁵

14. On June 16, 2017 (ten days after the interim order was granted), His Honour extended the interim order for 30 days on the consent of Davies and Aeolian.¹⁶

15. On July 17, 2017, on the consent of Davies and Aeolian, His Honour further extended the order to allow for a scheduled hearing process, and His Honour also expanded the order to capture Ms. Davies and the trustees of the Trusts. In so ordering, His Honour noted that “*the court previously found a sufficiently strong prima facie case exists against the defendants to justify extraordinary pretrial injunctive relief issuing against them,*” as a “*very substantial amount of money invested by public shareholders appears to have be[en] misappropriated at first blush.*”¹⁷

16. After presiding over a half-day contested hearing, His Honour granted the Receiver’s motion on August 30, 2017 to extend the Mareva Order on an interlocutory basis.¹⁸

17. On August 30, 2017, the Court also granted the Receiver leave to amend its statement of claim to add the parties subject to the Mareva Order as additional defendants to the Initial Litigation, namely: (i) Davies, in his capacity as the trustee and/or representative of the Trusts; (ii) Ms. Davies, both in her personal capacity and in her capacity as trustee and/or representative

¹⁵ Receiver’s 19th Report, Appendix “D” - Receiver’s 6th Report, section 5.0 and Appendix “O” - Aeolian’s detailed Statement of Receipts and Disbursements.

¹⁶ Receiver’s 19th Report, Appendix “E” - Supplement to the Sixth Report to Court of KSV Kofman Inc. as Receiver and Manager of certain property Scollard Development Corporation et al. dated August 8, 2017 (the “**Receiver’s Supplement to 6th Report**”), section 2.0, para. 2.

¹⁷ Receiver’s 19th Report, Appendix “E” - Receiver’s Supplement to 6th Report, section 2.0, para. 3, and Appendix “A” - Order and Endorsement of The Honourable Mr. Justice Myers both dated July 17, 2017.

¹⁸ Receiver’s 19th Report, Appendix “G” - Receiver’s 18th Report, Section 1.0, para. 3.

of one of the Trusts (together with Davies in his personal capacity and Aeolian, the “**Mareva Defendants**”); and (iii) Gregory Harris, solely in his capacity as trustee and/or representative of one of the Trusts (“**G. Harris Trustee**”).¹⁹

18. In substance, the Mareva Order restricted the Mareva Defendants and G. Harris Trustee from selling, removing, dissipating, alienating, transferring, assigning, encumbering or similarly dealing with any of their assets, wherever situate worldwide, including but not limited to the assets and accounts listed in Schedule “A” to the Mareva Order and, in particular, the Arizona Real Property.²⁰

C. The Appeal of the Mareva Order

19. On January 19, 2018, Davies and Aeolian obtained leave to appeal the Mareva Order (the “**Mareva Appeal**”).²¹

D. The Sale of the Arizona Real Property

20. Prior to the hearing of the Mareva Appeal, on or about November 7, 2018, the Arizona Real Property was sold by the Arizona Trust for USD\$1.65 million along with the furnishings in the Arizona Real Property for a further USD\$150,000. The net proceeds generated from the sale (after paying transaction expenses and liens on the property) were USD\$862,568, which amount was then reduced by virtue of Davies accessing living expenses of \$7,500 per month pursuant to

¹⁹ Receiver’s 19th Report, section 1.1, para. 6.

²⁰ Receiver’s 19th Report, Appendix “G” – Eighteenth Report to Court of KSV Kofman Inc. as Receiver and Manager of certain property Scollard Development Corporation et al. dated April 24, 2019 (“**Receiver’s 18th Report**”), Section 1.0, para. 3.

²¹ Receiver’s 19th Report, Section 2.1.2, para. 3.

an order issued by The Honourable Mr. Justice Myers granting an exemption to the Mareva Order, resulting in total remaining proceeds of USD\$828,171.71 (the “**Proceeds**”).²²

21. The Mareva Defendants provided financial disclosure to the Receiver which indicated that the Proceeds represented a significant portion of the Mareva Defendants’ assets.²³

E. The Mareva Settlement

22. In and around this time, the Receiver, in consultation with the Trustee and their respective counsel, engaged in discussions and negotiations with the Mareva Defendants concerning the Mareva Order and the Mareva Appeal (collectively, the “**Mareva Issues**”), which discussions and negotiations culminated in a settlement of solely the Mareva Issues (the “**Mareva Settlement**”). The Mareva Settlement was formalized in a written settlement agreement (the “**Mareva Settlement Agreement**”).²⁴

23. On May 2, 2019, The Honourable Mr. Justice Hainey approved the Mareva Settlement.²⁵ Pursuant to the Mareva Settlement, all the Mareva Issues were fully and finally resolved in exchange for, among other things, payment of 72.5% of the Proceeds to the Receiver, with the balance of the Proceeds, amounting to 27.5%, being paid to Davies.²⁶ The Receiver has been paid a total of USD \$584,027.69 under the Mareva Settlement.²⁷ The Receiver also lifted the Mareva Order and the parties dismissed the Mareva Appeal on consent, subject to the condition that the Mareva Order would be immediately reinstated in the event of any misrepresentations in the disclosure provided to the Receiver or the Trustee by the Mareva Defendants, which served

²² Receiver’s 19th Report, Section 2.1.2, para. 4.

²³ Receiver’s 19th Report, Section 2.1.2, para. 4.

²⁴ Receiver’s 19th Report, Section 2.1.2, para. 5.

²⁵ Receiver’s 19th Report, Section 2.1.2, para. 5.

²⁶ Receiver’s 19th Report, Section 2.1.2, para. 6.

²⁷ Receiver’s 19th Report, Section 2.1.2, para. 7; Trustee’s 12th Report, para. 26, Motion Record, Tab E.

as a basis for the Mareva Settlement.²⁸ Under the Mareva Settlement, the Mareva Defendants are also required to report to the Receiver and the Trustee with respect to all their direct and indirect earnings on a quarterly basis going forward.²⁹

24. Importantly, pursuant to the Mareva Settlement, no releases were provided to any of the Mareva Defendants and the Receiver and the Trustee preserved all their rights to continue their claims and pursue recovery against the Mareva Defendants for any and all matters in the Initial Litigation and in any and all other proceedings, subject to the terms of the Mareva Settlement Agreement.³⁰

25. The Receiver distributed \$560,000 of the Proceeds to the Trustee for further distribution to the Investors.³¹

III. The Settlement with Alan Harris et al.

26. In connection with its pursuit of the Initial Litigation, the Receiver contemplated further amending its pleading in the Initial Litigation to name certain additional defendants, including, but not limited to, Dachstein Holdings Inc. (“**Dachstein**”), Alan Harris (“**A. Harris**”) and Erika Harris (“**Ms. Harris**”) (collectively, the “**Harris Settling Defendants**”).³²

27. With the assistance of counsel, the Receiver and the Trustee engaged in extensive discussions and negotiations with A. Harris, as representative for the Harris Settling Defendants, regarding the Receivership Companies’ claims as against them, particularly regarding

²⁸ Receiver’s 19th Report, Section 2.1.2, para. 8; Trustee’s 12th Report, para. 26, Motion Record, Tab E.

²⁹ Trustee’s 12th Report, para. 26, Motion Record, Tab E.

³⁰ Receiver’s 19th Report, Section 2.1.2, para. 9; Trustee’s 12th Report, para. 27, Motion Record, Tab E.

³¹ Trustee’s 12th Report, para. 27, Motion Record, Tab E.

³² Receiver’s 19th Report, Section 2.1.1, para. 1.

Dachstein's receipt of dividends totalling \$1,000,000 from 555 Princess, 525 Princess, Bronson and Ross Park.³³

28. Those discussions and negotiations culminated in a settlement (the "**Harris Settlement**") between the Receiver and the Trustee, on the one hand, and the Harris Settling Defendants, on the other hand, which was formalized in a written settlement agreement (the "**Harris Settlement Agreement**").³⁴

29. Pursuant to the Harris Settlement Agreement, the Receiver and the Trustee agreed to resolve all known claims that they have against the Harris Settling Defendants in exchange for a payment of \$1,000,000, representing a return of all amounts that the Harris Settling Defendants received in connection with the SMI scheme at issue in the Initial Litigation. The \$1,000,000 of dividends received and repaid by the Harris Settling Defendants was determined by an investigation conducted by the Receiver and further confirmed in a series of sworn declarations provided by the Harris Settling Defendants.³⁵

30. On May 30, 2018, the Court approved the Harris Settlement. The Receiver and the Trustee have been paid all amounts due and owing by the Harris Settling Defendants under the Harris Settlement Agreement.³⁶

IV. The Expanded Litigation against Singh et al.

31. On October 3, 2018, the Trustee and the Receiver jointly commenced new and expanded litigation (the "**Litigation**") in respect of the SMI scheme against each of (among others):

³³ Receiver's 19th Report, Section 2.1.1, para. 2.

³⁴ Receiver's 19th Report, Section 2.1.1, para. 3.

³⁵ Receiver's 19th Report, Section 2.1.1, para. 4.

³⁶ Receiver's 19th Report, Section 2.1.1, para. 5.

- (a) Singh and certain related corporations, including Tier 1 Transaction Advisory Services Inc. (“**Tier 1 Transaction**”) and RS Consulting Group Inc. (“**RSCG**”);
- (b) certain directors and officers of the Receivership Companies, including Davies, Walter Thompson, Bruce Stewart, Jude Cassimy, David Arsenault, James Grace and certain related persons and corporations (including but not limited to Ms. Davies and Aeolian);
- (c) certain lawyers and law firms that acted in connection with certain of the SMIs, the Trustee Corporations and/or the Receivership Companies, namely:
 - (A) G. Harris and Harris + Harris LLP (“**H+H**”), which are alleged in the Litigation to have acted as the solicitors for all the Trustee Corporations and certain of the Receivership Companies; and
 - (B) Nancy Elliot and Elliot Law Professional Corporation, which are alleged in the Litigation to have acted as solicitors for the Trustee Corporations in respect of their loans to certain of the Receivership Companies, but which are further alleged in the Litigation to have delegated substantially all duties to H+H, thereby creating, facilitating and/or furthering conflicts of interest in which H+H and its lawyers acted for both borrowers and lenders in respect of the applicable SMIs; and
- (d) Michael Cane, who is alleged in the Litigation to have, amongst other things, acted as the appraiser for the Receivership Companies, been aware that his

appraisals were being used and relied upon to promote and solicit the SMIs, and prepared faulty, inaccurate and/or misleading appraisals.³⁷

32. A total of \$106 million in damages is sought in the Litigation (among other relief), representing the anticipated Investor losses from their aggregate investment of approximately \$131.3 million in the SMIs. The allegations in the Litigation are set out in detail in the 100-page amended statement of claim attached to the Trustee's 12th Report to Court.³⁸

33. The Litigation remains in the very early stages, with pleadings having not yet closed.³⁹

V. The Settlement with Singh et al.

34. With the assistance of counsel, the Trustee and the Receiver engaged in extensive discussions and negotiations with Singh, in his personal capacity and in his capacity as representative for RSCG and Tier 1 Transaction (collectively with Singh, the "**Settling Defendants**"), regarding the Trustee Companies' claims as against them in the Litigation.⁴⁰

35. After lengthy investigations and due diligence, those discussions and negotiations culminated in a settlement (the "**Settlement**") between the Trustee and the Receiver, on the one hand, and the Settling Defendants, on the other hand, which was formalized in a written settlement agreement (the "**Settlement Agreement**").⁴¹

³⁷ Trustee's 12th Report, para. 11, Motion Record, Tab E; Receiver's 19th Report, Section 1.1, para. 7.

³⁸ Trustee's 12th Report, para. 12 and Appendix "4" – Amended Statement of Claim, Motion Record, Tab E; Receiver's 19th Report, Appendix "B" – Fresh Statement of Claim.

³⁹ Trustee's 12th Report, para. 13, Motion Record, Tab E.

⁴⁰ Trustee's 12th Report, para. 36, Motion Record, Tab E; Receiver's 19th Report, Section 4.0, para. 1.

⁴¹ Trustee's 12th Report, para. 36, Motion Record, Tab E; Receiver's 19th Report, Section 4.0, para. 1 and Appendix "H" – Settlement Agreement.

36. The Settlement Agreement is meant to be a full and final settlement of all claims that the Trustee and the Receiver have against the Settling Defendants, while preserving all the Trustee's and the Receiver's claims as against the remaining parties to the Litigation and any other parties with potential liability who are not Settling Defendants (collectively, the "**Non-Settling Defendants**"), as set out in more detail below and in the Settlement Agreement.⁴² A description of the Settlement is provided below; however, the below is a high-level summary only. Full particulars of the Settlement are reflected in the Settlement Agreement appended to both the Trustee's 12th Report to Court and the Receiver's 19th Report to Court.⁴³

37. Subject to the approval of this Court, the purpose of the Settlement is to resolve – as against the Settling Defendants only and their respective predecessors, successors and heirs (collectively, the "**Released Parties**") – the Litigation and any other potential claims that the Trustee and/or the Receiver may have against the Released Parties with regard to the Litigation, the facts and issues in dispute therein and the facts and issues arising from or relating to the SMIs with the Trustee Corporations and the real estate development projects of the Receivership Companies (collectively, the "**Proposed Released Matters**").⁴⁴

38. As part of the Settlement, the Settling Defendants have:

- (a) provided certain detailed sworn statutory declarations, with supporting documentation (including bank statements, tax returns and other corroborating documentation), in escrow to the Trustee and the Receiver attesting to all the Settling Defendants' financial assets and liabilities, other financial circumstances

⁴² Trustee's 12th Report, paras. 38 and 41, Motion Record, Tab E.

⁴³ Trustee's 12th Report, Appendix 11 – Settlement Agreement, Motion Record, Tab E; Receiver's 19th Report, Appendix "H" – Settlement Agreement.

⁴⁴ Trustee's 12th Report, para. 38, Motion Record, Tab E.

and financial history going back five years from the date of the sworn statutory declarations (the “**Declarations**”); and

- (b) paid \$2.1 million in escrow to the Trustee’s counsel (the “**Settlement Funds**”), pending Court approval of the Settlement.⁴⁵

39. The Settlement Agreement provides that the Declarations and the Settlement Funds are not to be released from escrow unless and until the Court grants the Order (as defined in the Settlement Agreement) approving the Settlement, and that, even then, the Trustee and the Receiver are to keep the Declarations and the information set out therein confidential and not to disclose same except if required by law.⁴⁶ Aside from the Declarations (which contain only the personal and confidential information of the Settling Defendants relating to their assets and liabilities and have no relevance to the matters at issue in the proceeding), all other terms of the Settlement have been disclosed to the Non-Settling Defendants.⁴⁷

40. The Settlement Agreement expressly provides that the Trustee and the Receiver intend to preserve all their rights and remedies, and all claims that they have in the Litigation or otherwise as against the Non-Settling Defendants, subject to the terms and conditions of the Settlement Agreement, including the Trustee and the Receiver agreeing to forego recovery of any damages, restitution, an accounting, disgorgement, interest, costs or any other monetary relief from the Non-Settling Defendants (“**Monetary Relief**”) that corresponds to the proportion of any judgment that, had the Settling Defendants not settled, the Court would have apportioned to them. In other words, the Trustee and the Receiver shall be entitled to recover from the Non-

⁴⁵ Trustee’s 12th Report, para. 39, Motion Record, Tab E; Receiver’s 19th Report, Section 4.0, paras. 2 and 3.

⁴⁶ Trustee’s 12th Report, para. 40, Motion Record, Tab E; Receiver’s 19th Report, Section 4.0, para. 3.

⁴⁷ All of the other parties to the Litigation have been served with the Motion Record.

Settling Defendants only such claims for Monetary Relief attributable to the aggregate of the several liability of the Non-Settling Defendants.⁴⁸

41. The Settlement Agreement further provides that:

- (a) in the event there is any material failure by the Settling Defendants to pay any of the Settlement Funds in accordance with the terms of the Settlement Agreement, the release in respect of the Proposed Released Matters shall be immediately revocable at the option of the Trustee and the Receiver, and, upon revocation, of no further force or effect (for greater certainty, the Settling Defendants have already paid the full amount of the Settlement Funds to the Trustee's counsel, which funds are being held in escrow by the Trustee's counsel pending Court approval of the Settlement Agreement);
- (b) in the event the Trustee and the Receiver believe there is a material misrepresentation in the Declarations, the Trustee and the Receiver may seek a determination from the Court regarding whether there is such a material representation, and if such material representation is found by the Court to exist, the release in respect of the Proposed Released Matters shall be immediately revocable at the option of the Trustee and the Receiver, and, upon revocation, of no further force or effect;
- (c) in the event the release in respect of the Proposed Released Matters is revoked, there will be no reversion of any the Settlement Funds to the Settling Defendants;

⁴⁸ Trustee's 12th Report, para. 41, Motion Record, Tab E; Receiver's 19th Report, Section 4.0, para. 4.

- (d) as soon as reasonably possible following the issuance of the proposed Order approving the Settlement, the Trustee and the Receiver shall discontinue the Litigation as against the Settling Defendants on a with prejudice and without costs basis, and shall amend their statement of claim in the Litigation so as to continue the Litigation against the Non-Settling Defendants only and so as only to seek recovery from the Non-Settling Defendants on a several basis from the Settling Defendants (though on a joint and several basis as between the Non-Settling Defendants); and
- (e) the Settling Defendants shall fully and reasonably cooperate with the Trustee and the Receiver in relation to their claims and proceedings against the Non-Settling Defendants, including, but no limited to, the Litigation. Such cooperation shall include, but not be limited to, providing an account of the facts known to the Settling Defendants that are relevant to such claims and proceedings, producing relevant non-privileged documents, records and information over which the Settling Defendants have possession, power or control, using best efforts to make themselves fully and reasonably available to the Trustee and the Receiver at the Trustee's or the Receiver's request and providing testimony subject to the Settling Defendants being compelled to do so by way of summons or other legal process.⁴⁹ The Settling Defendants' productions will be discoverable by the Non-Settling

⁴⁹ Trustee's 12th Report, para. 42, Motion Record, Tab E; Receiver's 19th Report, Appendix "H" – Settlement Agreement.

Defendants and the Non-Settling Defendants can similarly obtain evidence from the Settling Defendants through summons or other legal processes.⁵⁰

42. The Trustee and the Receiver are of the view that the Settlement represents the most reasonable and practical way forward because:

- (a) the Trustee and the Receiver have examined the Settling Defendants' Declarations, as well the supporting documentation (including books and records), and are satisfied that the Settlement Funds represent a significant portion of the Settling Defendants' net worth;
- (b) it generates immediate proceeds of \$2.1 million, which, based on the Trustee's independent investigations and the Declarations, represents a significant portion of the Settling Defendants' available assets. Further, these assets would likely be eroded by virtue of the Settling Defendants' defence costs and, therefore, largely inaccessible if the Litigation were to continue as against the Settling Defendants;
- (c) it allows for the release in respect of the Proposed Released Matters to be revocable, and the Litigation as against the Settling Defendants to be reinstated, in the event of any material misrepresentation in the Declarations or any material failure by the Settling Defendants to pay the Settlement Funds,⁵¹ with no reversion of the Settlement Funds to the Settling Defendants in such event;

⁵⁰ Receiver's 19th Report, Section 4.0 and Appendix "H" – Settlement Agreement.

⁵¹ For greater certainty, the Settling Defendants have already paid the full amount of the Settlement Funds to the Trustee's counsel, which funds are being held in escrow by the Trustee's counsel pending Court approval of the Settlement Agreement.

- (d) it resolves the Proposed Released Matters as against the Settling Defendants and avoids protracted and complex proceedings as against them, thereby reducing expense and risk, resulting in legal and professional costs savings that would be incurred in seeking judgement, and, if obtained, enforcing judgment, as against the Settling Defendants;
- (e) it requires the Settling Defendants to cooperate with the Trustee and the Receiver in respect of the Litigation and any other related proceedings, thereby strengthening the case against the Non-Settling Defendants, improving the chance of increased monetary recovery from those parties and streamlining and reducing the costs of the Litigation and any other related proceedings as against the Non-Settling Defendants;
- (f) it provides that the Non-Settling Defendants will only be liable for their proportionate share of the losses and it contemplates a bar order with respect to their potential exposure to claims of joint responsibility with the Settling Defendants, thereby leaving the Non-Settling Defendants responsible only for the losses they can be proved to have caused;
- (g) it provides a degree of certainty regarding costs and benefits relating to both the Settling Defendants and the Non-Settling Defendants, which cannot be expeditiously or effectively achieved otherwise; and

(h) it reduces financial and opportunity costs related to protracted, complicated litigation, and conserves valuable court resources.⁵²

43. For these reasons, the Trustee and the Receiver both support the approval of the Settlement Agreement by this Honourable Court and the granting of the related relief sought with respect to the Settlement.⁵³

PART III - ISSUE

44. The sole issue to be determined is whether this Court should approve the Settlement as set out in the Settlement Agreement and grant the related relief sought.

PART IV - LAW AND ARGUMENT

45. There is an overriding public interest in favour of encouraging and supporting settlements. It is sound judicial policy which contributes to the administration of justice.⁵⁴

46. *Pierringer* agreements, such as the Settlement Agreement at issue here, should be approved and supported if possible because there are not only benefits to the parties involved in the litigation but also systemic benefits to the justice system as a whole.⁵⁵

47. *Pierringer* agreements have been recognized as very helpful methods to advance settlements in complex lawsuits such as the Litigation. As described by the Supreme Court of

⁵² Trustee's 12th Report, para. 43, Motion Record, Tab E; Receiver's 19th Report, Section 4.1, para. 1.

⁵³ Trustee's 12th Report, paras. 44-45, Motion Record, Tab E; Receiver's 19th Report, Section 4.1, para. 1, section 5.0, para. 1, and section 1.2, para. 1.

⁵⁴ *Allianz v. Canada (Attorney General)*, 2017 ONSC 4484 ("*Allianz*"), at para 9.

⁵⁵ *Allianz*, at para. 9, citing *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 ("*Sable*"), at para 23

Canada, a *Pierringer* agreement is an important tool without which it is very difficult to conclude a settlement with only some of the defendants and with which it is possible to substantially streamline the litigation. The Supreme Court has approved the use of *Pierringer* agreements so long as the terms proposed are fair and avoid the possible prejudice associated with these types of agreements.⁵⁶

48. Promoting settlement while preserving the fairness of the ongoing litigation process to the remaining parties (i.e., the Non-Settling Defendants) is at the heart of *Pierringer* agreement approval.⁵⁷

49. Here, the terms of the Settlement are fair and reasonable, in the best interest of the Trustee Corporations, the Receivership Companies and their respective stakeholders, and avoid possible prejudice to the Non-Settling Defendants, for the following reasons, among others:

- (a) the Settlement is accretive – it increases recoveries in the Trustee Corporations’ and Receivership Companies’ estates;
- (b) the Settlement avoids protracted, complex and costly litigation with the Settling Defendants. Subject to the terms and conditions of the Settlement Agreement, all the claims that the Trustee and the Receiver have against the Settling Defendants will be fully and finally resolved. The Settlement therefore provides a degree of certainty with regard to costs, benefits and timing, which cannot be expeditiously or effectively achieved otherwise;

⁵⁶ *Sable*, at paras. 24-27; Also see *1511419 Ontario Inc. v. KPMG LLP*, 2017 ONSC 2472 (“*1511419 Ontario Inc.*”) at para. 15.

⁵⁷ *1511419 Ontario Inc.*, at para. 16.

- (c) the Settlement allows the Trustee and the Receiver to focus on the other actors in the SMI scheme in the go-forward Litigation, which will increase the efficiency and efficacy with which the Litigation can be advanced, thereby resulting in further costs savings, timing efficiencies and benefits;
- (d) the Settling Defendants will provide cooperation to the Trustee and the Receiver in connection with the Litigation and any other related actions or proceedings, thereby increasing the likelihood and extent of monetary recovery from those remaining defendants and streamlining and reducing the costs of the Litigation and any other related proceedings;
- (e) given the Settling Defendants financial position, the Settlement reflects an appropriate practical outcome as against them in the Litigation, while avoiding the costs of pursuing them to obtain Judgment and then seeking to enforce that Judgment;
- (f) the release in respect of the Proposed Released Matters is revocable in the event of, among other things, any material misrepresentation in the Declarations, with no reversion of the Settlement Funds to the Settling Defendants in such event;
- (g) the terms of the Settlement (other than the Declarations, which contain only the Settling Defendants' personal and confidential information regarding their assets and liabilities and have no relevance to the matters at issue in the Litigation), including the amount of the Settlement, are being fully disclosed to the Non-Settling Defendants;

- (h) the Settlement contemplates a bar order with respect to the Non-Settling Defendants' potential exposure to claims of joint responsibility with the Settling Defendants, thereby leaving the Non-Settling Defendants responsible only for the losses they can be proved to have caused;
- (i) the Non-Settling Defendants will be able to fairly present their case. Among other things, all productions received from the Settling Defendants will be discoverable and, therefore, the Non-Settling Defendants will have the same access to relevant material from the Settling Defendants as the Trustee and the Receiver; and
- (j) the Trustee and the Receiver both recommend the Settlement and recommend the granting of the sought Order.

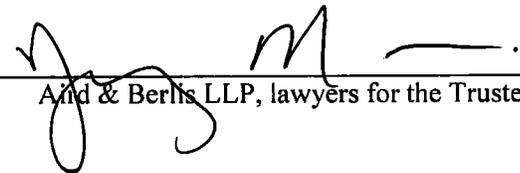
50. The Settlement Agreement represents a fair and commercially reasonable compromise in all of the circumstances and for purposes of these proceedings. It is in the best interests of the Trustee Corporations, the Receivership Companies, their respective stakeholders, the Court and the administration of justice that the terms contemplated under the Settlement Agreement be approved and implemented.

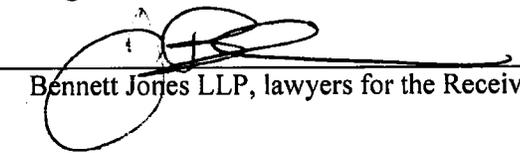
51. The Trustee and the Receiver therefore respectfully request and recommend that this Honourable Court approve the Settlement Agreement and grant the related relief sought.

PART IV - ORDER REQUESTED

52. For the foregoing reasons, the Trustee and the Receiver respectfully request that the Settlement be approved and that the Order included at Tab C of the Motion Record be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of November, 2019.


Aid & Berlis LLP, lawyers for the Trustee


Bennett Jones LLP, lawyers for the Receiver

TAB A

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Allianz v. Canada (Attorney General)*, 2017 ONSC 4484
2. *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37
3. *1511419 Ontario Inc. v. KPMG LLP*, 2017 ONSC 2472

THE SUPERINTENDENT OF FINANCIAL SERVICES

Applicant

- and - **TEXTBOOK STUDENTS SUITES (525 PRINCESS STREET) TRUSTEE CORPORATION ET AL.**

Respondents

Court File No: CV-16-11567-00CL

IN THE MATTER OF THE RECEIVERSHIP OF SCOLLARD DEVELOPMENT CORPORATION, ET AL.

Court File No: CV-17-11689-00CL

KINGSETT MORTGAGE CORPORATION

Applicant

- and - **TEXTBOOK (445 PRINCESS STREET) INC.**

Respondent

Court File No. CV-17-589078-00CL

GRANT THORNTON LIMITED IN ITS CAPACITY AS THE COURT-APPOINTED TRUSTEE OF TEXTBOOK STUDENT SUITES (774 BRONSON AVENUE) TRUSTEE CORPORATION, ET AL. - and - **TEXTBOOK (774 BRONSON AVENUE) INC., ET AL.**

Applicant

Respondents

Court File No. CV-18-598788-00CL

GRANT THORNTON LIMITED, IN ITS CAPACITY AS THE COURT-APPOINTED TRUSTEE OF TEXTBOOK STUDENT SUITES (525 PRINCESS STREET) TRUSTEE CORPORATION, ET AL, AND KSV KOFMAN INC., IN ITS CAPACITY AS THE COURT-APPOINTED RECEIVER AND MANAGER OF CERTAIN PROPERTY OF SCOLLARD DEVELOPMENT CORPORATION, ET AL. - and - **AEOLIAN INVESTMENTS LTD., ET AL.**

Plaintiffs

Defendants

Court File No. CV-18-606314-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**PROCEEDING COMMENCED AT
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