

**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 -

**TEXTBOOK (256 RIDEAU STREET) INC.**

Defendant

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**FACTUM OF THE PLAINTIFF  
(Motion for Certificates of Pending Litigation – Returnable May 16, 2017)**

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May 16, 2017

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Plaintiff

- and -

**TEXTBOOK (256 RIDEAU STREET) INC.**

Defendant

**FACTUM OF THE MOVING PARTY**

**PART I - OVERVIEW**

1. This is a motion for the issuance of certificates of pending litigation (“**CPLs**”) on two properties (the “**Properties**”) owned by the defendant, Textbook (256 Rideau Street) Inc. (“**Rideau**”).

2. In the within action, the plaintiff, KSV Kofman Inc. (“**KSV**”), solely 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. (collectively, the “**Companies**”) and not in its personal capacity or in any other capacity, claims an interest in the Properties. The plaintiff now seeks the issuance of CPLs on title

to the Properties in order to preserve the status quo and protect its proprietary interest in the Properties pending a disposition of the matter on the merits or until further Order of this Court.

3. There are currently efforts underway to try to sell the Properties. The plaintiff has a reasonable claim to an interest in the Properties and, in all of the circumstances, the equities support the issuance of CPLs. Accordingly, CPLs should issue.

## **PART II – FACTS**

4. In the within action, the plaintiff alleges that funds of the investing public were improperly diverted from Textbook (555 Princess Street) Inc. (“**555 Princess**”) and Memory Care Investment (Kitchener) Ltd. (“**Kitchener**”) (and the specific real estate development projects in which the funds were required to be invested) to Rideau and then used by Rideau to acquire the Properties, giving the plaintiff a proprietary interest in the Properties based on constructive trust and other legal and equitable principles.<sup>1</sup>

### **Parties**

5. The plaintiff was appointed as the receiver and manager of certain property of the Companies pursuant to orders of the Ontario Superior Court of Justice dated February 2, 2017, April 28, 2017 and May 2, 2017. Each of the Companies in respect of which the plaintiff has been appointed receiver and manager was advanced monies on a secured basis by various trust

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<sup>1</sup> Notice of Action issued May 16, 2017 (the “**Notice of Action**”), Motion Record of the Plaintiff (“**Motion Record**”), Tab 3.

corporations, which monies had been raised from investors through syndicated mortgages for particular real estate development projects specific to the respective Companies.<sup>2</sup> In particular:

- (a) 555 Princess is a company incorporated pursuant to the laws of Ontario, which is subject to the receivership. It was advanced monies on a secured basis by Textbook Student Suites (555 Princess Street) Trustee Corporation (“**555 Trust Co.**”), 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 John Davies (“**Davies**”) and Walter Thompson (“**Thompson**”).<sup>3</sup>
- (b) Textbook (525 Princess Street) Inc. (“**525 Princess**”) is a company incorporated pursuant to the laws of Ontario, which is subject to the receivership. It was advanced monies on a secured basis by Textbook Student Suites (525 Princess Street) Trustee Corporation (“**525 Trust Co.**”), which monies had been raised from investors through a syndicated mortgage for a particular real estate development project specific to 525 Princess. The only officers and directors of 525 Princess are Davies and Thompson.<sup>4</sup>
- (c) Kitchener is a company incorporated pursuant to the laws of Ontario, which is subject to the receivership. It was advanced monies on a secured basis by MC Trustee (Kitchener) Ltd. (“**Kitchener Trust Co.**”), which monies had been raised

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<sup>2</sup> Third Report of KSV Kofman Inc. as Receiver and Manager of Certain Property of Scollard Development Corporation, Memory Care Investments (Kitchener) Ltd., Memory Care Investments (Oakville) Ltd., 1703858 Ontario Inc., Legacy Lane Investments Ltd., Textbook (525 Princess Street) Inc. and Textbook (555 Princess Street) Inc. dated May 16, 2017 (the “**Third Report**”), Motion Record, Tab 2.

<sup>3</sup> Third Report, Motion Record, Tabs 2, 2A and 2F.

<sup>4</sup> Third Report, Motion Record, Tabs 2, 2A and 2F.

from investors through a syndicated mortgage for a particular real estate development project specific to Kitchener. The sole officer and director of Kitchener is Davies.<sup>5</sup>

- (d) 1703858 Ontario Inc. (“**Burlington**”) is a company incorporated pursuant to the laws of Ontario. It was advanced monies on a secured basis by 2223947 Ontario Limited (“**2223947**”), which monies had been raised from investors through a syndicated mortgage for a particular real estate development project specific to Burlington. The sole officer and director of Burlington is Davies.<sup>6</sup>

6. The defendant, Rideau, is a company incorporated pursuant to the laws of Ontario. Like both 555 Princess and 525 Princess, Rideau’s sole officers and directors are Davies and Thompson. However, Rideau was in no way to be involved in the respective real estate development projects to be undertaken by 555 Princess, 525 Princess, Kitchener or Burlington.<sup>7</sup>

### **Relevant Non-Party, Non-Receivership Entities**

7. Textbook (445 Princess Street) Inc. (“**445 Princess**”) is a company incorporated pursuant to the laws of Ontario. It is not one of the Companies for which the plaintiff has been appointed as receiver and manager. However, similar to 555 Princess, 525 Princess, Kitchener and Burlington, it was advanced monies on a secured basis by Textbook Student Suites (445 Princess Street) Trustee Corporation (“**445 Trust Co.**”), which monies had been raised from investors

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<sup>5</sup> Third Report, Motion Record, Tabs 2, 2A and 2F.

<sup>6</sup> Third Report, Motion Record, Tabs 2, 2A and 2F.

<sup>7</sup> Third Report, Motion Record, Tabs 2, 2A and 2F.

through a syndicated mortgage for a particular real estate development project specific to 445 Princess. The only officers and directors of 445 Princess are Davies and Thompson.<sup>8</sup>

8. Textbook (Ross Park) Inc. (“**Ross Park**”) is a company incorporated pursuant to the laws of Ontario. It is also not one of the Companies for which the plaintiff has been appointed as receiver and manager. However, similar to 555 Princess, 525 Princess, Kitchener, Burlington and 445 Princess, it was advanced monies on a secured basis by Textbook Student Suites (Ross Park) Trustee Corporation (“**Ross Park Trust Co.**”), which monies had been raised from investors through a syndicated mortgage for a particular real estate development project specific to Ross Park. The only officers and directors of Ross Park are Davies and Thompson.<sup>9</sup>

9. Textbook (774 Bronson Avenue) Inc. (“**774 Bronson**”) is a company incorporated pursuant to the laws of Ontario. It too is not one of the Companies for which the plaintiff has been appointed as receiver and manager. However, similar to 555 Princess, 525 Princess, Kitchener, Burlington, 445 Princess and Ross Park, it was advanced monies on a secured basis by Textbook Student Suites (774 Bronson Avenue) Trustee Corporation (“**774 Trust Co.**”), which monies had been raised from investors through a syndicated mortgage for a particular real estate development project specific to 774 Bronson. The only officers and directors of 774 Bronson are Davies and Thompson.<sup>10</sup>

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<sup>8</sup> Third Report, Motion Record, Tabs 2 and 2A.

<sup>9</sup> Third Report, Motion Record, Tabs 2 and 2A.

<sup>10</sup> Third Report, Motion Record, Tabs 2 and 2A.

**The Improper Transfer by 555 Princess and Kitchener to Rideau to Finance its Purchase of the Properties**

10. In the action, it is alleged that Rideau used funds misappropriated from 555 Princess and Kitchener to purchase the Properties on November 6, 2015.<sup>11</sup>

11. On or around October 27, 2015, shortly prior to Rideau's acquisition of the Properties, 555 Princess improperly transferred \$1.39 million to Rideau, and Kitchener improperly transferred \$111,000 to Rideau, both by way of cheque, contrary to the terms of 555 Princess's and Kitchener's respective loan agreements with 555 Trust Co. and Kitchener Trust Co. The cheques were both signed by Davies.

12. Given the timing of these transfers and the timing of the purchase of the Properties, coupled with all the other circumstances, there are reasonable grounds to believe that these misappropriated funds were improperly used by Rideau to finance the acquisition of the Properties.

**Other Improper Transfers by Non-Party, Non-Receivership Entities to Rideau to Finance the Purchase of the Properties**

13. On the same date, October 27, 2015, Ross Park (which, as noted, is not a party to this proceeding or the receivership), improperly transferred a further \$1.25 million to Rideau, contrary

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<sup>11</sup> Notice of Action, Motion Record, Tab 3.

to the terms of Ross Park's loan agreement with Ross Park Trust Co. The cheque was also signed by Davies.<sup>12</sup>

14. Given the timing of this transfer and the timing of the purchase of the Properties, and all the other circumstances, there are reasonable grounds to believe that these misappropriated funds were also improperly used by Rideau to finance the acquisition of the Properties.

**Improper Transfers by 555 Princess, 525 Princess and Burlington to Rideau Following its Acquisition of the Properties**

15. Subsequent to Rideau's acquisition of the Properties, a further \$61,200 was improperly transferred to Rideau from 555 Princess, 525 Princess and Burlington by way of cheques signed by Davies, contrary to the terms of 555 Princess's, 525 Princess's and Burlington's respective loan agreements with 555 Trust Co., 525 Trust Co. and 2223947. Specifically:

- (a) \$2,200 was transferred by Burlington to Rideau on November 5, 2015;
- (b) \$36,000 was transferred by 555 Princess to Rideau on December 17, 2015;
- (c) \$7,000 was transferred by 555 Princess to Rideau on May 31, 2016; and
- (d) \$16,000 was transferred by 525 Princess to Rideau on June 20, 2016.<sup>13</sup>

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<sup>12</sup> Third Report, Motion Record, Tab 2.

<sup>13</sup> Third Report, Motion Record, Tab 2.



### **Other Improper Transfers by Non-Party, Non-Receivership Entities to Rideau Following its Acquisition of the Properties**

16. A further \$839,700 was improperly transferred to Rideau by certain non-party, non-receivership entities, contrary to the terms of the entities' respective loan agreements with the relevant trust companies, as follows:

- (a) \$766,500 was transferred to Rideau by 445 Princess, contrary to the terms of 445 Princess's loan agreement with 445 Trust Co.;
- (b) \$56,200 was transferred to Rideau by 774 Bronson, contrary to the terms of 774 Bronson's loan agreement with 774 Trust Co.; and
- (c) \$17,000 was transferred to Rideau by Ross Park, contrary to the terms of Ross Park's loan agreement with Ross Park Trust Co.<sup>14</sup>

### **The Action against Rideau and Risk of the Ottawa Property Being Alienated**

17. In the action, the plaintiff alleges that Rideau was unjustly enriched and that it used funds that were misappropriated from 555 Princess and Kitchener to purchase the Properties, leading to the right to trace the funds or, alternatively, to claim an interest in the Properties on the basis of constructive trust and other legal and equitable principles, giving rise to a question of title to, or interest in, the Properties.<sup>15</sup>

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<sup>14</sup> Third Report, Motion Record, Tab 2.

<sup>15</sup> Notice of Action, Motion Record, Tab 3.

18. The plaintiff is aware that efforts are being made by Rideau to sell the Ottawa Property in which the plaintiff, on behalf of 555 Princess and Kitchener, claims a proprietary interest, and there is a risk that the Ottawa Property will be alienated.<sup>16</sup>

### **PART III – ISSUES**

19. The sole issue that arises on this motion is whether the plaintiff has met the test for the issuance of CPLs over the Properties.

### **PART IV – LAW & ARGUMENT**

#### **THE TEST FOR CPLs**

20. Section 103 of the *Courts of Justice Act* and Rule 42 of the *Rules of Civil Procedure* empower the Court to issue CPLs over properties where an interest in the properties is in question.<sup>17</sup>

21. A plaintiff seeking to obtain CPLs must establish that it has a reasonable claim to the interest in land claimed. If this requirement is satisfied, the court must then consider all of the relevant matters between the parties and make a determination, in equity, as to whether or not the CPLs should issue.<sup>18</sup>

22. On a motion for the issuance of CPLs, the motion judge must not decide whether the moving party actually has or does not have a reasonable claim to an interest in the land. Rather, the motion judge must determine that “a triable issue” has been raised as to whether there is a

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<sup>16</sup> Third Report, Motion Record, Tab 2.

<sup>17</sup> *Courts of Justice Act*, R.S.O. 1990, c. C-34, s. 103; *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, (“*Rules*”) R. 42.

<sup>18</sup> *Transmaris Farms Ltd. v. Sieber*, 1999 CarswellOnt 234 (Gen. Div. [Comm. List]), at paras. 61-63 (“*Transmaris*”), Plaintiff’s Book of Authorities, (“*Plaintiff’s BOA*”), Tab 1; *Hupka v. Aarts Estate*, [2003] O.J. No. 742 (S.C.J.) at paras. 45-50 (“*Hupka*”), Plaintiff’s BOA, Tab 2.

reasonable claim to an interest in the land. A triable issue for a reasonable claim does not mean that the plaintiff will necessarily succeed in establishing entitlement, but that it could.<sup>19</sup>

23. Courts have held that a claim in constructive trust, based on unjust enrichment, can form the basis for a CPL.<sup>20</sup>

24. Courts have also granted CPLs where there is a triable issue that lands were purchased using the proceeds of a fraud leading to the right to trace funds or, alternatively to claim property on constructive trust principles.<sup>21</sup> Further, Courts have granted CPLs where there is alleged to have been a breach of fiduciary duty giving rise to a question of title to, or interest in, property based also upon constructive trust principles.<sup>22</sup>

### **THE PLAINTIFF HAS MET THE TEST FOR OBTAINING CPLs**

25. As required under Rule 42, the plaintiff has claimed an interest in the Properties.<sup>23</sup>

26. The Third Report of KSV suggests that the Properties were purchased using at least \$1.5 million of misappropriated funds that were improperly diverted from 555 Princess and Kitchener to Rideau.

27. The plaintiff submits that there is a clear, or sufficient, link between the funds misappropriated from 555 Princess and Kitchener, and the funds used to purchase the Properties.

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<sup>19</sup> *Transmaris*, at paras. 62-63, Plaintiff's BOA, Tab 1; *Hupka* at paras. 45-50, Plaintiff's BOA, Tab 2; *G.P.I. Greenfield Pioneer Inc. v. Moore* (2002), 58 O.R. (3d) 87 (Ont. C.A.) at paras. 18-20, Plaintiff's BOA, Tab 3.

<sup>20</sup> *Transmaris*, at paras. 63-64, Plaintiff's BOA, Tab 1; *Battistella v. Italian Home Bakery Ltd.*, 2011 ONSC 4964 at para. 56, Plaintiff's BOA, Tab 4; *De Cotiis v. De Cotiis*, 2004 BCSC 1658 at paras. 60-62, Plaintiff's BOA, Tab 5, citing *Soulos v. Korkontzilas*, [1997] 2 SCR 217 and *LeClair v. LeClair Estate* (1998), 159 D.L.R. (4th) 638 (BCCA); *Romanelli v. Romanelli*, 2017 ONSC 1312 at para. 30, Plaintiff's BOA, Tab 6.

<sup>21</sup> *Transmaris*, at para 61, Plaintiff's BOA, Tab 1.

<sup>22</sup> *Transmaris*, at para 61, Plaintiff's BOA, Tab 1; *Firenze Exteriors Inc. v. Westwing Construction Group Inc.* (2005), 42 C.L.R. (3d) 129 (Ont. Master) at paras. 20-21 and 26 ("*Firenze*"), Plaintiff's BOA, Tab 7.

<sup>23</sup> Notice of Action, Motion Record, Tab 3.

28. Further, the plaintiff has also raised a triable issue that, if successful, could entitle it to an interest in the Properties on the basis of, among other things, equitable tracing and unjust enrichment resulting in a constructive trust.

29. It cannot be said at this stage that a proprietary interest will not be found by a trial judge if the plaintiff's evidence is accepted. Therefore, a triable issue exists with respect to the plaintiff's interest in the Properties.

30. Accordingly, CPLs are warranted in the circumstances to prevent the Properties from being transferred to a *bona fide* purchaser without notice, which would frustrate and potentially defeat the plaintiff's recovery efforts.

#### **THE CPLs SHOULD ISSUE ON *EX PARTE* BASIS**

31. Generally, a CPL is ordered in the first instance on an *ex parte* basis, as provided for in Rule 42.01(3) of the *Rules of Civil Procedure*.<sup>24</sup>

32. It is necessary and important for this motion to be heard on an *ex parte* basis in order to protect the plaintiff's interests. If notice were given, the plaintiff is concerned that the Properties could be alienated to a third party who does not have actual notice of the allegations made in this litigation.

33. On an *ex parte* motion for obtaining CPLs, it is necessary to provide full and fair disclosure of all material facts.<sup>25</sup>

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<sup>24</sup> [Firenze](#), at para. 5, Plaintiff's BOA, Tab 7; *Rules*, R. 42.01(3).

<sup>25</sup> *Rules*, R. 39.01(6).

34. The plaintiff does not have access to and, accordingly, has not been able to review the books and records of Rideau, nor has it discussed or corresponded with Davies or Thompson regarding the matters set out herein. Therefore, the plaintiff cannot know with certainty the use of the funds which were transferred to Rideau on October 27, 2015 and it is possible that Davies could provide an explanation for such transfers. However, the plaintiff can think of no commercial or legitimate purpose for the transfers which occurred in violation of the parties' respective loan agreements.<sup>26</sup> Rideau's conduct has been less than *bona fide* from all appearances. This makes it necessary to give the plaintiff leave to issue CPLs against the Properties without notice.

35. If certificates of pending litigation are not registered on title to the Ottawa Property, then the Ottawa Property may be alienated, which could cause significant prejudice and harm to 555 Princess, Kitchener and their respective stakeholders. Accordingly, even to the extent that Rideau could argue that it will suffer any harm or prejudice as a result of the CPLs being issued and registered on title to the Ottawa Property, such harm and prejudice would pale in comparison to that which could be suffered by the plaintiff if the Ottawa Property was permitted to be sold and the plaintiff lost recourse to the Property over which it holds a proprietary interest and which Rideau holds as its constructive trustee.

36. In all of the circumstances, it is just and equitable for CPLs to issue and be registered on title to the Properties.

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<sup>26</sup> Third Report, Motion Record, Tab 2.

**PART V – REQUESTED RELIEF**

37. The plaintiff respectfully requests an Order that the registrar issue and register CPLs on title to the Properties.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 16<sup>th</sup> day of May, 2017.

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## SCHEDULE “A” – LIST OF AUTHORITIES

1. *Transmaris Farms Ltd. v. Sieber*, 1999 CarswellOnt 234 (Gen. Div. [Comm. List])
2. *Hupka v. Aarts Estate*, 2003 CarswellOnt 737 (S.C.J.)
3. *G.P.I. Greenfield Pioneer Inc. v. Moore* (2002), 58 O.R. (3d) 87 (Ont. C.A.)
4. *Battistella v. Italian Home Bakery Ltd.*, 2011 ONSC 4964
5. *De Cotiis v. De Cotiis*, 2004 BCSC 1658
6. *Romanelli v. Romanelli*, 2017 ONSC 1312 (S.C.J.)
7. *Firenze Exteriors Inc. v. Westwing Construction Group Inc.* (2005), 42 C.L.R. (3d) 129 (Ont. Master)

## SCHEDULE “B” – LEGISLATION

### ***RULES OF CIVIL PROCEDURE, R.R.O. 1990, REG. 194***

#### ISSUING OF CERTIFICATE

##### *Court Order Required*

**42.01** (1) A certificate of pending litigation (Form 42A) under section 103 of the Courts of Justice Act may be issued by a registrar only under an order of the court.

##### *Claim for Certificate to be in Originating Process*

(2) A party who seeks a certificate of pending litigation shall include a claim for it in the originating process or pleading that commences the proceeding, together with a description of the land in question sufficient for registration.

##### *Motion Without Notice*

(3) A motion for an order under subrule (1) may be made without notice.

##### *Order to be Served Forthwith*

(4) A party who obtains an order under subrule (1) shall forthwith serve it, together with a copy of the notice of motion and all affidavits and other documents used at the hearing of the motion, on all parties against whom an interest in land is claimed in the proceeding.

### ***COURTS OF JUSTICE ACT, R.S.O. 1990, C. C.43***

#### *Certificate of pending litigation*

**103.** (1) The commencement of a proceeding in which an interest in land is in question is not notice of the proceeding to a person who is not a party until a certificate of pending litigation is issued by the court and the certificate is registered in the proper land registry office under subsection (2).

#### *Registration*

(2) Where a certificate of pending litigation is issued under subsection (1) it may be registered whether the land is registered under the Land Titles Act or the Registry Act.

#### *Exception*

(3) Subsections (1) and (2) do not apply to a proceeding for foreclosure or sale on a registered mortgage or to enforce a lien under the *Construction Lien Act*.

#### *Liability where no reasonable claim*

(4) A party who registers a certificate under subsection (2) without a reasonable claim to an interest in the land is liable for any damages sustained by any person as a result of its registration.



*Recovery of damages*

(5) The liability for damages under subsection (4) and the amount thereof may be determined in the proceeding in respect of which the certificate was registered or in a separate proceeding.

*Order discharging certificate*

(6) The court may make an order discharging a certificate,

(a) where the party at whose instance it was issued,

(i) claims a sum of money in place of or as an alternative to the interest in the land claimed,

(ii) does not have a reasonable claim to the interest in the land claimed, or

(iii) does not prosecute the proceeding with reasonable diligence;

(b) where the interests of the party at whose instance it was issued can be adequately protected by another form of security; or

(c) on any other ground that is considered just,

and the court may, in making the order, impose such terms as to the giving of security or otherwise as the court considers just.

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

v.

**TEXTBOOK (256 RIDEAU STREET) INC.**

Defendant

Court File No: CV-17-11805-00CL

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**SUPERIOR COURT OF JUSTICE  
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PROCEEDING COMMENCED AT  
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**FACTUM OF THE PLAINTIFF  
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