

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

BETWEEN:

**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

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**FACTUM OF THE PLAINTIFF  
(Motion for *Mareva* Injunction – Returnable July 17, 2017)**

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July 12, 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. In this action, KSV Kofman Inc. (“**KSV**”) – the court-appointed receiver and manager of certain property of the Receivership Companies (as defined below) – is seeking the return of tens of millions of dollars that were misappropriated from the Receivership Companies and retained by John Davies (“**Davies**”), his spouse Judith Davies (“**Ms. Davies**”), their family company Aeolian Investments Ltd. (“**Aeolian**”) and the trusts that Mr. and Ms. Davies control and/or in which they have a legal or beneficial interest – the Davies Family Trust (the “**Family Trust**”) and the Davies Arizona Trust (the “**Arizona Trust**”).

2. 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**”). 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**”). It has since become clear that millions of dollars of the Receivership Companies’ funds were not only improperly transferred to Mr. Davies and Aeolian but, in turn, to Ms. Davies, the Family Trust and the Arizona Trust. Among other things:

- (i) over \$2.5 million was transferred from Aeolian directly to Ms. Davies;
- (ii) approximately \$1.3 million was used to pay personal expenses charged to an American Express card used by Mr. and Ms. Davies to fund their lifestyle; and
- (iii) over \$1.8 million went from Aeolian to purchase and renovate real property municipally described as 35411 N. 66<sup>th</sup> 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.

3. While KSV’s investigation is still ongoing and the full magnitude of the Receivership Companies’ losses are still not fully known, what is now known is that millions of dollars effectively disappeared under Mr. Davies’ watch and were diverted from the Receivership Companies (and the respective real estate development projects in which the funds were required to be invested) through related corporations and a network of other non-arm’s length parties that Mr. Davies and others control to, *inter alia*, himself, Aeolian, Ms. Davies, the Family Trust and the Arizona Trust, amongst others.

4. In light of the flow of funds from the Receivership Companies to Mr. and Ms. Davies, Aeolian, the Family Trust and the Arizona Trust, the plaintiff now seeks to expand the Extended Interim Order so that it applies: (1) on an interlocutory basis, until final disposition of this proceeding, to Mr. Davies in his personal capacity and Aeolian; and (2) on an interim basis to Mr. Davies in his capacity as trustee and/or representative of both the Family Trust and the Arizona Trust, Ms. Davies in her personal capacity and in her capacity and as trustee and/or representative of the Family Trust and Gregory Harris solely in his capacity as trustee and/or representative of the Family Trust (“**Mr. Harris**” and, collectively with Mr. Davies (in his personal capacity and in his capacity as trustee and/or representative of both the Family Trust and the Arizona Trust), Ms. Davies (in her personal capacity and in her capacity as trustee of the Family Trust) and Aeolian, the “**Defendants**”).

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

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

7. Since the commencement of the receivership proceeding in January 2017, Mr. and Ms. Davies have engaged in a course of conduct to liquidate assets and put them beyond the reach of the Receivership Companies and their creditors. Most recently, Mr. and Ms. Davies re-listed their personal residence for sale, and the listing agreement with the real estate agent was entered into on June 7, 2017 (the date that the Initial Interim Order was granted). Further, an open house was held on July 8, 2017 (well after the Extended Interim Order was granted). Accordingly, there is a real and demonstrated risk that Mr. and Ms. Davies, as well as Aeolian, the Family Trust and the Arizona Trust (all three of which are controlled by Mr. Davies and/or Ms. Davies) will permanently abscond with the Receivership Companies' funds and/or dissipate assets to avoid enforcement of any judgment the plaintiff may ultimately obtain.

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

## PART II – FACTS

### Parties

9. 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 syndicated mortgages for particular real estate development projects specific to the respective Receivership Companies. In particular:

- (a) Scollard is a company incorporated pursuant to the laws of Ontario. It was advanced monies on a secured basis by Scollard Trustee Corporation (“**Scollard Trust Co.**”), which monies had been raised from investors through a syndicated mortgage for a particular real estate development project specific to Scollard. The sole officer and director of Scollard is 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) Trust 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) Trust 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.<sup>1</sup>

10. The defendant, Mr. Davies, is an individual residing in King City, Ontario. He was, at all material times, a director and officer of the Receivership Companies.<sup>2</sup> He was also, at all material times, the trustee and/or representative of the Family Trust, together with the proposed defendants, Ms. Davies and Mr. Harris. He was also, at all material times, the sole trustee and/or representative of the Arizona Trust.<sup>3</sup>

11. 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.<sup>4</sup>

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<sup>1</sup> 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.

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

<sup>3</sup> 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.

<sup>4</sup> Sixth Report, Motion Record, Tabs 3 and 3I.

12. 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 Arizona Property) in the manner and on the terms and conditions he, as sole trustee, deems appropriate.<sup>5</sup>

13. The defendant, 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.<sup>6</sup> 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.<sup>7</sup>

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<sup>5</sup> Sixth Report, Motion Record, Tabs 3, 3H, 3I and 3J.

<sup>6</sup> Fourth Report, Motion Record, Tab 2.

<sup>7</sup> Sixth Report, Motion Record, Tab 3.



14. The proposed defendant, Mr. Harris, is an individual residing in [Toronto], Ontario. He is a licensed Ontario lawyer in private practice. He acted as legal counsel to some or all of the Receivership Companies, as well as other related entities. He is also the trustee and/or representative of the Family Trust, together with Mr. Davies and Ms. Davies.<sup>8</sup> 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**

15. Under the loan agreements between the respective Receivership Companies and the applicable Trust Companies (the “**Loan Agreements**”), the funds advanced from the Trust Companies to the Receivership Companies were to be used to purchase real property and to pay the soft costs associated with the specific real estate development projects (the “**Projects**”) for which the funds were invested and advanced.<sup>9</sup>

16. 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”.<sup>10</sup>

### **Prohibited Management Fees**

17. 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

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<sup>8</sup> Sixth Report, Motion Record, Tabs 3 and 3I.

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

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

to 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.<sup>11</sup>

18. 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 prohibited management fees to Aeolian:

- (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.<sup>12</sup>

19. 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, such payments are prohibited under the Loan Agreements.<sup>13</sup>

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<sup>11</sup> Fourth Report, Motion Record, Tab 2.

<sup>12</sup> 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

<sup>13</sup> Fourth Report, Motion Record, Tabs 2 and 2A.

### **Further Improper Management Fees**

20. Pursuant to Section 7.02(c) of the Loan Agreements with 525 Princess and 555 Princess, ordinary course payments to shareholders for amounts related to the management, development and operation of the Property are permitted, provided such payments are reasonable in relation to the services rendered.<sup>14</sup>

21. 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 (they both remain in the pre-construction phase).<sup>15</sup>

22. Although Mr. Singh and/or others may have had knowledge of some or all of these payments, they are prohibited under the Loan Agreements.

### **Improper Transfers to TSI, TSSI and MCIL**

23. Contrary to the Loan Agreements and the Receivership Companies' contractual and legal obligations, Mr. Davies caused certain of the Receivership Companies to improperly transfer millions of dollars to TSI, TSSI and MCIL, the parent companies of Kitchener, Oakville, Burlington, 525 Princess and 555 Princess, all three of which are owned, in part, by Aeolian.<sup>16</sup>

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<sup>14</sup> Fourth Report, Motion Record, Tabs 2 and 2A.

<sup>15</sup> Fourth Report, Motion Record, Tabs 2, 2G and 2H.

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

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

- (a) none of these “loans” were documented;
- (b) no interest has been received by any of the applicable Receivership Companies on account of any such “loan”; and
- (c) the relevant Loan Agreements do not permit the applicable Receivership Companies to make these “loans”.<sup>17</sup>

25. Although Mr. Singh and/or others may have had knowledge of some or all of these transfers, such transfers are prohibited under the Loan Agreements.

### **Improper Dividends**

26. Mr. Davies also 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).<sup>18</sup>

27. 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

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<sup>17</sup> Fourth Report, Motion Record, Tabs 2 and 2A.

<sup>18</sup> Fourth Report, Motion Record, Tabs 2, 2G and 2H.

essentially had no further monies to advance their respective Projects, which, as noted, are still in the pre-construction phase.<sup>19</sup>

28. These dividend distributions caused or contributed to 525 Princess and 555 Princess becoming insolvent (if they were not already insolvent at the time of payment).<sup>20</sup>

29. Although Mr. Singh and/or others may have had knowledge of some or all of these payments, such payments are prohibited under the Loan Agreements.

### **Improper Payments to Mr. Davies' Family Members**

30. Mr. Davies also caused certain of the Receivership Companies to make further payments directly, and/or indirectly through Aeolian, to Ms. Davies and certain Davies Children for services purportedly rendered by them in connection with the Projects.

31. Mr. Davies has advised that Ms. Davies performed no services for the Receivership Companies. The payments to Ms. Davies are prohibited under the applicable Loan Agreements and constitute a breach of the Loan Agreements.<sup>21</sup>

32. While Mr. Davies has advised that certain Davies Children had limited involvement in some of the Projects, KSV currently does not have enough information to make a definitive determination at this stage. However, to the extent these services were not provided, or the payments in respect of any services that were provided are unreasonable, these payments are also

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<sup>19</sup> Fourth Report, Motion Record, Tabs 2 and 2A.

<sup>20</sup> Fourth Report, Motion Record, Tab 2.

<sup>21</sup> Sixth Report, Motion Record, Tabs 3 and 3H; Fourth Report, Motion Record, Tabs 2, 2A, and 2G-Q.

prohibited under the applicable Loan Agreements and constitute a breach of the Loan Agreements.<sup>22</sup>

33. Although Mr. Singh and/or others may have had knowledge of some or all of these payments, they are, in large part (if not entirely), prohibited under the Loan Agreements.

### **Improper Inter-Company Transfers and Transfers to Affiliates**

34. 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 Companies that Mr. Davies controls, including Textbook Ross Park Inc., Textbook (445 Princess Street) Inc., Textbook (774 Bronson Avenue) Inc. and McMurray.<sup>23</sup>

35. 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:

- (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.<sup>24</sup>

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<sup>22</sup> Sixth Report, Motion Record, Tabs 3 and 3H; Fourth Report, Motion Record, Tabs 2, 2A, and 2G-Q.

<sup>23</sup> Fourth Report, Motion Record, Tabs 2, 2A, and 2G-Q.

<sup>24</sup> Fourth Report, Motion Record, Tabs 2, 2K and 2N.

36. 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.<sup>25</sup>

### **Misappropriation of Funds to Finance the Purchase of the Ottawa Property**

37. 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-Receiver'ship 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**").<sup>26</sup>

38. The Ottawa Property was purchased by Rideau on or around November 6, 2015 for \$11 million.<sup>27</sup>

39. 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 Kitchener to improperly transfer \$111,000 to Rideau, both by way of cheque. The cheques were both signed by Mr. Davies.<sup>28</sup>

40. The funds were transferred from 555 Princess and Kitchener to Rideau for no consideration, for an illegitimate business purpose and in contravention of the relevant Loan Agreements. Despite the fact that the funds were required to be used for specific Projects to be

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<sup>25</sup> Fourth Report, Motion Record, Tabs 2 and 2A.

<sup>26</sup> Fourth Report, Motion Record, Tabs 2, 2H, 2O and 2U.

<sup>27</sup> Fourth Report, Motion Record, Tabs 2 and 2U.

<sup>28</sup> Fourth Report, Motion Record, Tabs 2, 2H, 2O and 2U.

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.<sup>29</sup>

41. 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
- (d) \$16,000 was transferred by 525 Princess to Rideau on June 20, 2016.<sup>30</sup>

42. 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.<sup>31</sup>

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<sup>29</sup> Fourth Report, Motion Record, Tabs 2, 2A, 2H, 2O and 2U.

<sup>30</sup> Fourth Report, Motion Record, Tabs 2, 2G, 2H, 2Q and 2U.

<sup>31</sup> Fourth Report, Motion Record, Tabs 2, 2A, 2G, 2H, 2Q and 2U.



## **Kitchener Property Purchase**

43. On June 4, 2013, 2375219 Ontario Ltd. (“**237**”), an entity in which Aeolian has an ownership interest, purchased, in the context of a receivership, a retirement home located at 169 Borden Avenue, Kitchener, Ontario (the “**Kitchener Property**”) for \$1.585 million.<sup>32</sup>

44. On February 25, 2014, approximately nine months after the Kitchener Property was purchased by 237, it was sold by 237 to Kitchener above fair market value for \$3.950 million, netting a gain for 237 in the amount of approximately \$2.365 million. It appears Aeolian received at least \$344,000 in profit from the sale of the Kitchener Property.<sup>33</sup>

45. The Kitchener Property was purchased from 237 with funds advanced to Kitchener by the Kitchener Trust Co., which funds were raised from the investing public.<sup>34</sup>

## **Further Improper Conduct involving Non-Receiverhip Companies**

46. 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.

47. For instance, Mr. Davies caused McMurray – a company he controlled that entered into a loan agreement with 7743718 Canada Inc. (the “**McMurray Trust Co.**”) pursuant to which it was advanced monies that had been raised from investors through a syndicated mortgage for a particular real estate development project specific to McMurray – to improperly transfer \$935,000 to Moscowitz Capital Mortgage Fund II (“**Moscowitz**”).<sup>35</sup>

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<sup>32</sup> Fourth Report, Motion Record, Tab 2; Sixth Report, Motion Record, Tab 3.

<sup>33</sup> Fourth Report, Motion Record, Tab 2; Sixth Report, Motion Record, Tab 3.

<sup>34</sup> Fourth Report, Motion Record, Tab 2; Sixth Report, Motion Record, Tab 3.

<sup>35</sup> Fourth Report, Motion Record, Tabs 2 and 2P.

48. Moscowitz is not a mortgagee on the relevant real property owned by McMurray; however, it is a mortgagee on Mr. and Ms. Davies' personal residence.<sup>36</sup>

49. McMurray's Loan Agreement with the McMurray Trust Co. prohibits these payments.<sup>37</sup>

### **The Initial Interim Order, and the Extension of the Order, Granted by Mr. Justice Myers**

50. On June 7, 2017, the plaintiff moved for, and this Honourable Court granted, the Initial Interim Order as against Mr. Davies in his personal capacity and Aeolian. In the 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."<sup>38</sup>

51. 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.<sup>39</sup>

52. 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 Affidavit**").<sup>40</sup>

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<sup>36</sup> Fourth Report, Motion Record, Tabs 2 and 2T.

<sup>37</sup> Fourth Report, Motion Record, Tabs 2 and 2A.

<sup>38</sup> Sixth Report, Motion Record, Tab 3.

<sup>39</sup> Sixth Report, Motion Record, Tab 3.

<sup>40</sup> Sixth Report, Motion Record, Tabs 3, 3D and 3E.

53. On June 16, 2017, Mr. Davies, in his personal capacity and on behalf Aeolian, was cross-examined on the Davies Affidavit, pursuant to the terms of the Initial Interim Order.<sup>41</sup>

54. On June 16, 2017, the Extended Interim Order, which extended the Initial Interim for 30-days, was granted by this Honourable Court, on the consent of Mr. Davies and Aeolian.<sup>42</sup>

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

55. Based on the plaintiff's review of the RBC Records and Aeolian's receipts and disbursements, 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, the Family Trust and the Arizona Trust. 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.<sup>43</sup>

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<sup>41</sup> Sixth Report, Motion Record, Tabs 3 and 3H.

<sup>42</sup> Sixth Report, Motion Record, Tab 3.

<sup>43</sup> Sixth Report, Motion Record, Tabs 3 and 3O.

## **The Arizona Property**

56. 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, with the BofI Federal Bank having 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 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.<sup>44</sup>

## **The Defendants' Liabilities and Limited Assets**

57. As a result of the above-noted transactions and others, there is virtually no money left in Aeolian's account. Further, Mr. Davies does not have any bank accounts, and he has not had any accounts for several years. Rather, Mr. Davies has funded his living expenses over the last five years by receiving development fees from the various Projects through Aeolian. This has been his only employment and source of income over the last five years. In order to pay for living expenses, Mr. Davies has either used an Aeolian bank card or Ms. Davies has paid the expenses. Importantly, Ms. Davies only recently began working part-time (not for Aeolian or any of the Receivership Companies) and, prior to that, she did not work. Although Ms. Davies never worked for Aeolian or any of the Receivership Companies, management fees were paid to her, through Aeolian, in any event.<sup>45</sup>

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<sup>44</sup> Sixth Report, Motion Record, Tabs 3, 3H and 3I.

<sup>45</sup> Sixth Report, Motion Record, Tabs 3 and 3•.

58. In light of the flow of funds from the Receivership Companies through Aeolian to Mr. Davies, Ms. Davies, the Family Trust and the Arizona Trust, amongst others, the plaintiff now seeks to expand the Extended Interim Order so that it applies: (1) on an interlocutory basis, until final disposition of this proceeding, to Mr. Davies in his personal capacity and Aeolian; and (2) on an interim basis to Ms. Davies, the Family Trust and the Arizona Trust (including the Arizona Property).

**Incompleteness of the initial Davies Affidavit**

59. On cross-examination, it became clear that the Davies Affidavit 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 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) 237.<sup>46</sup>

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<sup>46</sup> Sixth Report, Motion Record, Tabs 3 and 3H.

60. 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.<sup>47</sup>

61. 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**”).<sup>48</sup>

### **The Recent Listing for Sale of Mr. and Ms. Davies’ Personal Residence**

62. Notwithstanding the terms of the Initial Interim Order and the Extended 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 personal residence for sale. The listing agreement with the real estate agent was entered into on June 7, 2017 (the date that the Initial Interim Order was first granted). Further, an open house was recently held on July 8, 2017 (well after the Extended Interim Order was granted).<sup>49</sup>

63. 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.<sup>50</sup>

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<sup>47</sup> Sixth Report, Motion Record, Tabs 3 and 3H.

<sup>48</sup> Sixth Report, Motion Record, Tabs 3, 3F and 3G.

<sup>49</sup> Sixth Report, Motion Record, Tab 3.

<sup>50</sup> Sixth Report, Motion Record, Tab 3.

64. Mr. and Ms. Davies' recent efforts to sell their personal residence, coupled with the incomplete and inaccurate nature of the Davies Affidavit, are clear breaches of this Honourable Court's Initial Interim Order and Extended Interim Order, and show a blatant disregard for the authority of this Court and for the rights and interests of the Receivership Companies.

### **Restrictions and Limitations regarding KSV's Reports**

65. As set out in more detail in section 1.2 of KSV's Fourth and Sixth Reports respectively dated June 6 and July 12, 2017, KSV has not performed an audit of the financial information addressed in its Fourth and Sixth Reports, which serves as the evidentiary basis for this motion. Further, KSV has not spoken to or had any communications with certain relevant parties (such as Ms. Davies, Mr. Harris, Mr. Thompson and Mr. Singh) regarding the matters addressed in the Fourth and Sixth Reports. Further, the books and records of the Receivership Companies (amongst other entities controlled by Mr. Davies) are not well maintained.<sup>51</sup>

66. While Mr. Davies has produced documentation regarding some or all of the above-noted transactions, including email correspondence with the representative of the Trust Companies, pro formas for the Projects, and other documentation (including approximately 70,000 emails which KSV is in the process of reviewing), KSV is aware of no legitimate purpose for the above-noted transfers and payments that occurred in contravention of, among other things, the Receivership Companies' obligations under the terms of the applicable Loan Agreements at times when the various Projects were facing a liquidity crisis.<sup>52</sup>

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<sup>51</sup> Fourth Report, Motion Record, Tab 2; Sixth Report, Motion Record, Tab 3.

<sup>52</sup> Sixth Report, Motion Record, Tab 3.

### PART III – ISSUES

67. The issues to be decided on this motion are: (1) whether the plaintiff has met the test for a worldwide interlocutory injunctive order freezing the assets of Mr. Davies in his personal capacity and Aeolian until final disposition of this proceeding (continuing the Extended Interim Order), (2) whether the plaintiff has met the test for a worldwide interim injunctive order freezing the assets of Mr. Davies in his capacity as trustee and/or representative of both the Family Trust and the Arizona Trust, Ms. Davies in her personal capacity and in her capacity as trustee and/or representative of the Family Trust, and Mr. Harris solely in his capacity as trustee and/or representative of the Family Trust and (3) 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**

68. 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.<sup>53</sup>

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

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<sup>53</sup> *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 40.01; *Courts of Justice Act*, RSO 1990, c C43, ss 101(1), (2).



Trust, or Mr. Harris in his capacity as trustee and/or representative of the Family Trust, the plaintiff intends to do so forthwith.<sup>54</sup>

70. 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.<sup>55</sup>

71. 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;<sup>56</sup>
- (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.<sup>57</sup>

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<sup>54</sup> KSV intends to seek leave to add these individuals, and potentially other individuals and entities, as parties to the within action.

<sup>55</sup> *Chitel v Rothbart* (1982), 39 OR (2d) 513, 1982 CarswellOnt 508 at paras 30–32 (CA), Book of Authorities, Tab 1.

<sup>56</sup> *Lambrou v Voudouris*, 2015 ONSC 998, 2015 CarswellOnt 1929 at para 5, Book of Authorities, Tab 2.

<sup>57</sup> *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.

72. 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).<sup>58</sup>

### **Worldwide Mareva Injunction**

73. 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

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<sup>58</sup> *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.<sup>59</sup>

74. 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.<sup>60</sup>

75. 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.<sup>61</sup>

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<sup>59</sup> *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.

<sup>60</sup> *Mooney v Orr* (1994), 98 BCLR (2d) 318, 1994 CarswellBC 488 at paras 11, 13 (BCSC), Book of Authorities, Tab 6.

<sup>61</sup> *Innovative Marketing Inc v D'Souza* (2007), 155 ACWS (3d) 672, 2007 CarswellOnt 1131 (Sup Ct J Comm List), Book of Authorities, Tab 7.

76. Another more recent example can be found in the case of *Cosimo Borrelli, in his capacity as trustee of the SFC Litigation Trust v Allen Tak Yuen Chan*, where the Order of the Honourable Mr. Justice Hailey 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.<sup>62</sup>

77. 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.<sup>63</sup> As discussed in more detail below, the Defendants 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.

78. 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”.<sup>64</sup> 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”.<sup>65</sup>

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<sup>62</sup> *Sino Forest*, *supra* note 59, Book of Authorities, Tab 5.

<sup>63</sup> *Mooney v Orr*, *supra* note 60 at paras 8, 13, Book of Authorities, Tab 6.

<sup>64</sup> 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.

<sup>65</sup> *Sino Forest*, *supra* note 59 at para 38, Book of Authorities, Tab 5.

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

“[I]nsofar as this Order purports to have any effect outside of the territorial jurisdiction of this Court, no person shall be affected by it or concerned by the terms of it until this Order is declared enforceable or registered or enforced by a foreign court of competent jurisdiction for that purpose, unless that person is:

(a) a party to this action or any agent of a party to this action; or

(b) a person who is subject to the judicial jurisdiction of this Court, who has received written notice of this Order within the territorial jurisdiction of this Court.”<sup>66</sup>

### **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***

80. 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.

81. 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

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<sup>66</sup> *Cussons v Slobbe* (1996), 66 ACWS (3d) 342, 1996 CarswellBC 2104 at para 6 (BCSC), Book of Authorities, Tab 9.

actual determination of the merits of the case. Rather, the question of whether the plaintiff has 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?<sup>67</sup>

## **Fraud**

82. 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.<sup>68</sup>

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

- (a) concealed the relationships between themselves and other related, non-arm's length parties;
- (b) directed, caused and/or facilitated prohibited payments and transfers to be made by the Receivership Companies to such related, non-arm's length parties, including

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<sup>67</sup> *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.

<sup>68</sup> *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.

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

### **Conversion**

85. 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.<sup>69</sup>

86. 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

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<sup>69</sup> *Salimjazi 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**

87. 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.<sup>70</sup>

88. 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.<sup>71</sup>

89. 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**

90. 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

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<sup>70</sup> *Garland v Consumers’ Gas Co*, 2004 SCC 25, 2004 CarswellOnt 1558 at para 30, Book of Authorities, Tab 13.

<sup>71</sup> *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***

91. 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.<sup>72</sup>

92. 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.<sup>73</sup>

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

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<sup>72</sup> *Galambo v Perez*, 2009 SCC 48, 2009 CarswellBC 2787 at para 36, Book of Authorities, Tab 15.

<sup>73</sup> *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.<sup>74</sup>

94. 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***

95. 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.<sup>75</sup>

96. 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.

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<sup>74</sup> *Business Corporations Act*, RSO 1990, c B 16, s 134(1).

<sup>75</sup> See, for instance, *Canadian Aero Service Ltd v O’Malley*, [1974] SCR 592, 1973 CarswellOnt 236, Book of Authorities, Tab 16.

97. 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.

98. 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.

99. 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 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***

100. 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.

101. 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;<sup>76</sup> and
- (b) Mr. and Ms. Davies attempted to sell their jointly owned personal residence located in King City, Ontario.<sup>77</sup>

102. 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 June 7, 2017 (*i.e.*, the date that the Initial Interim Order was granted). Further, an open house was held on July 8, 2017 (*i.e.*, well after the Initial Interim Order, and the Extended Interim Order, were granted).

103. Given all of Mr. and Ms. Davies' conduct to date, including the alienation of the family cottage, their attempted sale of their jointly owned personal residence, their re-listing of their personal residence in contravention of the Extended Interim Order, 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 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 Affidavit, there is 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

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<sup>76</sup> Fourth Report, Motion Record, Tabs 2 and 2W.

<sup>77</sup> Fourth Report, Motion Record, Tabs 2 and 2T.

Ms. Davies control) will put their assets beyond the reach of creditors for the purpose of avoiding judgment.

104. 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.<sup>78</sup> 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.<sup>79</sup>

105. 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, the Court can infer a real risk of dissipation of assets by the Defendants.

106. 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 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*

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<sup>78</sup> *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).

<sup>79</sup> *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.

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

107. 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.”<sup>80</sup>

108. Mr. Davies does not have a bank account. Aeolian’s bank account has virtually no money in it. Further, the Asset and Liability Statements reveal that Mr. Davies and Aeolian have more liabilities than they do stated assets, notwithstanding that millions were misappropriated from the Receivership Companies and diverted directly to them.<sup>81</sup>

109. 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.<sup>82</sup>

110. 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 million spent on renovations, it is currently only worth approximately US\$1.795 million given the depressed market for real estate in Arizona.<sup>83</sup> 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

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<sup>80</sup> *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.

<sup>81</sup> Sixth Report, Motion Record, Tabs 3, 3F, 3G and 3H.

<sup>82</sup> Sixth Report, Motion Record, Tabs 3 and 3H.

<sup>83</sup> Sixth Report, Motion Record, Tabs 3 and 3H.

that “[t]he current account balance of the Chase account is \$62.67 (chequing) and \$2.30 (savings).”<sup>84</sup>

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

112. It is essential that the Extended Interim Order be expanded to capture Ms. Davies, the Family Trust and the Arizona Trust so that whatever limited funds may remain can be frozen and preserved.

### **The Balance of Convenience Favours the Plaintiff**

113. The law is clear that the factors leading to irreparable harm are important in considering the balance of convenience.<sup>85</sup> 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 interim relief (in the case of the Ms. Davies, the Family Trust and the Arizona Trust) and interlocutory relief (in the case of Mr. Davies and Aeolian) is granted. Importantly, it is open to the Defendants to move to vary the injunction order at any time if any prejudice or harm should arise.

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

### ***The Defendants’ Assets Ex Juris***

115. 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

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<sup>84</sup> Sixth Report, Motion Record, Tabs 3 and 3•.

<sup>85</sup> *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.

the assets of his adversary in litigation.<sup>86</sup> In this case, Mr. Davies gave evidence under oath that he owns the Arizona Property (in his capacity as trustee of the Arizona Trust), which he acquired with funds from Aeolian.<sup>87</sup> Mr. Davies also testified that the Arizona Trust has a bank account with JP Morgan Chase in the United States.<sup>88</sup>

### **An Undertaking as to Damages Ought Not to be Required**

116. 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.

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

40.03 On a motion for an interlocutory injunction or mandatory order, the moving party shall, *unless the court orders otherwise*, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party [emphasis added].<sup>89</sup>

118. While the requirement for an undertaking will generally only be dispensed with in exceptional circumstances, and the plaintiff acknowledges that its status as a court-appointed receiver may not be sufficient in and of itself to dispense with this requirement, courts have dispensed with the requirement for an undertaking where the plaintiff has a compelling case, does

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<sup>86</sup> *Revenue and Customs Commissioners v Cozens*, [2011] EWHC 2782, 2011 WL 5105121 at para 41, Book of Authorities, Tab 23.

<sup>87</sup> Sixth Report, Motion Record, Tabs 3 and 3H.

<sup>88</sup> Sixth Report, Motion Record, Tabs 3 and 3H.

<sup>89</sup> *Rules of Civil Procedure*, *supra* note 53, Rule 40.03.



not have the financial means to make such an undertaking and/or other special circumstances exist that justify foregoing the requirement.<sup>90</sup>

119. 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.

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

#### **PART V – REQUESTED RELIEF**

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

- (a) its worldwide nature;
- (b) the timing for Mr. Davies in his capacity as trustee and/or representative of both the Family Trust and the Arizona Trust, Ms. Davies in her personal capacity and in her capacity as trustee and/or representative of the Family Trust, and/or Mr. Harris solely in his capacity as trustee and/or representative of the Family Trust, to submit sworn statements describing the nature, value, and location of their assets

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<sup>90</sup> *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.

worldwide and be cross-examined on those statements, which is truncated given the highly time-sensitive nature of the matter and the plaintiff's serious concerns regarding the Defendants' dissipation of assets; and

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

122. 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 Family Trust, the Arizona Trust, TSI, TSSI, MCIL, Lafontaine, MC Victoria and Rideau in the manner set out above, as detailed with more particularity in KSV's Fourth and Sixth Reports.

123. A blackline of the proposed draft Order to the Commercial List model Order is included in the Motion Record.<sup>91</sup>

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<sup>91</sup> Blackline of Draft Interim Order to Commercial List Model Order, Motion Record, Tab 5.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of July, 2017.

A handwritten signature in black ink, consisting of a large, stylized initial 'S' followed by a series of loops and a long horizontal stroke extending to the right.

**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

# TAB A

## 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).

# TAB B

## SCHEDULE “B” – LEGISLATION

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

#### **INTERLOCUTORY INJUNCTION OR MANDATORY ORDER**

##### ***HOW OBTAINED***

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

##### ***WHERE MOTION MADE WITHOUT NOTICE***

##### **Maximum Duration**

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

##### **Extension**

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

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

##### **Labour Injunctions Excepted**

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

##### ***UNDERTAKING***

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

##### ***FACTUMS REQUIRED***

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

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

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

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

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

**INTERLOCUTORY ORDERS**

***INJUNCTIONS AND RECEIVERS***

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

***TERMS***

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



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

**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 July 17, 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