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

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.

Plaintiffs

- and -

JOHN DAVIES and AEOLIAN INVESTMENTS LTD.

Defendants

AFFIDAVIT OF JOHN DAVIES

(Sworn July 27, 2017)

I, John Davies, of King City in the Province of Ontario, MAKE OATH AND SAY:

1. I am one of the defendants in the above noted action and the sole director and officer of the corporate defendant Aeolian Investments Ltd. ("**Aeolian**"). As such, I have personal knowledge of the information set out in this affidavit. For convenience, unless otherwise defined, the defined terms herein have the same meaning as the terms defined in the Receiver's Sixth Report and in my first affidavit sworn on July 14, 2017 (my "**First Affidavit**").

2. I swear this affidavit as a supplement to my First Affidavit in opposition to the Receiver's motion seeking certain interim and interlocutory Mareva relief. As I noted in my First Affidavit, I had only a short amount of time to initially respond to the Receiver's materials before the

return date of July 17, 2017. I have now had the opportunity to more fully review the materials and wish to respond fully to the allegations made against me.

3. The Receiver has accused me of, amongst other things, fraud and deceit. I categorically reject these accusations, and all of the similar allegations the Receiver has made about me, my business and my family. We had no relationship or contact with investors. Our only relationship was with the Trustee Corporations, and that relationship was one of conventional borrower and lender. At all times, I acted in accordance with the Loan Agreements that governed the terms of the Davies Developers' borrowing. We were required to obtain the lender's consent in order to make loans and pay development management fees and dividends. We did so. I have done nothing wrong, yet through this process, I have lost the ability to profitably complete the projects I have spent the past six years developing. I refuse to continue to be treated as a scapegoat for loan losses caused by the regulatory failures of Tier 1 Transaction Advisory Services Inc. ("**Tier 1**") and the subsequent costs of a premature and untimely liquidation of development p. cts.

4. I have been a real estate developer for 25 years. The development process takes years, is risky and complex, and requires multiple rounds of financing. Initial predevelopment financings, such as those between the Davies Developers and the Trustee Corporations, pay a high interest rate in recognition of the risks and complexities of the development process, especially at an early stage.

5. Real estate development projects go through many stages, including pre-acquisition analysis of potential development properties, acquisition of those properties, planning, site work, sales and marketing, pre-construction and construction work. Developers are hired to take development projects through this process, and get compensated for their efforts through

development management fees – it is how we get paid. Such fees are an accepted cost in the development process, as lenders and stakeholders have an interest in working with experienced professionals to ensure their investments appreciate in value.

6. The projects that were being developed by the Davies Developers were all real and located on properties that had been carefully chosen and acquired for their development potential, as evidenced by the independent appraisals conducted on the properties (copies of which I have attached as **Exhibit "A"**)[1]. My expectation was that each of the development projects in question would be successfully completed and each of the loans would be repaid, as has been the case with the $200 million that I have borrowed and repaid over the course of my career.

7. The Davies Developers had an obvious interest in seeing the projects through to a profitable conclusion. We invested our expertise, experience and reputation towards achieving that result, and I believe that we would have been successful in doing so had Tier 1 not been suspended from raising funds and been replaced by Grant Thornton. Now, as a result of Grant Thornton's decision to force the sale of some of the development properties at an early stage liquidation value rather than continuing to develop them, together with the fees that have been incurred by the Receiver, it is unlikely that the loans in question will be fully repaid.

8. As I noted in my First Affidavit, the effect of this receivership and of the Receiver's unwarranted accusations against the Davies Developers and against me personally have been tremendously harmful. I worked hard to advance these projects through the predevelopment stages to bring them to a state of construction readiness, and earned the fees we were paid. I have

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[1] For brevity, I have included only the executive summaries. Full versions of the appraisals are available for inspection upon request.

now lost my livelihood, my reputation has been damaged and I have lost virtually all of my assets. The rationale underlying the initial issuance of this Mareva order – the concern that I was selling assets to escape my creditors – has been proven false, and yet the Receiver has continued to take steps to constrain my family and my ability to earn a living. The initial allegations that the development management fees were "secret", unauthorized and prohibited by the Loan Agreements have been proven false, and so the Receiver has changed its position and alleges that the fees were unreasonable and not earned – allegations which, as set out in great detail below, cannot be supported.

9. I ask this Court to look long and hard at the allegations that have been made by the Receiver, which are based entirely on a review of cash receipts and disbursements. These allegations ignore the factual context in which the Davies Developers operated, including the business realities of the development industry, the detailed pro formas that were provided to Tier 1 prior to any loans being advanced (and which were provided to the Receiver nearly a month ago), the ordinary course relationship between borrower and lender, and the value that was created in the development projects (which is now at risk of being destroyed). The only substantive, contextual evidence before this Court is that we acted at all times with the consent of the Trustee Corporations and in accordance with the Loan Agreements and, through hard work over six years, achieved significant value for each of the development projects in question.

Management Fees were Reasonable and Earned

10. In my First Affidavit, I explained that the development management fees paid to the Davies Developers were not "secret", "covert" or "fraudulent", as alleged by the Receiver, but in fact were both approved by the Trustee Corporations and permitted under the Loan Agreements.

Detailed pro formas were prepared for each of the Davies Developers projects and provided to the Trustee Corporations for review and approval before loans were advanced. I had attached a sample pro forma to my First Affidavit; copies of pro formas for each of the project companies are attached hereto as **Exhibit "B"**.[2]

11. We prepared these pro formas as genuine estimates of the costs that would be incurred and the fees that we would earn through the course of the projects. Each of the projects would require additional financing as they progressed through the development process, and each of the loans made would be repaid. We expected, as set out in the pro formas, that each of the projects would be concluded profitably. In each instance, after reviewing the pro formas, the Trustee Corporations advanced funds under the Loan Agreements with full knowledge of the costs and fees associated with each project. Had the Davies Developers been permitted to continue advancing the projects toward construction financing, each of the loans would have been repaid.

12. The Receiver has also alleged that the development management fees were unreasonable as the development projects for which they were advanced had achieved little progress and remained in pre-construction. While I addressed this allegation briefly in my First Affidavit (see paragraph 12), I want to provide the Court with additional detail regarding the work that was carried out by the Davies Developers, as I firmly believe that we achieved significant progress that more than justified the development management fees that were paid.

13. As I noted in my First Affidavit (see paragraph 8), development management fees were paid to the Davies Developers to advance projects through predevelopment, which consisted of everything from site acquisition and analysis to the stage where a guaranteed upset price contract

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[2] For brevity, I have included only the pro forma summaries and revenue/cost forecasts. Full copies of the pro formas are available for inspection upon request.

had been or was about to be executed and the project was ready to begin construction. In this context, the fact that most of the development projects remained in the pre-construction phase is irrelevant to the question of whether the Davies Developers performed sufficient work to justify the payment of development management fees.

14. In the case of each project, as set out below, we carried out significant predevelopment work and, in some cases, initial construction work, creating incremental value for the properties:

(a) With respect to the Memory Care entities (Kitchener, Oakville and Burlington), we worked with a leading US health care architect over a 15-month period to design a unique building concept tailored to dementia sufferers, which is a relatively new concept in Canada. We obtained site plan approvals, which included work relating to a holding designation placed on the Oakville property. We produced working drawings and construction drawings, obtained construction hard cost pricing for all three projects and, in respect of Burlington, signed a CCDC contract and began construction before progress was halted in December 2016. A detailed summary of the work carried out on the Memory Care projects is attached as **Exhibit "C"**.

(b) With respect to Scollard, we conducted significant pre-acquisition work to reconceptualize the condominium project that had been planned for the site into a contemporary 4-storey condominium project, which was more suited to the area and our target demographic. We also developed a phasing plan that would allow us to coordinate construction timing with sales goals. Following acquisition, we completed design development, commissioned the necessary studies and liaised with the City's planning department to ensure there were no servicing issues. We retained marketing and advertising experts and constructed an onsite sales centre with a model suite. After sales began, we received so much interest that we reworked the design in our working drawings into a 5-storey townhome project, increasing the overall units from 230 to 291 (226 of which we had sold by fall

2016 when the Tier 1 situation arose). We completed construction pricing and completed working drawings to approximately 70%. At the time that Grant Thornton took over as trustee, we were set to execute a $67 million construction financing agreement which did not proceed as Grant Thornton refused to postpone Tier 1's first mortgage. A detailed summary of the work carried out on Scollard is attached as **Exhibit "D"**.

(c) With respect to the Princess Street projects (555 Princess, 525 Princess and 445 Princess), we identified three ideal development properties within close proximity and conducted detailed pre-acquisition due diligence on each property, including an environmental review of a former service station, development of massing and design studies, and consultation with the City of Kingston regarding its redevelopment guidelines. Following purchase of the properties, we retained transportation engineers and worked with the City to develop solutions for the parking shortage in the development area. We developed design concepts for 555 Princess and 525 Princess together, and a standalone concept for 445 Princess, both of which we presented to the City and local stakeholders for discussion. We engaged consultants and engineers to prepare background studies and reports in support of our anticipated submissions to the City for zoning, planning and engineering approvals. Development work continued until the Tier 1 situation halted progress in October 2016. A detailed summary of the work carried out on 555 Princess, 525 Princess and 445 Princess is attached as **Exhibit "E"**.

(d) With respect to Legacy Lane, we acquired a property adjacent to a luxury retirement home that my former partner, Bruce Stewart, had helped develop. In light of the potential synergies with the retirement home, we hired an architect to design a 5-storey seniors-oriented condominium development. We also pursued discussions with the retirement home owner regarding potential access for condominium buyers to the home's facilities. Site plans and full design drawings for the project were completed before we received market feedback that interest had shifted from condominiums to townhome and "bungaloft" developments. As a result, we identified a local developer who had successfully built such projects

and hired him as a consultant to redesign the project into a townhome development. We hired engineers to prepare site servicing and grading design reports for approvals, and completed final drawings in spring 2015. We identified a potential construction partner but were unable to secure financing to complete site servicing work. A detailed summary of the work carried out on Legacy Lane is attached as **Exhibit "F"**.

(e) With respect to McMurray (which is not a Receivership Company), we demolished the existing high school on the property and renovated the historical schoolhouse into a sales presentation centre which included two model suites. We designed a Phase 1 development consisting of lofts in the schoolhouse, suites in a new 60-unit building, and 2-storey townhomes. We obtained site plan approval and approvals of architectural design drawings. We prepared all necessary condominium documents and obtained Tarion warranty approval. We also began conceptual work on a Phase 2 development consisting of "bungaloft" townhomes. We obtained 30 firm sales commitments on Phase 1 but ultimately were unable to obtain construction financing as a result of waning market interest. A detailed summary of the work carried out on McMurray is attached as **Exhibit "G"**.

(f) With respect to Ross Park (which is not a Receivership Company), we acquired a site with a student residence concept that had been introduced to City officials. Following acquisition, we engaged numerous consultants and made a formal application to the City for a by-law amendment to permit the residence to be built. The City required extensive design changes which we worked through and reached consensus on a revised concept. We also dealt throughout with a local conservation authority which was carrying out a study to determine flood parameters for the area in which the property was located. This required us to engage hydrogeological engineers to respond to the study and negotiate with the conservation authority. Despite extensive work and negotiations, the conversation authority's study remains incomplete. A detailed summary of the work carried out on Ross Park is attached as **Exhibit "H"**.

(g) With respect to 774 Bronson (which is not a Receivership Company), although the property was introduced to us in February 2015, we did not close until January 2016 as a result of numerous issues that had to be resolved. The property had been planned by the previous owner as a luxury condominium (which had failed), and the design was unsuitable for student housing. We had to create a new student residence design and renegotiate the site-specific zoning by-law with the City and an influential ratepayer group, which required a long and involved consultation process through the design planning phase. We also worked with Doran Construction to prepare a hard cost budget demonstrating the financial viability of the project. Following closing, we developed detailed architectural and structural engineering studies, prepared working drawings and tendered them to the market, and dealt with minor soil contamination. We were preparing to apply for a building permit in late 2016 before the Tier 1 situation in October 2016 halted progress on the project. A detailed summary of the work carried out on 774 Bronson is attached as **Exhibit "I"**.

15. The development management fees paid varied from project to project (both in terms of projections and actual fees paid) based on factors such as complexity, cost, length of the predevelopment period and other factors unique to certain projects (for example, the issues experienced by Ross Park in relation to the local conservation authority, which has significantly delayed the commencement of construction). A spreadsheet containing a summary of the development management fees paid and payable is attached as **Exhibit "J"**. A similar version of this spreadsheet was previously provided to the Receiver; one immaterial change has since been made to the fees paid or payable in respect of Scollard as a result of adjustments made by our external accountant. In addition, certain amounts relating to the Rideau development project in Ottawa have been backed out of the development management fee calculation, as they had previously been included in error.

16. As set out in the spreadsheet, the development management fees as a percentage of total project costs ranged from 2% on the low end (Scollard) to 6% (Burlington and Kitchener), with most calculated at 4-5% (although the projects were all initially estimated and calculated at 5%, as stated in my First Affidavit). Based on my industry experience, which includes 7 years as Director of Acquisitions and VP, Development at Markborough Properties Ltd. – at the time Canada's third-largest real estate development enterprise – these percentages are well within industry standards. For example, while at Markborough, I sourced a joint venture opportunity with McArthur Glen Group ("**MGG**"), a public US-based developer of designer outlet malls which funds its operations from fee income. MGG charged development fees on an "a la carte" basis, including 2% of land cost as an acquisition fee; 2% of hard and soft costs for arranging financing; 3.5% of hard and soft costs as a design development fee; and 2% of hard costs for overseeing the preparation of construction documents and the tendering process. When added up, these fees are roughly equivalent to a 5% overall development management fee for the same scope of services.

17. These fees also reflect the significant amount of work done on the projects over the course of 1-5 years, depending on the project. In many cases, the work we carried out exceeded the scope of "typical" development management (which does not include any pre-acquisition analysis, site selection, development of full working drawings or tendering). To date, a total of $11.7 million, or 57% of the budgeted development management fees across all projects, has been drawn down by the Davies Developers, which is reasonable given the length of time over which development activities occurred (work commenced on McMurray in 2011 and, as set out in paragraph 14 above, continued on several projects through to late 2016), and the value accrued in the projects (as evidenced by the independent appraisals attached as Exhibit "A").

18. Moreover, a significant portion of these development management fees were used to pay normal office expenses of the Textbook and Memory Care enterprise. These costs included overhead (rent, utilities and office expenses) and salaries for our staff which, at the peak of our operation, included a CFO and VP Finance with a combined 60 years of real estate finance experience; a VP Development with 25 years of development and planning experience; a senior analyst; an office manager; a sales administrator; a marketing manager; and a clerk. Annual salary costs for our team were over $1 million (not including myself and Mr. Thompson). I have attached as **Exhibit "K"** copies of the P&L statements and balance sheets for the Textbook and Memory Care companies.

19. It should be noted that KingSett Mortgage Corporation ("**KingSett**") approved mortgage facilities for both Ross Park and the Rideau project in Ottawa on the basis of a project budget that included 5% development management fees as part of the projected soft costs (see Schedule "B" of KingSett's commitment letters for Rideau and Ross Park attached respectively as **Exhibits "L"** and **"M"**, the Rideau pro forma attached as **Exhibit "N"**, and the Ross Park pro forma at Exhibit "A"). In the case of Rideau, Pelican Woodcliff (Kingsett's project monitor) subsequently approved a revised budget which included 4% development management fees, the reduction coming as a result of increased project costs and our desire to balance our use of funds (see Pelican Woodcliff's report attached as **Exhibit "O"**). The approval of these fees by objective market participants such as KingSett and Pelican Woodcliff are further evidence of the reasonableness of development management fees in real estate development projects, and reflects the commercial reality that these fees are accepted as a cost of such projects in exchange for the expertise to advance them through the development process.

Allegations Regarding Intercompany Loans are Without Merit

20. From the outset of this proceeding, the Receiver has consistently alleged that the intercompany loans made between and among the Davies Developers (including the Receivership Companies) are improper and prohibited under the terms of the Loan Agreements between the Davies Developers and the Trustee Corporations. As is the case with respect to the Receiver's allegations regarding development management fees, the Receiver has since been provided with substantial additional evidence that makes it clear that these loans were known to and authorized by the Trustee Corporations.

21. Contrary to the Receiver's position that intercompany loans are prohibited under the Loan Agreements, each Loan Agreement provides that the borrower (i.e. the relevant Davies Developer) may, with consent of the lender (i.e. the relevant Trustee Corporation), use loan proceeds for purposes other than the development of the specific project for which they were raised. As reflected in correspondence which has been provided to the Receiver (representative examples of which are attached as **Exhibit "P"**), from the time of the very first financing for McMurray, Mr. Singh and the Trustee Corporations were aware of and consented to the practice of making intercompany loans. Indeed, in many instances, Mr. Singh and/or Greg Harris, counsel to the Trustee Corporations, suggested or directed that specific intercompany loans be made in order to pay certain interest payments or other costs. Mr. Singh and Mr. Harris made it clear that interest payments were the first priority and that all necessary steps should be taken to ensure that payments were not made late. I note that when we retained the Receiver in late 2016 in the context of a CCAA application, Mr. Kofman expressed the view that intercompany loans were permissible if they stayed within the enterprise and were made with the consent of the trustee.

This view was confirmed by Mr. Goldstein in a meeting on or about February 3, 2017 when the Receiver was collecting information regarding Scollard.

22. For context, and as we set out in a memorandum prepared for and provided to the Receiver on June 23, 2017 (a copy of which I attach as **Exhibit "Q"**), which is not included in the Receiver's materials before this Court, the Memory Care and Textbook companies were operated as an "umbrella" organization, with separate bank accounts for each project company. To the knowledge of the Trustee Corporations, intercompany loans were regularly made between companies in the organization in order to pay for certain liabilities as they came due, including costs associated with advancing the development projects (e.g. design costs, planning approvals, engineering and other studies) and interest payments on the loans.

23. As explained more fully in the memorandum at Exhibit "Q", there are significant restrictions associated with raising funds by way of syndicated mortgage investment ("**SMI**") loans. The quantum of an SMI loan cannot exceed the appraised value of the property, and the borrower incurs significant upfront costs leaving only a small percentage of the face amount of the loan to be used to begin developing the property. In addition, the obligation to pay interest commences one year after the initial raise. As such, the Davies Developers worked aggressively to advance the development status of projects during the first year, with a view to having the property reappraised with the expectation that its development value will have increased and additional financing could be raised.

24. Occasionally, situations arose where the surplus proceeds from an initial raise would be fully disbursed before the value of the development project had increased sufficiently to support a further financing – this was the case with Scollard, for example. Alternatively, a project might

be sufficiently developed to support an increased loan, but Tier 1 was not in a position to raise funds. In these situations, an intercompany loan would be made from another Davies Developer in order to pay liabilities as they came due until such time as additional funds could be raised, or the developer would raise construction funds from another source and Tier 1 willingly agreed to postpone to these new mortgages. Every intercompany loan was recorded in the companies' accounting records and stayed within the "umbrella" of the overall organization.

25. Intercompany loans were made in the ordinary course and were to be repaid once construction financing was secured. As noted above, at the time that Grant Thornton was appointed, construction financing for Scollard was imminent. Had this financing been allowed to close, we planned to use some of the proceeds to pay down debt.

26. With respect to the Receiver's allegations regarding payments made to Lafontaine Terrace Management Corporation ("**Lafontaine**") and Memory Care Investments (Victoria) Inc. ("**Victoria**"):

(a) The payments made to Lafontaine were loans to fund the losses stemming from the existing retirement home on site at the Kitchener property until new homes could be arranged for the residents and the property was ready to be developed and brought into the Textbook/Memory Care umbrella enterprise. These loans were repaid from the sale proceeds of the Kitchener property.

(b) The payment made to Victoria was a small intercompany loan to fund initial due diligence efforts regarding a potential Memory Care project in Victoria, British Columbia to be brought into the enterprise. We completed a pro forma and appraisal for the projects and were in the process of preparing marketing materials when Tier 1 advised that it was restricted from raising funds for projects outside of Ontario.

All Payments to Davies' Family Members were Legitimate and Earned

27. The Receiver alleges that certain payments made to members of my family were improper. These allegations are not true. To the Receiver's knowledge, the payments made to my family were all earned and justified:

(a) With respect to my wife Judith, and as I testified at my examination (see questions 391-394), on the advice of my accountant, from time to time, portions of the development management fees that I earned were paid to my wife for the purpose of reducing my personal income tax burden. Some of these payments flowed through Aeolian while others flowed directly from the Davies Developers. In all cases, these payments were taken from my portion of development management fees earned by the Davies Developers; they were not additive or separate.

(b) With respect to my daughter Sarah, and as I testified at my examination (see questions 291-297), she was hired in 2013 as a marketing director for the Davies Developers and was paid a reasonable salary plus a car allowance for her work. I have attached as **Exhibit "R"** a sample of third party correspondence regarding the exemplary work performed by Sarah and my son Andrew (who is addressed in the paragraph below). This correspondence was previously provided to the Receiver.

(c) With respect to my son Andrew, and as I testified at my examination (see question 299), he was retained from time to time through his company, Y2 Media, to provide advice on potential advertising mediums and to secure competitive rates. Andrew was paid a reasonable, below-industry-standard commission of 8% for whatever advertisements he recommended and we purchased, as recommended by our marketing consultants.

(d) Finally, with respect to my daughter Jessica, and as I testified at my examination (see question 298), she was hired as the receptionist at the McMurray sales centre for one summer.

Dividend Payments were Authorized and Paid Responsibly

28. The Receiver alleges that certain dividend payments made to Aeolian from 525 Princess and 555 Princess were improper and prohibited by the Loan Agreements. I do not understand the rationale behind this allegation given that the Receiver also acknowledges, in contradiction to its allegation, that such payments were contemplated by and permitted under the Loan Agreements.

29. Specifically, the relevant Loan Agreements provide at section 7.01 that:

> "From any excess proceeds available after the Property has been acquired, the [Davies Developer] intends to pay a dividend of $250,000 to each of its four shareholders, in compensation of expenses incurred and efforts in locating suitable property, negotiating and structuring the purchase transaction and matters ancillary thereto..." [emphasis added].

In each instance, the dividends were paid in accordance with the Loan Agreement – after the property was acquired and out of the remaining loan proceeds. In this context, the Receiver's statement that these dividend payments were prohibited under the Loan Agreement is incorrect.

30. In its Fourth Report, the Receiver questions the propriety of the dividend payments because they were paid at a time when 525 Princess and 555 Princess had no profits, and "questions why dividends would be payable from a fundraising, particularly because the Shareholders had not created value...". This statement either fails to account for or ignores the significant work that the Davies Developers undertook in order to locate suitable development properties and arrange for their purchase as development sites – work which is specifically

referenced in the Loan Agreement (see emphasis above) in relation to the payment of dividends. This work included: preparation of height and massing studies and over a dozen different concepts for vetting with relevant municipal officials; participation in the pre-development municipal approval process; working with consultants to address site servicing issues and related meetings with the City of Kingston's engineering staff; and presenting the development concept to the local BIA and other civic groups. All of this work occurred prior to the purchase of the property. The payment of dividends to the Davies Developers was fully justified and represented good value.

31. Moreover, and contrary to the Receiver's allegation that 525 Princess and 555 Princess had little or no equity following the payment of dividends, the umbrella nature of the Textbook/Memory Care enterprise allowed available cash to be deployed through intercompany loans to projects which were short on funds. Indeed, following the purchase of the properties and payment of dividends, significant work was carried out on these projects, including the retention of consultants and preparation of a joint application to the City of Kingston, and consultations with the City regarding potential parking solutions (as set out above in paragraph 14(c) and in Exhibit "E").

32. Any suggestion that dividends were paid irresponsibly or in circumstances where they had not been earned is unsupported. For instance, with respect to 445 Princess, much of the pre-purchase work described above in respect of 525 Princess and 555 Princess also applied to 445 Princess. As dividends had already been paid in respect of those two projects, and there was not a substantial amount of unique work specific to 445 Princess that was to be completed in advance of the property purchase, we determined that it would not be appropriate to pay

dividends for that project. I accordingly advised Mr. Singh and Mr. Harris that dividends would not be budgeted for (see the correspondence attached as **"Exhibit "S"**).

Purchase and Sale of Kitchener Property was Proper and Disclosed to Investors

33. In its Fourth Report and in its court materials, the Receiver draws attention to the purchase and sale of the property associated with the Kitchener project, and the fact that Aeolian received a profit upon the sale of the property to the Kitchener development company. It is unclear whether the Receiver believes that these transactions were improper or is simply raising them as "colour" in the context of the overall allegations made against me. The fact is that these transactions were fair and proper, and the profit that would be made by Aeolian and other interested parties upon the sale of the property was fully disclosed by Tier 1 to investors.

34. For context, in 2013, the Memory Care projects in Burlington and Oakville were underway and Bruce Stewart (my former partner) and I were looking for another potential project. Through our market research, we became aware of an underperforming retirement facility in Kitchener that was being put into receivership. After conducting initial due diligence, we determined that the facility could be purchased and, with substantial work, converted into a development site which could be acquired by a development company. We therefore incorporated 2372519 Ontario Ltd. ("**237**") and purchased the property on June 4, 2013. We also incorporated Lafontaine to act as the operating company for the facility.

35. As I testified at my examination (see questions 224-225), following this purchase, over the next eight months, Lafontaine operated the retirement facility and funded all shortfalls while searching for new seniors' residences for the approximately 30 residents that lived at the facility (we also bore all relocation costs associated with moving these residents). We also dealt with all

employment issues related to the approximately 20 unionized employees at the facility who were let go. When this work was complete and the site was ready to be developed, we sold the property to Kitchener on February 25, 2014 for $3.95 million. This price was fully disclosed in the Tier 1 documents.

36. To the Receiver's knowledge, all of the work described above, as well as the fact that 237 would realize a profit upon the sale of the Kitchener property, was fully disclosed to prospective investors (see the Acknowledgement and Direction contained at Tab 2R of the Receiver's Motion Record).

Payment to Moskowitz was Repayment to Davies Family Trust of McMurray Purchase Price

37. The Receiver also alleges that certain payments made by McMurray to Moskowitz, the first mortgagee on the Residence, were improper and prohibited by the Loan Agreement with the McMurray Trustee Corporation. Contrary to these allegations, and to the Receiver's knowledge, these payments were made to reimburse the Davies Family Trust, which had loaned McMurray $650,000 to purchase the property on January 15, 2010. This reimbursement was agreed to by the McMurray Trustee Corporation and permitted under the Loan Agreement. I should note that although the property was appraised at $1.965 million shortly after purchase (see the attached appraisal at **Exhibit "T"** and the McMurray pro forma at Exhibit "A"), I declined to purchase the property myself at the below-market price I had negotiated and make a profit by subsequently selling it to McMurray.

38. For context, I entered into negotiations to purchase the McMurray property long before I met Mr. Singh or did any business with Tier 1. The property had been listed for sale by the Bracebridge school board for a price which, based on my market knowledge, was far below its

potential development value. As such, I sought to purchase the property as an investment with a view to developing it in the future, potentially as a retirement facility (though I later concluded that the retirement facility market in that location was likely saturated).

39. In 2011, I was introduced to Mr. Singh and Tier 1 and we subsequently agreed that Tier 1 would provide a loan facility for the purpose of developing the McMurray property as a lifestyle condo project. The initial loan was anticipated to be approximately $3.5 million which, after Tier 1's fees, legal fees and an 8% interest holdback, left approximately $2.3 million to be used to develop the property. The site included an old schoolhouse, which we intended to renovate as a sales centre, and an old high school which needed to be demolished. I did not believe there would be sufficient loan proceeds to repay the Davies Family Trust loan, complete the necessary demolition and renovation work, and develop the property to a point where it could support a reappraisal and second financing. As a result, I agreed with Mr. Singh and Mr. Harris, on behalf of the McMurray Trustee Corporation, that the Davies Family Trust would wait to be repaid out of subsequent loan proceeds.

40. Although Mr. Singh agreed to pursue a second round of financing which would have been used, in part, to repay the Davies Family Trust, no further financing was ever obtained. The Davies Developers continued to advance the McMurray project through pre-development and pay interest on the original Tier 1 loan. In order to reimburse the Davies Family Trust for the McMurray property purchase, beginning in June 2012, I directed McMurray to pay monthly instalments to Moskowitz on behalf of the Davies Family Trust. As set out in the Receiver's Fourth Report, a total of $935,000 was paid to Moskowitz, which represented the original $650,000 purchase price plus accumulated 8% annual interest.

Rideau Transfers

41. The Receiver has alleged that I improperly diverted funds from several project companies, including 555 Princess and Kitchener, to finance the purchase of the property at 256 Rideau Street and 211 Besserer Street in Ottawa (collectively, the "**Ottawa Property**"). While it is true that funds were transferred from 555 Princess and Kitchener (as well as Ross Park, a non-receivership Davies Developer) to GenerX (Byward Hall) Inc. ("**GenerX**"), the project company for the Ottawa Property development, these funds were not misappropriated or improperly transferred. Rather, they were transferred with the knowledge and consent of the Trustee Corporations.

42. In mid-2015, when we were considering whether to purchase the Ottawa Property and bring it into the Textbook/Memory Care umbrella, we looked at a number of potential financing options, including through Tier 1. However, it became apparent that it would take a considerable amount of time for Tier 1 to arrange for the size of the raise required which might have put the purchase transaction in jeopardy. In this context, we decided to finance the purchase through a combination of a mortgage facility with KingSett and an initial $2.75 million equity contribution made through Textbook Suites Inc., GenerX's sole shareholder (as required by KingSett – see section 8 of the Commitment Letter at Exhibit "L"). Following the purchase, Tier 1 would begin work on arranging for a significant SMI raise.

43. The initial equity contribution was funded by way of intercompany loans from development companies which had funds available, including 555 Princess ($1.39 million), Kitchener ($111,000) and Ross Park ($1.25 million). To be clear, these amounts were never intended to be equity contributions from the development companies. Rather, and as was the case

with previous purchase transactions within the Textbook/Memory Care enterprise (e.g. Kitchener), these funds were loaned with the consent of Mr. Singh, Mr. Harris and the relevant Trustee Corporations, in accordance with the Loan Agreements, and with the understanding and expectation that the subsequent Tier 1 financing would be used, in part, to repay the loans. The anticipated financing would also be used to pay GenerX the development management fees it would earn over the intervening period, which GenerX intended to reinvest into the project as an equity stake.

44. Consistent with this understanding, GenerX worked through 2016 to advance the Ottawa Property through predevelopment and increase its value. This work included obtaining a zoning by-law amendment in July 2016 to permit the development project's proposed height, density and use, and receiving staff approval for site plan control in September 2016. From time to time, additional intercompany loans were made in the ordinary course from other project companies to fund pre-development work and interest payments to KingSett as they came due. These loans were recorded and tracked in the development companies' accounting records in the same manner as all other intercompany loans.

45. GenerX also continued to provide Tier 1 with the information necessary to arrange the anticipated $16 million SMI raise, which was anticipated to occur in early 2017. Indeed, as late as October 20, 2016 (the day before FSCO issued its cease-and-desist order in respect of Tier 1), we provided Tier 1 with a pro forma and due diligence information to allow for the preparation of a disclosure schedule and brochures for the project (see the correspondence attached as **Exhibit "U"**). Following the cease-and-desist order, GenerX immediately approached Core Advisory to attempt to arrange replacement financing. Although Core Advisory was interested and began the fundraising process in November 2016, there was very little market interest in

light of the recent FSCO activity involving Tier 1. GenerX approached other lenders but, unfortunately, was met with the same resistance.

46. In parallel with its efforts to acquire replacement financing, GenerX continued its work to advance the Ottawa Property through predevelopment, including submitting building permits for excavation/foundation work and the superstructure in December 2016, and engaging both an architect and construction manager to prepare working drawings and a preliminary budget analysis, develop a construction schedule and tender the project to the market. Until February 2017, it was expected that KingSett would provide construction financing pursuant to their commitment and, prior to the Receiver's appointment over the Ottawa Property, excavation was scheduled for September 2017.

47. As noted above, GenerX has completed significant work to advance the Ottawa Property to construction readiness. I believe that this work has substantially increased the value of the Ottawa Property. In addition, prior to the acquisition of the Ottawa Property, GenerX conducted extensive due diligence to confirm that the existing proposal on the site (for condominiums) could be revised for student housing purposes, and that a significant reduction in the number of parking spaces (from five levels of underground parking to 14 parking spaces at grade) could be accommodated. As a result of this work and the resultant increase in value, GenerX has earned development management fees of approximately $1 million (accrued at $50,000 per month from November 2015 to June 2017, in accordance with the Rideau pro forma supplied to KingSett). In light of the current financial status of the project, these fees have not been paid but would be payable, along with the intercompany loans, out of any proceeds raised in respect of the Ottawa Property.

48. To the knowledge of the Receiver and this Court, GenerX has been engaged in concerted efforts over the past several months to obtain replacement financing to pay out KingSett and to continue to advance the project. In the event the refinancing is successful, GenerX remains prepared to pay the disputed amounts regarding the Ottawa Property into trust pending the resolution of that litigation.

The Mareva Should be Lifted and This Process Stopped

49. Borrowing money from Tier 1 has been the biggest mistake of my business career. I believe that these proceedings are being prosecuted so as to make me the scapegoat for the problems caused by Tier 1 and the losses suffered by its investors. I have fairly and honestly answered the questions asked by the Receiver and presented full explanations, supported by evidence, to the Receiver and this Court in response to the allegations made against me, my business and now my family. I am frustrated and angry that unfounded allegations were made against my wife and family, that my reputation has been unfairly attacked, and that I have lost my business and the great opportunity to successfully complete these development projects and make a legitimate developer's profit. I have lost my personal assets. I am about to lose my home. I have no income. I have received threats and abuse from investors. How much punishment is enough?

50. I believe that all of the Textbook and Memory Care development projects would have been profitable and the investors would have been repaid in full had the projects been allowed to proceed. This process has destroyed the value of the projects, which are now being liquidated at distressed prices. Those prices, together with the weight of the steep fees and expenses of this process, will likely result in limited recoveries for the investors in Tier 1. Ironically, the investors

have suffered losses caused by the very mechanism that was designed to protect their interests. I have considerable sympathy for their plight. They are losers in this process but so am I.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario on July 27, 2017

Commissioner for Taking Affidavits
(or as may be)
Michael Beeforth

JOHN DAVIES