

Heyde v. Theberge Developments Limited
Ontario Superior Court of Justice File No. 15-64526CP
Proceeding under the *Class Proceeding Act, 1992*

SETTLEMENT AGREEMENT

Made as of June 1, 2021

Between

SABRINA HEYDE

(the “**Plaintiff**”)

and

THEBERGE DEVELOPMENTS LIMITED

(the “**Defendant**”)

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RECITALS

- A. **WHEREAS** the Action was commenced by the Plaintiff in Ontario on behalf of certain original purchasers and current owners of condominiums at Alta Vista Ridge in Ottawa arising out of the purchase and sale of the condominiums units between 2011 and 2015 from the Defendant (“**Alta Vista Ridge**”) as set out in the Statement of Claim;
- B. **AND WHEREAS** the Defendant was the developer of Alta Vista Ridge;
- C. **AND WHEREAS** the Defendant commenced the Related Action against persons or entities who are alleged to be responsible for Alta Vista Ridge, including the Purchasers’ Lawyers;
- D. **AND WHEREAS** the Action was certified as a class proceeding and the Plaintiff was appointed the representative plaintiff;
- E. **AND WHEREAS** the Defendant has disputed liability and it does not admit, through the execution of this Settlement Agreement or otherwise, any allegation of unlawful conduct alleged in the Action, and otherwise denies all liability and asserts that it has complete defences in respect of the merits of the Action;
- F. **AND WHEREAS** the Parties through their counsel have engaged in settlement discussions and negotiations with a view to resolving the Action and the Related Action as against the Purchasers’ Lawyers only;
- G. **AND WHEREAS** as a result of those settlement discussions and negotiations, the Parties have reached this Settlement with the material terms outlined in the lawyer for the Defendant’s letter of January 27, 2021 and the Class Counsel’s letter of January 29, 2021, and they have entered into this Settlement Agreement, which embodies all the terms and conditions of the Settlement between the Defendant and the Plaintiff, both individually and on behalf of the Settlement Class, subject to the approval of the Court;

- H. **AND WHEREAS** the Defendant is entering into this Settlement Agreement in order to achieve a final resolution of all claims asserted or which could have been asserted by the Plaintiff and the Settlement Class in the Action, and to avoid further expense of burdensome and protracted litigation;
- I. **AND WHEREAS** Class Counsel has reviewed and fully understands the terms of this Settlement Agreement and, based in their analyses of the facts and law applicable to the Plaintiff's claims, having regard to the burdens and expense in prosecuting the Action, including the risks and uncertainties associated with trials and appeals, and having regard to the value of the Settlement Agreement, have concluded that this Settlement Agreement is fair, reasonable and in the best interests of the Class;
- J. **AND WHEREAS** the Parties have intended and acknowledge that the Settlement provides a simplified and convenient procedure for the Class in addressing Alta Vista Ridge;
- K. **AND WHEREAS** the Parties therefore wish to and finally resolve the Action against the Defendant, and the Related Action as against the Purchasers' Lawyers only, without admission of liability and in particular agree that the compensation to the Class is not an acknowledgement of any legal right to compensation in these circumstances;
- L. **AND WHEREAS** the Parties acknowledge that the Settlement is contingent on approval by the Court as provided for in this Settlement Agreement, and entered into with the express understanding that this Settlement shall not derogate from the respective rights of the Parties relating to the Action and the Related Action in the event that this Settlement Agreement is not approved, is terminated or otherwise fails to take effect for any reason; and
- M. **AND WHEREAS** the Plaintiff and Defendant agree that neither this Settlement Agreement nor any statement made in the negotiation thereof shall be deemed or construed to be an

admission by, or evidence against, the Defendant, or evidence of the truth of any of the Plaintiff's allegations, which allegations are expressly denied by the Defendant;

NOW THEREFORE, in consideration of the covenants, agreements and releases set forth in this Settlement Agreement and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, it is agreed by the Parties that the Related Action as against the Purchasers' Lawyers only shall be settled and dismissed with prejudice, and it is agreed by the Parties that that Action shall be settled and dismissed with prejudice, all without costs as to the Plaintiff, the Settlement Class or the Defendant, subject to the approval of the Court, on the following terms and conditions:

SECTION 1 – DEFINITIONS

For the purposes of this Settlement Agreement, including the Recitals hereto:

- 1) **“Action”** means the Ottawa action styled *Heyde v. Theberge Developments Limited*, commenced in the Court bearing Court File No. 15-64526CP;
- 2) **“Administration Expenses”** means all fees, disbursements, expenses, costs, taxes and any other amounts incurred or payable by the Plaintiff, Class Counsel or otherwise for the approval, implementation and administration of this Settlement, and any other costs associated with notice and/or claims administration and notice of settlement approval hearing and, where the settlement is approved, notice of settlement approval, but excluding Class Counsel Fees and Class Counsel Disbursements;
- 3) **“Class”** and **“Class Members”** mean any person

- a. who were either, an original purchaser or who received a transfer or assignment of an original purchaser's interest before closing who purchased a condominium unit or units from the Defendant at Alta Vista Ridge;
 - b. received a disclosure statement containing the specification for a standard unit in Schedule "2" which included forced air heating/cooling; and
 - c. whose agreement of purchase and sale does not include a paragraph fifteen (15) (inserted on about February 15, 2015) stating that "The purchaser acknowledges that the water heater and HVAC System in the dwelling may be a rental unit ...";
- 4) **"Class Counsel"** means KMH Lawyers;
 - 5) **"Class Counsel Disbursements"** means the disbursements and applicable taxes incurred by Class Counsel and the Plaintiff in the prosecution of the Action;
 - 6) **"Class Counsel Fees"** means the fees of Class Counsel, and any applicable taxes or charges thereon;
 - 7) **"Court"** means the Ontario Superior Court of Justice;
 - 8) **"CPA"** means *Class Proceedings Act, 1992*, S.O. 1992, c.6, as amended;
 - 9) **"CPF"** means the Class Proceedings Fund created pursuant to Section 59.1 of the *Law Society Act* and administered by the Class Proceedings Committee of the Law Foundation of Ontario;
 - 10) **"CPF Levy"** means a levy from the Settlement Amount equal to the amount of financial support paid to the Plaintiff by the CPF plus 10% Net Settlement Proceeds to which the CPF is entitled pursuant to Ontario Regulation 771/92 after it approved the Plaintiff for financial support in 2016;

- 11) **“Effective Date”** means the date when the Court’s Order approving this Settlement Agreement becomes a Final Order;
- 12) **“Execution Date”** means the date on which the last of the Parties signs this Settlement Agreement;
- 13) **“Fees and Disbursement Approval Date”** means the date when the Order approving the Class Counsel Fees and Class Counsel Disbursements becomes a Final Order;
- 14) **“Final Order”** means the later of: (a) the date of a final judgment entered by the Court, the time to appeal such judgment having expired without any appeal being taken, if an appeal lies, and (b) the disposition of all appeals taken;
- 15) **“First Subclass”** means Class Members who purchased a unit or units in Condominium Corporation 958 (Urban Flats) whose agreement of purchase and sale included a storage locker as part of the base price;
- 16) **“Net Settlement Proceeds”** means the Settlement Amount less Class Counsel Fees, Class Counsel Disbursements and Administration Expenses;
- 17) **“Notice”** means the form of notice approved by the Court, which inform(s) the Class Members of:
- a. the principal elements of the Settlement;
 - b. the date and location of the Settlement Approval Motion;
 - c. Class Counsel Fees and Class Counsel Disbursements to be requested by Class Counsel; and
 - d. the process to object to the Settlement should any Class Member wish to do so.
- 18) **“Notice Approval Motion”** means the motion for an Order of the Court:

- a. approving the form, content and manner of distribution of the settlement approval hearing notice; and
 - b. such other relief as the Parties may request.
- 19) **“Parties”** means the Plaintiff and the Defendant, each being a party to this Settlement Agreement;
- 20) **“Purchasers’ Lawyers”** means the law firms and lawyers who provided independent legal advice to the Plaintiff and the Settlement Class named as defendants in the Related Action in connection with the purchase of Alta Vista Ridge units, being Kelly Manthorp Heaphy Professional Corporation and John Doe 1-100 (but specifically excludes Andre Munroe and Kelly Santini LLP);
- 21) **“Related Action”** means the Ottawa action styled *Theberge Developments Limited v. Kelly Santini LLP et al.* commenced in the Court bearing Court File No. 17-72825;
- 22) **“Released Claims”** means any and all manner of claims, demands, actions, suits, causes of action, whether class, individual, representative or otherwise in nature, whether personal or subrogated, damages of any kind (including compensatory, punitive or other damages) whenever incurred, liabilities of any nature whatsoever, including interest, costs, expenses, class administration expenses, penalties, and lawyers fees (including Class Counsel Fees and Class Counsel Disbursements), known or unknown, suspected or unsuspected, foreseen or unforeseen, actual or contingent, and liquidated or unliquidated, in law, under statute or in equity, that the Releasers, or any of them, whether directly, indirectly, derivatively, or in any other capacity, ever had, now have or hereafter can, shall or may have, relating in any way to any conduct occurring anywhere, from the beginning of time to the date hereof relating to any conduct alleged (or which could have been alleged) in the Action and the

Related Action as against the Purchasers' Lawyers only, including, without limitation, any such claims which have been asserted, would have been asserted, or could have been asserted, directly or indirectly, whether in Canada or elsewhere, as a result of or in connection with, related to, or arising from, any conduct described in the Action and Related Action on account of, arising out of, resulting from, Alta Vista Ridge;

23) **"Releasees"** means:

- a. when the release is granted by the Plaintiff and the Settlement Class: jointly and severally, individually and collectively, the Defendant and its respective present and former, direct and indirect, parents, subsidiaries, divisions, affiliates, partners, principals, insurers, and all other person, partnerships or corporations with whom any of the former have been, or are now, affiliated, and all of their respective past, present, and future officers, directors, employees, stockholders, shareholders, agents, lawyers, trustees, servants and representatives; and the predecessors, successors, purchasers, heirs, executors, administrators, trustees and assigns of each of the foregoing (relating to the Action);
- b. when the release is granted by the Defendant: the Purchasers' Lawyers and their respective successors, heirs, executors, administrators, trustees and assigns (relating to the Action);

24) **"Releasers"** means, jointly and severally, individually and collectively, the parties granting a release or releases to one or more of the Releasees, including their respective successors, heirs, executors, administrators, trustees and assigns;

25) **"Second Subclass"** means Class Members who signed an Acknowledgement prior to close of sale;

- 26) **“Settlement”** means the settlement provided for in this Settlement Agreement;
- 27) **“Settlement Agreement”** means this agreement, including the Recitals hereto;
- 28) **“Settlement Amount”** means the all-inclusive sum of CAD\$405,224.04 to be paid in full and final settlement of any and all claims against the Defendant, inclusive of Net Settlement Proceeds, Class Counsel Fees, Class Counsel Disbursements, CPF Levy, any honorarium payable to the Plaintiff and Administration Expenses;
- 29) **“Settlement Approval Motion”** means the motion for an Order of the Court:
- a. approving the Settlement;
 - b. approving the manner of distribution of the Net Settlement Proceeds;
 - c. dismissing the Action with prejudice and without costs; and
 - d. such other relief as the Parties may request.
- 30) **“Settlement Class”** means the Class Members except any person who validly opts out of this Action.

SECTION 2 – PAYMENTS

2.1 The Settlement Amount

- 1) Subject to and following the Final Order approving the Settlement, the Settlement Amount shall be distributed in accordance with section 6 of this Settlement Agreement.
- 2) The Settlement Amount shall be the total amount payable by the Defendant in relation to the Action and shall be all-inclusive of Class Counsel Fees, Class Counsel Disbursements, CPF Levy, costs and interests of and relating to the Action, any honorarium payable to the Plaintiff and the Administration Expenses.

2.2 No Further Payments

- 1) The Settlement Amount shall be paid by the Defendant in full satisfaction of the Released Claims against the Releasees.
- 2) The Plaintiff, the Class Members, the Purchasers' Lawyers and Class Counsel, including their heirs, executors, predecessors, successors, assigns and agents, have no obligation to pay anything to the Defendant or any of the Releasees in relation to this Settlement Agreement or the Action.

SECTION 3 –NOTICE APPROVAL MOTION

3.1 Materials

- 1) As soon as reasonably practicable, Class Counsel will bring the Notice Approval Motion.
- 2) As part of the Notice Approval Motion, the Plaintiff shall seek an Order that the Defendant disclose the identities of the two Class Members who have settled their claims related to the First Subclass out of the of the list of sixty-one purchasers provided by the Defendant on February 26, 2021. The Defendant shall consent or take no position on this Order.

3.2 Where Consent Required

- 1) The Defendant shall consent to the Notice Approval Motion for the purposes of implementing the Settlement and the Defendant's consent should not be taken as an admission of liability or damages.
- 2) If this Settlement is not approved by the Court or it is terminated in accordance with its terms, the Parties shall consent to an Order of the Court vacating and setting aside any relief granted by the Court by way of the Notice Approval Motion.

3.3 Costs

- 1) Each Party shall bear its own costs of the Notice Approval Motion.

SECTION 4 – NOTICE OF PROPOSED CLASS ACTION SETTLEMENT APPROVAL HEARING

4.1 Mode of Dissemination

- 1) Once approved, the Notice shall be disseminated as follows:
 - a. Direct notice shall be provided by the Plaintiff by means through which is conventionally communicates with each Class Member, whether by direct e-mail or postal mail;
 - b. Class Counsel may cause to be issued a press release containing the content of the Notice; and
 - c. Class Counsel may post the Notice to their firm’s accounts on Twitter, Facebook and other such channels, in addition to their firm’s website.
- 2) Class Counsel shall provide a copy of the Notice to any person that has contacted them in respect of the Action.

SECTION 5 – SETTLEMENT APPROVAL HEARING

5.1 The Settlement Approval Motion

- 1) As soon as reasonably practicable after the Notice Approval Motion, Class Counsel shall bring the Settlement Approval Motion.

5.2 Where Consent Required

- 1) The Defendant shall consent to the Settlement Approval Motion concerning the Court’s Approval of the Settlement and the distribution of the Net Settlement Proceeds, except, for clarity any aspect of the Settlement Approval Motion that concerns Class Counsel Fees, Class

Counsel Disbursements, CPF Levy, any honorarium payable to the Plaintiff and Administration Expenses, on which the Defendant shall take no position.

5.3 Form of Order

- 1) The Order approving this Settlement Agreement shall be in such form or manner as agreed to by the Parties and approved by the Court.

5.4 Date Upon Which Settlement is Final

- 1) This Settlement shall become final on the Effective Date.

5.5 Dismissal of Claims

- 1) Contemporaneously with the Settlement Approval Motion, Class Counsel shall bring a motion for an order dismissing the following matters with prejudice and without costs:
 - a. the Action; and
 - b. the Related Action as against the Purchasers' Lawyers only.

5.6 Pre-Motion Confidentiality

- 1) Until the Notice Approval Motion is brought, the Parties shall keep all of the terms of the Settlement Agreement confidential and shall not disclose them without the prior written consent of the Parties, except as required for the purposes of financial reporting, communications regarding insurers, legal representatives in related proceedings, and/or the preparation of financial records (including tax returns and financial statements) as necessary to give effect to its terms, or as otherwise required by law.

5.7 Costs

- 1) Each Party shall bear their own costs of the Settlement Approval Motion and any other motion, if necessary, contemplated in this section.

SECTION 6 – DISTRIBUTION OF NET SETTLEMENT PROCEEDS

6.1 Class Counsel’s Fees and Disbursements

- 1) Class Counsel shall bring a motion for approval of the Class Counsel Fees and the Class Counsel Disbursements contemporaneously with or immediately following the Settlement Approval Motion. Within 30 days of the later of the Effective Date or the Fee and Disbursement Approval date, the Defendant shall pay the Class Counsel Fees and the Class Counsel Disbursements to KMH lawyers, in trust for the following amounts:
 - a. \$125,000 all inclusive for Class Counsel Fees and taxes;
 - b. \$25,224.04 all inclusive for Class Counsel Disbursements that have been paid by the Plaintiff personally in the amount of \$15,469.84 and the Class Proceedings Fund in the amount of \$9,754.20; and
 - c. \$25,000 all inclusive for the CPF Levy consisting of \$15,000 for amounts allocated to the Class and \$10,000 for amounts allocated to the First Subclass.
- 2) Class Counsel shall provide to the Defendant verification for all Class Counsel Disbursements at least seven days (7) prior to the Settlement Approval Motion.
- 3) Class Counsel will seek the Court’s approval for an honorarium to be paid to the Plaintiff in the amount of \$5,000 on a *quantum meruit* basis for the contribution she has made in the prosecution of this Action for the benefit of the Class.
- 4) The Class Counsel Fees and the Class Counsel Disbursements shall be deemed to be incurred equally between the issues related to the Class and the First Subclass.

6.2 Claims and Claimants

- 1) Members of the Settlement Class shall be eligible for the relief provided in this Settlement Agreement.

- 2) Each member of the Settlement Class shall be a **“Claimant”** for the purposes of receiving compensation from the Net Settlement Proceeds.

6.3 Calculation of Compensation

- 1) Repayment to the CPF including the CPF Levy shall be paid prior to payment to the Settlement Class.
- 2) The Net Settlement Proceeds shall be divided and distributed equally amongst the members of the Settlement Class as follows:

Category	Amount to be Distributed	Number of Class Members
Class	\$150,000 all inclusive, less the CPF Levy	114
First Subclass	\$100,000 all inclusive, less the CPF Levy	60
Honorarium	\$5,000 all inclusive	Paid to the Plaintiff

Distribution of Net Settlement Proceeds

- 3) The Net Settlement Proceeds shall be distributed amongst the Claimants in the following manner:
- i. Class Counsel shall provide the names and addresses of the Settlement Class, along with the exact quantum to be paid to each Settlement Class member, to the Defendant prior to the Settlement Approval Motion.
 - ii. The Defendant shall provide to Class Counsel the letter and cheques, without postage, addressed to the Settlement Class within forty-five (45) days after the Effective Date for distribution to the Settlement Class.

- iii. Settlement cheques that are not deliverable to the Claimants or which are not cashed by a Claimant within six (6) months of issuance will become stale-dated, ineligible for redemption, and shall not be reissued.

6.4 Cy-Près Distribution

- 1) Within five (5) months of the date of the Settlement Class' cheques under section 6.3, the Defendant shall notify Class Counsel of any amounts remaining in the Net Settlement Proceeds (the "**Cy-Près Amount**") and, to the extent possible, provide the names of the Settlement Class members that did not cash their cheques.
- 2) Class Counsel shall then have one (1) months from the date that the Defendant notified Class Counsel as set out in subparagraph 1) of this section, to again contact a Claimant to cash a settlement cheque.
- 3) Any funds remaining after distribution of the Net Settlement Proceeds, whether as a result of failure to locate any Claimants, or as a result of stale-dated cheques, the *Cy-Près* Amount shall be distributed to the charity "Their Opportunity" by the Defendant or such other organization as the Court may order. Within thirty (30) days of payment to "Their Opportunity", the Defendant shall provide to Class Counsel proof of the charitable contribution in the form of an official receipt from the charity.

SECTION 7 – STEPS TO EFFECTUATE SETTLEMENT AGREEMENT

7.1 Reasonable Efforts

- 1) The Parties shall take all reasonable steps to effectuate this Settlement Agreement and to secure its approval and the prompt, complete and final dismissal with prejudice of the Action on a without costs basis as against the Defendant, including cooperating with the Plaintiff's efforts

to obtain the approval and the Orders required from the Court and the implementation of this Settlement Agreement.

- 2) Each Party shall bear its own costs in relation to any steps contemplated in or taken in accordance with this section.

7.2 Action in Abeyance

- 1) Until the Parties have obtained the Final Order approving the Settlement or this Settlement Agreement is terminated in accordance with its terms, whichever occurs first, the Parties agree to hold in abeyance all other steps in the Action other than the Notice Approval Motion and the Settlement Approval Motion contemplated by this Settlement Agreement and such other matters required to implement the terms of this Settlement Agreement, unless otherwise agreed to in writing by the Parties.

SECTION 8 – RELEASES AND DISMISSALS

8.1 Release of the Releasees

- 1) Upon the Effective Date, and in consideration of payment of the Settlement Amount and for other valuable consideration set forth in this Settlement Agreement, the Releasers forever and absolutely release, relinquish and forever discharge the Releasees from the Released Claims that any of them, whether directly, indirectly, derivatively, or in any other capacity, ever had, now have, or hereafter can, shall, or may have.
- 2) The Plaintiff, the Settlement Class and the Defendant acknowledge that they may hereafter discover facts in addition to, or different from, those facts which they know or believe to be true regarding the subject matter of the Settlement Agreement, and it is their intention to release fully, finally and forever all Released Claims and, in furtherance of such intention, this release

shall be and remain in effect notwithstanding the discovery or existence of new or different facts.

- 3) Except as provided herein, this Settlement Agreement does not settle, compromise, release or limit in any way whatsoever any claim by the Settlement Class or the Defendant against any person other than the Releasees.

8.2 No Further Claims

- 1) Upon the Effective Date, the Releasors shall not now or hereafter institute, continue, maintain, intervene in or assert, either directly or indirectly, whether in Ontario or elsewhere, on his or her own behalf or on behalf of any class or any other person, any proceeding, cause of action, claim or demand against the Releasees, or any other person who may claim contribution or indemnity, or other claims over, relief from the Releasees, whether pursuant to statute or at common law or equity in respect of any Released Claim, except for the Defendant's claims against its insurers and those claims in the Related Action other than claims asserted against the Purchasers' Lawyers. For greater certainty and without limiting the generality of the foregoing, the Releasors shall not assert or pursue a Released Claim, against any Releasee under the laws of any foreign jurisdiction.
- 2) The Defendant undertakes not to join or add any Class Members to the Related Action.
- 3) As of the date of this Settlement Agreement, Class Counsel do not and will not represent plaintiffs in any other proceeding related to any matter raised or which could have been raised in the Action.
- 4) Upon the Effective Date, each member of the Settlement Class shall be deemed to irrevocably consent to the dismissal, without costs, with prejudice and without reservation, of their Action against the Releasees.

- 5) Except as provided in section 8.1 1), this Settlement Agreement does not settle, compromise, release or limit in any way whatsoever any claim by Settlement Class Members or the Defendant against any person other than the Releasees.

8.3 Material Term

- 1) Without in any way limiting the ability of the Parties to assert that other terms in this Settlement Agreement are material terms, the releases and reservation of rights contemplated in this section shall be considered a “**Material Term**” of the Settlement Agreement and the failure of the Court to approve the releases and/or reservation of rights contemplated herein shall give rise to a right of termination pursuant to Section 10.1 of the Settlement Agreement.

SECTION 9 – EFFECT OF SETTLEMENT

9.1 No Admission of Liability or Concessions

- 1) The Plaintiff and the Defendant expressly reserve all of their rights if the Settlement is not approved, is terminated or otherwise fails to take effect for any reason.
- 2) This Settlement Agreement, whether or not it is implemented, anything contained in it, any and all negotiations, discussions, documents, and communications associated with this Settlement Agreement, and any action taken to implement this Settlement Agreement, shall not be deemed, construed, or interpreted to be:
 - a. an admission or concession by the Defendant of any fact, fault, omission, wrongdoing or liability, or the truth of any of the claims or allegations made or which could have been made against it in the Action, or the application of the applicable laws to any of the claims made in the Action or Related Action; or
 - b. an admission or concession by the Plaintiff, Class Counsel or the Class of any weakness in the claims of the Plaintiff and the Class, or that the consideration to be

given hereunder represents the amount that could or would have been recovered from the Defendant after the trial of the Action or Related Action.

9.2 Agreement Not Evidence or Presumption

- 1) This Settlement Agreement, whether or not it is implemented, and anything contained herein, and any and all negotiations, discussions, documents, communications, and proceedings associated with this Settlement Agreement, shall not be referred to, offered as evidence or received in evidence in any pending or future civil, quasi-criminal, criminal or administrative action or disciplinary investigation or proceeding in any jurisdiction as evidence, a presumption, concession, or admission of anything save as set out in section 9.1 2).
- 2) Notwithstanding section 9.2 1), this Settlement Agreement may be referred to or offered as evidence in order to obtain the Orders or directions from the Court contemplated by this Settlement Agreement, in a proceeding to approve and/or enforce this Settlement Agreement, to defend against the assertion of Released Claims, as may be necessary, or as otherwise required by law.

SECTION 10 – TERMINATION

10.1 Right of Termination

- 1) In the event that:
 - a. the Court declines to approve this Settlement Agreement or any material part hereof;
 - b. the Court issues an Order approving this Settlement Agreement that is materially inconsistent with the terms of the Settlement Agreement; or
 - c. the Order approving this Settlement Agreement is reversed on appeal and the reversal becomes a Final Order;

the Plaintiff and Defendant shall each have the right to terminate this Settlement Agreement by delivering a written notice within thirty (30) days following an event described above, subject to the Parties using best efforts and good faith to attempt to resolve any issues in furtherance of resolution of the Action on such modified terms as may be required to obtain Court approval.

- 2) In addition, if the Settlement Amount is not paid in accordance with Section 2.1 1), the Plaintiff shall have the right to terminate this Settlement Agreement by delivering a written notice.
- 3) Any Order, ruling or determination made or rejected by the Court with respect to Class Counsel Fees, Class Counsel Disbursements, CPF Levy, any honorarium payable to the Plaintiff, or Administration Expenses shall not be deemed to be a material modification of all, or a part, of this Settlement Agreement and shall not provide a basis for the termination of this Settlement Agreement.
- 4) Except as provided for in subsection 10.4 2), if the Plaintiff or the Defendant exercises the right to terminate, the Settlement Agreement shall be null and void and have no further force or effect, and shall not be binding on the Parties, and shall not be used as evidence or otherwise in any litigation or in any other way for any reason.

10.2 Steps Required on Termination

- 1) If this Settlement Agreement is terminated after the Court has heard or decided one or more of the motions contemplated herein, either the Defendant or the Plaintiff shall, as soon as reasonably practicable after termination, on notice to the other Party, bring a motion to the Court for an Order:
 - a. declaring this Settlement Agreement null and void and of no force or effect except for the provisions of those sections listed in subsection 10.4(2); and

- b. setting aside and declaring null and void and of no force or effect, *nunc pro tunc*, all prior Orders or judgments entered by the Court in accordance with the terms of this Settlement Agreement.
- 2) Subject to subsection 10.4 2), the Parties shall consent to the Order(s) sought in any motion made under subsection 10.2.

10.3 Notice of Termination

- 1) If this Settlement Agreement is terminated, a notice of the termination will be given to the Class in the form and content to be agreed upon by the Parties or ordered by the Court.
- 2) The notice of termination, if necessary, shall be disseminated in a manner agreed upon by the Parties or ordered by the Court.

10.4 Effect of Termination

- 1) In the event this Settlement Agreement is terminated in accordance with its terms:
- a. the Parties will be restored to their respective positions prior to the execution of this Settlement Agreement, except as expressly provided for herein;
 - b. this Settlement Agreement will have no further force or effect and no effect on the rights of the Parties except as specifically provided for herein;
 - c. all statutes of limitation applicable to the claims asserted in the Action shall be deemed to have been tolled during the period beginning with the execution of this Settlement Agreement and ending with the day on which the Orders contemplated by subsection 10.2 are entered; and
 - d. this Settlement Agreement will not be introduced into evidence or otherwise referred to in any litigation against the Defendant.

- 2) Notwithstanding the provisions of subsection 10.2, if this Settlement Agreement is terminated, the provisions of Sections 10.1 2), 10.1 3), 10.1 4), 10.2, 10.3, 10.4, 10.5, 10.6, 11.1, 11.2, 11.3, 11.4, 11.5, 11.6, 11.7, 11.10, 11.12, 11.15, 11.17, and the definitions applicable thereto (but only for the limited purpose of the interpretation of those sections), shall survive termination and shall continue in full force and effect. All other provisions of this Settlement Agreement and all other obligations pursuant to this Settlement Agreement shall cease immediately.

10.5 Disputes Relating to Termination

- 1) If there is a dispute about the termination of this Settlement Agreement, the Parties agree that the Court shall determine the dispute on a motion made by a Party on notice to the other Party.

10.6 Handling of Confidential Information in the event of Termination

- 1) In the event of termination, it is understood and agreed that all documents and information exchanged by the parties in order to reach the Settlement are and remain subject to settlement privilege, except to the extent that the documents or information were, are or become publicly available.
- 2) In the event of termination, within thirty (30) days of such termination having occurred, Class Counsel shall destroy all documents or other materials provided by the Defendant or containing or reflecting information derived from such documents for the purposes of reaching and implementing this Settlement. Class Counsel shall provide counsel for the Defendant with a written certification by Class Counsel of such destruction. Nothing contained in this section shall be construed as requiring Class Counsel to destroy any of their work product. However, any documents or information provided by the Defendant in connection with this Settlement Agreement may not be disclosed to any person in any manner, or used, directly or indirectly,

by Class Counsel or any other person in any way for any reason, without the express prior written permission of the Defendant. Class Counsel shall take reasonable steps and precautions to ensure and maintain the confidentiality of such documents, information and any work product of Class Counsel that discloses such documents and information.

SECTION 11 – MISCELLANEOUS

11.1 Motions for Directions

- 1) Any of the Parties may apply to the Court for directions in respect of the interpretation, implementation and administration of this Settlement Agreement.
- 2) All motions contemplated by this Settlement Agreement shall be on notice to the Parties.

11.2 Headings, etc.

- 1) In this Settlement Agreement:
 - a. the division into sections and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation of this Settlement Agreement;
 - b. the terms “this Settlement Agreement”, “the Settlement Agreement”, “hereof”, “hereunder”, “herein”, “hereto”, and similar expressions refer to this Settlement Agreement and not to any particular section or other portion of this Settlement Agreement; and
 - c. “person” means any legal entity including, but not limited to, individuals, corporations, sole proprietorships, general or limited partnerships, limited liability partnerships or limited liability companies.

11.3 Computation of Time

- 1) In the computation of time in this Settlement Agreement, except where a contrary intention appears:
 - a. where there is a reference to a number of days between two events, the number of days shall be counted by excluding the day on which the first event happens and including the day on which the second event happens, including all calendar days; and
 - b. only in the case where the time for doing an act expires on a holiday, as holiday is defined in the *Rules of Civil Procedure*, RRO 1990, Reg 194, the act may be done on the next day that is not a holiday.

11.4 Ongoing Jurisdiction

- 1) The Court shall exercise jurisdiction with respect to implementation, administration, interpretation and enforcement of the terms of this Settlement Agreement.

11.5 Governing Law

- 1) This Settlement Agreement shall be governed by and construed and interpreted in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein.

11.6 Severability

- 1) Subject to section 11.6 2), any provision hereof that is held to be inoperative, unenforceable or invalid in any jurisdiction shall be severable from the remaining provisions which shall continue to be valid and enforceable to the fullest extent permitted by law.
- 2) The following terms are not severable:
 - a. Material Terms; and
 - b. Any term giving rise to a right of termination as set out in section 10.1.

11.7 Entire Agreement

- 1) This Settlement Agreement constitutes the entire agreement among the Parties, and supersedes all prior and contemporaneous understandings, undertakings, negotiations, representations, promises, agreements, agreements in principle and memoranda of understanding in connection herewith. None of the Parties will be bound by any prior obligations, conditions or representations with respect to the subject matter of this Settlement Agreement, unless expressly incorporated herein.

11.8 Amendments

- 1) This Settlement Agreement may not be modified or amended except in writing and on consent of all Parties hereto, and any such modification or amendment after settlement approval must be approved by the Court.

11.9 Binding Effect

- 1) If the Settlement is approved by the Court and becomes final, this Settlement Agreement shall be binding upon, and enure to the benefit of, the Plaintiff, the Settlement Class members, the Purchasers' Lawyers, the Defendant, the Releasees and the Releasors or any of them, and all of their respective heirs, executors, predecessors, successors and assigns.

11.10 Counterpart

- 1) This Settlement Agreement may be executed in counterparts, all of which taken together will be deemed to constitute one and the same agreement, and a facsimile or electronic signature shall be deemed an original signature for purposes of executing this Settlement Agreement.

11.11 Survival

- 1) The representations and warranties contained in this Settlement Agreement shall survive its execution and implementation.

11.12 Negotiated Agreement

- 1) This Settlement Agreement and the underlying Settlement have been the subject of arm's-length negotiations and discussions among the undersigned and counsel. Each of the Parties has been represented and advised by competent counsel, so that any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafter of this Settlement Agreement shall have no force and effect. The Parties further agree that the language contained in or not contained in previous drafts of this Settlement Agreement, or any agreement in principle, shall have no bearing upon the proper interpretation of this Settlement Agreement.

11.13 Language

- 1) The Parties acknowledge that they have required and consented that this Settlement Agreement and all related documents be prepared in English. Nevertheless, if required to by the Court, Class Counsel and/or a translation firm selected by Class Counsel shall prepare a French translation of the Settlement Agreement, the cost of which shall be an Administration Expense. In the event of any dispute as to the interpretation or application of this Settlement Agreement, only the English version shall govern.

11.14 Recitals

- 1) The recitals to this Settlement Agreement are true, constitute material and integral parts hereof and are fully incorporated into, and form part of, this Settlement Agreement.

11.15 Acknowledgements

- 1) Each Party hereby affirms and acknowledges that:
 - a. they or a representative of the Party with the authority to bind the Party with respect to the matters set forth herein has reviewed this Settlement Agreement;

- b. the terms of this Settlement Agreement and the effects thereof have been fully explained to them or the Party's representative by their counsel;
- c. they or the Party's representative fully understands each term of the Settlement Agreement and its effect; and
- d. no Party has relied upon any statement, representation or inducement (whether material, false, negligently made or otherwise) of any other Party, beyond the terms of the Settlement Agreement, with respect to the first Party's decision to execute this Settlement Agreement.

11.16 Authorized Signatures

- 1) Each of the undersigned represents that they are fully authorized to enter into the terms and conditions of, and to execute, this Settlement Agreement on behalf of the Parties identified above their respective signatures and their law firms.

11.17 Notice

- 1) Any notice, instruction, motion for court approval or motion for directions or court Orders sought in connection with this Settlement Agreement or any other report or document to be given by any Party to any other Party shall be in writing and delivered by email, facsimile or letter by overnight delivery to:

For the Plaintiff, the Class and Class Counsel in the Proceeding:

KMH Lawyers

B0001-2323 Riverside Drive
Ottawa, ON
K1H 8L5

Miriam Vale Peters
Tel: 613-733-3000
Fax: 613-523-2924
E-Mail: mvp@kmhlawyers.ca

E-Mail: mvp@kmhlawyers.ca

For the Defendant:

Spiteri & Ursulak LLP
1010-140 Laurier Avenue West
Ottawa, ON
K1P 5J3

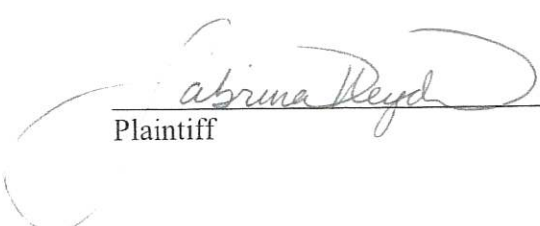
Norman Mizobuchi
Tel: 613-563-1010
Fax: 613-563-1011
E-mail: nm@sulaw.ca

IN WITNESS OF WHICH the Settling Parties have executed this Settlement Agreement.

Sabrina Heyde on her own behalf and on behalf of the Class

Name of Authorized Signatory: Sabrina Heyde


Signature of Authorized Signatory:


Plaintiff

Theberge Developments Limited

Name of Authorized Signatory: Joey Theberge

Signature of Authorized Signatory:


President, Theberge
Developments Limited