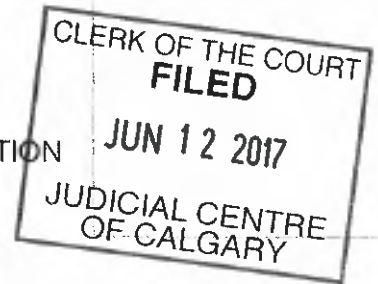


COURT FILE NUMBER 1401-12431
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY
APPLICANT ACCESS MORTGAGE CORPORATION (2004) LIMITED
RESPONDENT ARRES CAPITAL INC.

Clerk's Stamp



DOCUMENT AFFIDAVIT OF DAVID MURPHY

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT
Cassels Brock & Blackwell LLP
Suite 1250 Millennium Tower,
440 – 2nd Avenue SW,
Calgary, Alberta, T2P 5E9
Telephone 403-351-2921
Facsimile 403-648-1151

Attention: Jeffrey Oliver

AFFIDAVIT OF DAVID MURPHY

Sworn June 12, 2017

I, DAVID MURPHY, of the City of Calgary, in the Province of Alberta, SWEAR AND SAY THAT:

1. I am a director and officer of the Applicant, Access Mortgage Corporation (2004) Limited ("**Access**") and, as such, have personal knowledge of the matters hereinafter deposed to. Where I do not have personal knowledge of the matters set out herein, I have stated the source of my information and, in all such cases, believe it to be true.

Parties

2. Access is a mortgage investment corporation and is engaged in the business of mortgage lending.
3. Arres Capital Inc. ("**Arres**") was a mortgage brokerage firm and acted as a manager and trustee for investors in various mortgages issued by Arres. Access was an investor in numerous mortgages advanced by Arres to third party borrowers.

Management Agreement

4. On or about August 1, 2004, Access and Arres entered into an agreement (the "**Management Agreement**") whereby Arres would provide Access with brokerage and management services in respect of mortgage loans by Access to third parties (the "**Access Mortgage Loans**"). The Management Agreement provided that Arres would manage and administer the Access Mortgage Loans for and on behalf of Access. Attached hereto and marked as **Exhibit "A"** is a copy of the Management Agreement.
5. Pursuant to the Management Agreement, in exchange for Arres' management services, Arres would be paid a management fee ("**Management Fee**") equal to one third of the net income earned by Access in each fiscal year as calculated pursuant to a formula set out in the Management Agreement ("**Net Income**").
6. The Management Fee was advanced in monthly instalments, in such amounts as approved by Access' Board of Directors. At the end of each fiscal year, the actual Management Fee owing to or from Arres for the preceding fiscal year would be reconciled with the aggregate amount of advances actually paid to Arres by Access.

Access Overpays the Management Fees Owed to Arres

7. From April of 2008 to March of 2009 ("**2009 Fiscal Year**"), Access had advanced and Arres had received instalments totalling \$1,028,879.99.
8. A reconciliation of the Management Fee for the 2009 Fiscal Year revealed that Access had not earned any Net Income. Accordingly, pursuant to the Management Agreement, Arres was not entitled to a Management Fee for the 2009 Fiscal Year.
9. Although Access made a demand for repayment of the \$1,028,879.99 advanced to Arres for the 2009 Fiscal Year, Arres failed to repay that amount.

Summary Judgment Order

10. On March 11, 2011, Access filed a statement of claim in Court of Queen's Bench of Alberta Court File Number 1101-03481 against Arres seeking \$1,028,879.99 in damages for Access' overpayment of brokerage and management service fees to Arres (the "**Debt Action**"). Attached hereto and marked as **Exhibit "B"** is a copy of the statement of claim in the Debt Action.
11. On May 24, 2013, Access was granted summary judgment against Arres in the sum of \$1,028,879.99, less any amounts that had been paid by Arres to Access ("**Summary Judgment Order**"). A copy of the Summary Judgment Order is attached hereto and marked as **Exhibit "C"**.
12. On July 8, 2013, Arres appealed the Summary Judgment Order to the Court of Appeal of Alberta.

13. On September 29, 2014, the Court of Appeal of Alberta dismissed Arres' appeal of the Summary Judgment Order.

Arres' Meritless Counterclaim

14. On May 29, 2014, over a year after the Summary Judgment Order was granted, Arres sought leave to file a counterclaim against Access for \$4.7 million in unpaid fees under certain loan administration and trust agreements between Arres and Access. Arres' motion was denied by the Court of Queen's Bench of Alberta on September 25, 2014 by Master Robertson. Attached hereto and marked as **Exhibit "D"** is a copy of Arres' proposed counterclaim.
15. Despite the fact that Arres' motion for leave to file a counterclaim was denied, on December 23, 2014, Arres filed an action against Access for the relief sought in the counterclaim (the "**Arres Counterclaim Action**"). Arres also increased its damages claim to \$5.6 million, approximately \$900,000 more than the \$4.7 million it had claimed in its failed counterclaim in the Debt Action. It is also \$3.8 million more than the \$1.8 million Arres alleged was owed to it by Access in July 2013. Attached hereto and marked as **Exhibit "E"** is a copy of Arres' statement of claim in the Arres Counterclaim.
16. On January 16, 2015, Access brought a motion to dismiss the Arres Counterclaim Action.
17. As further discussed below, the parties contemplated staying the Arres Counterclaim Action in connection with an order appointing a receiver over Arres. However, no such stay was ordered and Arres has failed to take any further steps in the Arres Counterclaim Action.

Arres Has Failed to Pay the Summary Judgment Order

18. Access attempted to enforce the Summary Judgment Order against Arres without success. Although Access seized property purportedly owned by Arres at Arres' office, Arres has filed a notice of objection to such seizure claiming that the seized property does not belong to Arres. The property remains under seizure on a bailee's undertaking. Attached hereto and marked as **Exhibit "F"** is a copy of the Personal Property Registry Search Results for Arres as of June 5, 2017.
19. Access also attempted to garnish Arres' bank account with the Bank of Montreal and the trust accounts of Arres' solicitors without any success.
20. On October 20, 2014, Arres served counsel for Access with a Form 14 - Statutory Declaration – Financial Statement of Debtor (the "**Statutory Declaration**") indicating that Arres has no assets other than approximately \$9.7 million in purported accounts receivable (the "**Purported Accounts Receivable**"). Attached hereto and marked as **Exhibit "G"** is a copy of the statutory declaration.

21. According to Arres, the Purported Accounts Receivable arise from amounts allegedly owed to Arres pursuant to trust agreements or mortgage administration agreements between Arres and various investors.
22. The Purported Accounts Receivable are in dispute because several of the receivables listed in the Statutory Declaration are the subject of litigation in the Richcrooks Action, Fraudulent Preference Action, and the Accounts Receivable Action described below.
23. Moreover, the Statutory Declaration was inaccurate: Arres did not disclose that it had assigned all but \$65,000 of the \$9.7 million in Purported Accounts Receivable to 875892 Alberta Limited and/or Staci Serra, the principal of 875892 Alberta Limited and the spouse of Arres' principal, Wes Serra.
24. Arres also failed to disclose its claim against 1316405 Alberta Inc. for approximately \$100,000 of unpaid mortgage fees (discussed further below).
25. On October 28, 2014, Arres settled a lawsuit in Court of Queen's Bench of Court File Number 0901-12981 whereby approximately \$50,000 that was paid into court in that action was paid to Access and applied to reduce the amount awarded pursuant to the Summary Judgment Order.
26. Arres has otherwise failed to satisfy the Summary Judgment Order.

Receivership Application

27. As a result of Access' unsuccessful efforts to enforce the Summary Judgment Order against Arres, on November 18, 2014, Access brought an application for the appointment of a receiver over Arres' exigible property pursuant to the *Civil Enforcement Act*, R.S.A. 2000, c. C-15, as amended (the "**Receivership Application**"). Attached hereto and marked as **Exhibit "H"** is a copy of the Receivership Notice of Application.
28. On February 13, 2015, the Honourable Madam Justice Strekaf delivered the reasons of the Court on the Receivership Application (the "**Oral Receivership Order**"). Attached hereto and marked as **Exhibit "I"** is a copy of the February 13, 2015 transcript of Justice Strekaf's reasons for decision.
29. Justice Strekaf directed that a receiver be appointed over Arres' exigible property reasoning that "Arres' behaviour has ... raised some potential concerns about the feasibility and prospect of Access being able to realize on its judgment in the absence of a receiver being appointed."
30. Although Justice Strekaf directed the appointment of a receiver over Arres' exigible property, she directed that Access' counsel draft a form of order that would address the identification of Arres' exigible property and payment of the receiver's costs, and confer with counsel for Arres regarding the form of order. If the parties could not agree on the terms of the order, Justice Strekaf advised the parties they could reattend before Her Honour to address those matters.

31. On or about April 22, 2015, counsel for Access and Arres reattended before Justice Strekaf regarding the form of order. Justice Strekaf provided further directions to the parties with respect to the Oral Receivership Order.
32. Following both the Oral Receivership Order and Justice Strekaf's subsequent directions, the parties exchanged numerous draft forms of order. However, and despite Access' best efforts, the parties were unable to agree on a form of order.
33. During the period between, June 2015 and December 2015, given the failure to arrive at mutual agreement on a satisfactory form of receivership order, Access met with other counsel and insolvency professionals to seek strategic direction.
34. In January and February 2016, the parties considered meeting to discuss settling all litigation between them. No such meeting occurred.
35. In early December, 2016, the parties resumed discussions with respect to the Oral Receivership Order. Access advised that it intended to seek a receiver over Arres under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, and counsel for Arres maintained that this would be an abuse of process in light of the Oral Receivership Order.
36. In early January 2017, former counsel for Access advised counsel for Arres that Access intended to proceed with an application for a bankruptcy order and sought Arres' availability for the same.
37. In or around April 2017, Access retained its current counsel. Only Access, and not Arres, is applying to settle the Oral Receivership Order.
38. In addition to the within application to settle the Oral Receivership Order, Access has also brought an application for a bankruptcy order in respect of Arres. In the event that this Court were to grant a formal order in connection with the Oral Receivership Order, Access would seek a stay of the formal order pending the outcome of the bankruptcy application.

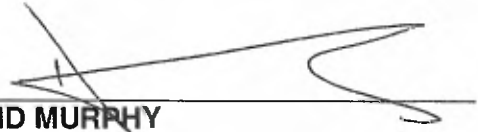
Arres' Assets

39. On May 2, 2017, I was advised by Access' counsel that Arres had reached a settlement in a claim it had made against 1316405 Alberta Inc. in connection with approximately \$100,000 of claimed outstanding mortgage fees. I am further advised by Access' counsel that 1316405 Alberta Inc. agreed to settle this claim and pay Arres \$65,000. I am also advised by Access' counsel that counsel for 1316405 Alberta Inc. is holding those funds in trust pending further order of the Court or agreement between Access and Arres.
40. I make this affidavit in support of an application for a receivership order against Arres.

SWORN BEFORE ME at the City of Calgary, in)
the Province of Alberta, this 12 day of June 2017)



Commissioner for Oaths/Notary Public in and for)
Alberta)



DAVID MURPHY

Richard Comstock
My Commission Expires September 21, 2018

This is **Exhibit "A"**
to the affidavit of **David Murphy** sworn
before me this 12th day of June, 2017

R. Comstock

.....
A Commissioner for Oaths/Notary Public
in and for the Province of Alberta

Richard Comstock
My Commission Expires September 21, 2018

Management Agreement

THIS AGREEMENT is made as of and effective this 1st day of August, 2004

BETWEEN:

ACCESS MORTGAGE CORPORATION (2004) LIMITED,
of 1610, 700 - 4th Avenue SW, Calgary, AB, T2P 3J4,
a body corporate, duly incorporated under the laws of the Province of Alberta

Hereinafter called "Access 2"

- and -

ARRES CAPITAL INC.,
of 150, 839 - 5th Avenue SW, Calgary, Alberta, T2P 3C8,
a body corporate, duly incorporated under the laws of the Province of Alberta

Hereinafter called "Arres"

WHEREAS Access 2 requires the services of a Broker/Manager;

AND WHEREAS Arres, a licensed broker, has agreed to provide brokerage and management services as set out herein;

NOW THEREFORE THIS AGREEMENT WITNESSETH that, in consideration of the mutual promises herein contained, Access 2 and Arres hereby covenant with one another as follows:

1. SERVICES

1.01 Arres agrees to provide the following services:

- a) Advertising for and soliciting mortgages in accordance with Access 2's lending policies as advised from time to time;
- b) Reviewing applications for mortgage loans, obtaining and completing application forms;
- c) Selecting mortgages suitable for funding, providing the borrowers with letters of intent, approval forms and statements of disclosure as appropriate; completing all necessary searches and credit checks; collecting and collating all information and forwarding it for approval to the appropriate Approval Committee;
- d) Upon approval, working with the borrower and the Corporate Solicitor to complete registration and funding of the mortgage as required.

- e) Administration and management of mortgages after funding as required.
(the "Services")

1.02 In performing the Services Arres agrees with Access 2 to:

- 1.02.01 comply with all applicable laws and, where not contrary to law or this Agreement, to provide the Services in a manner consistent with such policies, advice and requests as may in good faith from time to time be advanced by Access 2;
- 1.02.02 exercise integrity, diligence, honesty, fidelity and good faith;
- 1.02.03 exercise such expertise, care and ability as may reasonably be expected having regard to Arres's business and management experience;
- 1.02.04 make full and prompt disclosure to all matters which do or may reasonably be expected to concern, affect or relate to the interests, business opportunities or properties of Access 2.

2. TERM

- 2.01 The term of this agreement shall take effect as and from the date above written.
- 2.02 This agreement shall continue until terminated by either party. Neither party shall terminate the agreement without cause prior to January 1, 2007.
- 2.03 After January 1, 2007, termination of this agreement may be done unilaterally by either party upon giving the other party 1 year's written notice as provided herein.

3. REMUNERATION

- 3.01 Access 2 agrees to pay Arres compensation for the Services in an amount equal to 1/3 of the Balance of Net Income (BNI).
- 3.02 The BNI shall mean:

The income of Access 2 from all sources net of any amount attributable to repayment of principal and net of all expenses
LESS
an amount calculated as "the weighted average CIBC Prime Rate for the fiscal year +2 %" times the share capital in accordance with the audited financial statements averaged over the four quarters of the relevant fiscal year.

3.03 The Remuneration shall be paid in monthly instalments in an amount to be approved by the Board of Directors from time to time having regard to the financial performance of the Corporation with a final adjustment upon receipt by Access 2 of the financial statements for the relevant fiscal year, and in any event no later than June 30th following the end of that fiscal year.

3.05 The terms or method of remuneration may be altered only by written agreement between the parties and shall become effective upon a resolution of the Directors of Access 2.

4. ASSIGNMENT

4.01 Arres shall not assign the benefit of this agreement, or subcontract its obligations under this agreement, without the consent in writing of Access 2.

5. NOTICES

5.01 Any notice, direction or other instrument required or permitted to be given hereunder shall be in writing and shall be delivered personally or sent by registered mail as follows:

ACCESS MORTGAGE CORPORATION (2004) LIMITED
1610, 700 - 4th Avenue SW
Calgary, AB, T2P 3J4

ARRES CAPITAL INC.
150, 839 - 5th Avenue SW
Calgary, AB, T2P 3C8

5.02 Any such notice shall be deemed to have been received on delivery if delivered personally.

5.03 Any notice sent by registered mail shall be deemed to have been received on the 7th business day exclusive of any business days during a postal disruption.

5.04 Either party to this agreement may change its address for notice by giving notice to the other as aforesaid.

6. MISCELLANEOUS

6.01 In this agreement the singular includes the plural and the masculine includes the feminine and the neuter and vice versa unless the context otherwise requires.

6.02 Headings in this Agreement are only for the convenience of reference and do not perform a part of or effect the interpretation of this agreement.

- Cancellation of share purchase

The Corporation had received \$325,000.00 from Rachel Enterprises Ltd. for a potential share purchase in mid-September, 2008. The potential investor had requested a refund and was threatening legal action. The Board decided that the cash should be refunded on the basis that the potential investor never actually became a shareholder.

- Management fee advances

The revised September 30, 2008 financial statements indicated that Arres Capital had been overpaid management fees by \$118,000.00 as these had been calculated using an earlier version of the September statements which did not include the adjustments for impaired loans. These adjustments had reduced earnings because of the elimination of accrued interest income on impaired loans and the creation of a doubtful loan reserve. This in turn resulted in a reduction of the fees payable.

The Board noted that income would likely continue at a lower level than normal for the next few months. And as a result the fees due to Arres would also be substantially below normal. The Board also acknowledged that maintaining the Management services of Arres through this challenging period would be critical to the Corporation's success. As a result it was agreed that it would be necessary to provide financial support to Arres in the event that fees earned in future months fell below \$70,000.00 per month.

It was proposed that the Corporation provide Arres Capital with advances each month equal to the difference between \$70,000 and the actual amount of Management fees payable that month, up to a maximum accumulation of \$100,000 (over and above the \$118,000.00 currently owing). Such advances would be non-interest bearing and unsecured. This issue would be further reviewed at the next Board Meeting. Michael Kurtz moved the motion, seconded by Susan O'Connor; carried unanimously.

- The next Directors' Meeting date would be:

December 11, 2008 - location to be Christopher Saunder's condo office unless otherwise advised.

8. MOTION TO ADJOURN

No further business coming before the meeting, Jack Levy moved, seconded by Susan O'Connor that the Meeting adjourn; carried unanimously.


APPROVED THIS 11th DAY OF December, 2008.

A handwritten signature in dark ink, appearing to be "D. Saunderson", written over a horizontal line.

- 6.03 If any provision or part of this agreement is void for any reason it shall be severed without effecting the validity of the balance of the agreement.
- 6.04 Time is of the essence of this agreement.
- 6.05 There are no representations, warranties, conditions, terms or collateral contracts affecting the transaction contemplated in this agreement except as set out in this agreement.
- 6.06 Nothing in this agreement is intended to constitute a partnership or agency between the parties.
- 6.07 This agreement is governed by the laws of the province of Alberta.
- 6.08 This agreement binds and benefits the parties and their respective heirs, executors, administrators, personal representatives, successors and assigns.

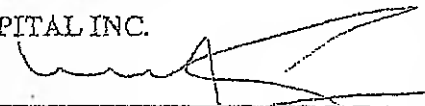
IN WITNESS WHEREOF the parties hereto have affixed their hands and seals the day and year first above written.

ACCESS MORTGAGE CORPORATION (2004) LIMITED

Per:  Director

Per:  (seal)
Director

ARRES CAPITAL INC.

Per: 
WESLEY SERRA President
(seal)

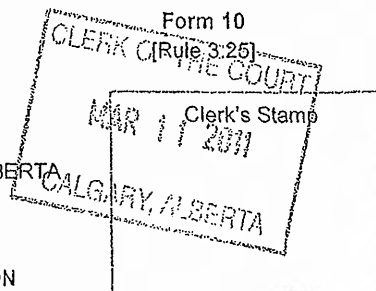
This is **Exhibit "B"**
to the affidavit of **David Murphy** sworn
before me this 12th day of June, 2017

R. Comstock

.....
A Commissioner for Oaths/Notary Public
in and for the Province of Alberta

Richard Comstock
My Commission Expires September 21, 2018

COURT FILE NUMBER 1101-03481
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY
PLAINTIFF(S) ACCESS MORTGAGE CORPORATION
(2004) LTD
DEFENDANT(S) ARRES CAPITAL INC.
DOCUMENT STATEMENT OF CLAIM



ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT CLARK AND ASSOCIATES
Barristers and Solicitors
#203, 136 - 17th Avenue N.E.
Calgary, Alberta T2E 1L6

Attention: Brian Clark
T: 403.520.2011
F: 403.230.3509
File: 3150-1

NOTICE TO DEFENDANT(S)

You are being sued. You are a defendant.

Go to the end of this document to see what you can do and when you must do it.

Note: State below only facts and not evidence (Rule 13.6)

Statement of facts relied on:

1. The Plaintiff, Access Mortgage Corporation (2004) LTD. ("Access"), is a body corporate duly incorporated under the laws of Alberta, and carrying on business in the City of Calgary, in the Province of Alberta. Access is a mortgage investment corporation, as defined by the *Canadian Income Tax Act*, and carries on the business of mortgage lending secured by real property assets.
2. The Defendant, Arres Capital Inc. ("Arres"), as far as is known to the Plaintiff, is a body corporate duly incorporated under the laws of Alberta and carrying on business in the City of Calgary, in the Province of Alberta. The Defendant carries on the business of a mortgage brokerage firm and a trustee for investors in various mortgages.
3. On or about August 1st, 2004, Access and Arres entered into an agreement (the "Agreement"), whereby Arres would provide Access with brokerage and management services in respect of mortgage loans advanced by Access (the "Access Mortgage Loans"). The Agreement provided, *inter alia*, that:
 - (a) From and after August 1st, 2004, Arres would manage and administer the Access Mortgage Loans for, and on behalf of, Access;

- (b) In respect of the management services to be provided by Arres, Arres would be paid a management fee equal to one third of the Balance of Net Income achieved by Access in respect of the Access Mortgage Loans in each fiscal year ending March 31st. The calculation of the Balance of Net Income achieved by Access in respect of the Access Mortgage Loans was in accordance with a prescribed formula set out in the Agreement.
 - (c) The management fees paid to Arres would be advanced in monthly installments, in such amounts as approved by the Board of Directors of Access on a monthly basis. At the end of each fiscal year, the actual management fees owing to Arres in the foregoing fiscal year would be reconciled with the aggregate amount of advances actually paid to Arres in the foregoing fiscal year.
 - (d) In the event that the advances paid to Arres in any fiscal year exceeded the management fees actually earned by Arres in that fiscal year, Arres was required to repay Access this cumulative overpayment on demand. Such adjustment was to be made no later than June 30th of each fiscal year.
4. From April of 2008 to March of 2009 (the "2009 Fiscal Year"), Arres was paid the aggregate sum of \$1,028,879.99 in the form of monthly advances against the management fees owing to Arres for 2009 Fiscal Year. In the later part of 2008 and in 2009, it was anticipated by the parties that the advances made in the 2009 fiscal year would substantially exceed the actual management fee earned by Arres; however, the Board of Directors for Access made the advances to Arres based on representations from Arres that it required these advances in order to continue to operate.
 5. A reconciliation of the 2009 Fiscal Year revealed that Access failed to achieve a profit or a Balance of Net Income in the 2009 Fiscal Year in respect of the Access Mortgage Loans administered by Arres. In accordance with the terms of the Agreement, Arres was not entitled to management fees for the 2009 Fiscal Year in respect of its administration of the Access Mortgage Loans. A demand was made by Access to Arres for the \$1,028,879.99 advanced to Arres in the 2009 Fiscal Year. Despite demand, Arres has thus far refused or otherwise failed to pay the said sum of \$1,028,879.99 plus accrued interest, or any part thereof, and the same remains a just debt, wrongfully withheld.
 6. In the alternative, the Plaintiff states that the Defendants were unjustly enriched at the expense of the Plaintiff, in that the Defendants were paid the said sum of \$1,028,879.99 by the Plaintiffs in respect of management of the Access Mortgage Loans during the 2009 Fiscal Year that were in excess of the management fees earned by Arres for 2009 Fiscal Year pursuant to the Agreement or otherwise.
 7. The Plaintiffs state that by reason of the foregoing, the Defendants were overpaid by the Plaintiffs in an amount of at least \$1,028,879.99 and were unjustly enriched thereby.

Remedy sought:

WHEREFORE the Plaintiff claims from and against the Defendant:

- (a) The said sum of \$1,028,879.99 being the amount by which Access overpaid Arres in respect of Arres management services together with interest pursuant to the *Judgment Interest Act*, R.S.A. 2000 Chapter J-1;
- (b) In the alternative, restitution for unjust enrichment in the amount of \$1,028,879.99 or such further or other amount as this Honourable Court deems just and equitable;

(c) Costs;

(d) Such further or other relief as this Honourable Court deems to be just and equitable.

NOTICE TO THE DEFENDANT(S)

You only have a short time to do something to defend yourself against this claim:

20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

2 months if you are served outside Canada.

You can respond by filing a statement of defence or a demand for notice in the office of the clerk of the Court of Queen's Bench at Calgary, Alberta, AND serving your statement of defence or a demand for notice on the plaintiff's(s') address for service.

WARNING

If you do not file and serve a statement of defence or a demand for notice within your time period, you risk losing the law suit automatically. If you do not file, or do not serve, or are late in doing either of these things, a court may give a judgment to the plaintiff(s) against you.

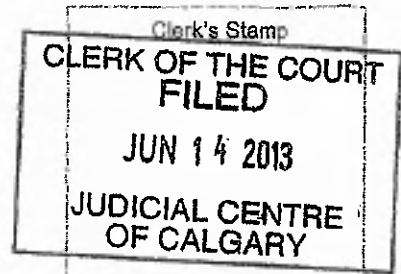
This is **Exhibit "C"**
to the affidavit of **David Murphy** sworn
before me this 12th day of June, 2017

R. Comstock

.....
A Commissioner for Oaths/Notary Public
in and for the Province of Alberta

Richard Comstock
My Commission Expires **September 21, 2018**

COURT FILE NUMBER 1101-03481
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY
PLAINTIFF(S)/ APPLICANT(S) ACCESS MORTGAGE CORPORATION (2004) LIMITED
DEFENDANT(S)/ RESPONDENT(S) ARRES CAPITAL INC.
DOCUMENT ORDER
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT BRIAN N. CLARK of CLARK & ASSOCIATES, Solicitor for the Plaintiff #203, 136--17th Avenue N.E. Calgary, Alberta T2E 1L6 Telephone: (403) 520-2011 Facsimile: (403) 230-3509 File No.: 3150-1



I hereby certify this to be a true copy of the original order
Dated this 14 day of JUNE 2013
H. B. Ho
for Clerk of the Court

DATE ON WHICH ORDER WAS PRONOUNCED: May 24, 2013
NAME OF MASTER/JUDGE WHO MADE THIS ORDER: Madam Justice S.L. Hunt McDonald
LOCATION OF HEARING: Calgary, Alberta

UPON THE APPLICATION of the Plaintiff; AND UPON hearing submissions from Counsel for the Plaintiff and from Counsel for the Defendant;

IT IS HEREBY ORDERED THAT:

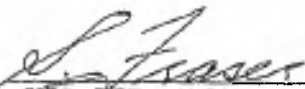
1. The Plaintiff, Access Mortgage Corporation (2004) Limited, shall have summary judgment as against the Defendant in the sum of \$1,028,879.99, less any amounts that have already been paid and applied by the Plaintiff to reduce the said indebtedness of \$1,028,879.99.
2. In the event the parties are unable to agree on the amount already paid and applied by the Plaintiff to the said indebtedness of \$1,028,879.99, this aspect of the matter shall be set down for an accounting to be done before this Honourable Court.
3. In the event the parties encounter any matters that require clarification or further direction the matter may be brought back to this Honourable Court for determination.
4. The Plaintiff shall be entitled to interest on the judgment amount pursuant to the *Judgment Interest Act*, from and after June 30, 2009.

5. The Plaintiff is entitled to its costs of this action calculated under Column 4 of Schedule "C" of the Rules of Court.


Justice of the Court of Queen's Bench of Alberta

Approved as the Order granted:

BLAKE, CASSELS & GRAYDON LLP

 SEAN FRASER
for CHRIS PETRUCCI
Solicitors for the Defendant

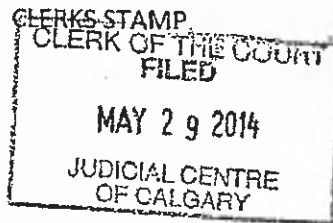
This is **Exhibit "D"**
to the affidavit of **David Murphy** sworn
before me this 12th day of June, 2017

R. Comstock

.....
A Commissioner for Oaths/Notary Public
in and for the Province of Alberta

Richard Comstock
My Commission Expires September 21, 2018

COURT FILE NUMBER 1101-03481
COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY
PLAINTIFF BY COUNTERCLAIM ARRES CAPITAL INC.
DEFENDANT BY COUNTERCLAIM ACCESS MORTGAGE CORPORATION (2004) LTD.
DOCUMENT COUNTERCLAIM
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT PELLETIER LAW
#350, 444 – 5th Avenue SW
Calgary, AB T2P 2T8
Main: 403.407.2600
Fax: 403.407.2601
Ryan P. Pelletier
Direct: 403.407.2630
File No. 13004.001



NOTICE TO DEFENDANT BY COUNTERCLAIM

You are being sued. You are a defendant by counterclaim.

Go to the end of this document to see what you can do and when you must do it.

Statement of facts relied on:

1. The Plaintiff by Counterclaim, Arres Capital Inc. ("Arres") repeats and adopts the allegations of fact and defined terms set out in the within Amended Statement of Defence as if set out separately herein.
2. Arres also adopts herein the contents of the within Affidavits of Jim Brander, filed November 14 and 20, 2013, respectively (together the "Brander Affidavits").
3. At various times throughout 2007 and 2008 Arres, as Trustee or Manager, and Access, as Co-Lender or Investor, entered into a number of Loan Administration Agreements and Trust Agreements (collectively the "Agreements") respecting mortgage loans and investments by Access in various properties located in Alberta and British Columbia.

4. Pursuant to the Agreements, including the further written agreements and materials which are related, ancillary and complimentary to the Agreements, Arres is entitled to receive from Access the total amount of \$4,682,829.52 as of October 31, 2013 (the "Amounts Outstanding").

5. The Amounts Outstanding represent Access' *pro rata* share with the other Co-Lenders and Investors of the amounts owing to Arres pursuant to the Agreements.

6. Further, the Amounts Outstanding are amounts; (i) previously paid by Arres to the credit of Access and the other Co-Lenders and Investors on account of the various Agreements and the mortgage loans and investments to which they relate, (ii) previously incurred by Access and the other Investors or Co-Lenders to the credit of Arres on account of the various Agreements and the mortgage loans and investments to which they relate, and (iii) outstanding to Arres in priority and from the principle amounts of and advances on the relevant loans and mortgages to which the Agreements relate.

7. Still further, Arres states that it is entitled to receive the Amounts Outstanding in priority to any amounts payable on the Agreements to Access and the other Investors or Co-Lenders. As such, all of the Outstanding Amounts should have been applied by Access to reduce any alleged indebtedness owed by Arres to Access, although any such alleged indebtedness is expressly denied by Arres.

8. Attached hereto as Schedule "1" is an itemized spreadsheet setting out the particulars of the Amounts Outstanding as of October 31, 2013, with the specific and detailed particulars of the Amounts Outstanding being set out in the Brander Affidavits.

9. Arres states and the fact is that the Agreements were managed by Arres as part of the Services provided by Arres pursuant to the Services Agreement and as such the Agreements are directly related to and are relevant to the allegations set out in the within Statement of Claim and Amended Statement of Defence.

10. However, for clarity, Arres states and the fact is that any amounts paid or owed to Arres from Access pursuant to the Services Agreement are entirely separate and otherwise in addition to Amounts Outstanding owed pursuant to the Agreements.

11. In other words, while the Services included management by Arres of the Agreements on Access behalf, the amounts outstanding to Arres from Access pursuant to the Services Agreement are entirely distinct from amounts that are owed to Arres from Access pursuant to the Agreements.

Remedy sought:

12. The Plaintiff by Counterclaim, Arres Capital Inc., seeks the following relief against the Defendant by Counterclaim, Access Mortgage Corporation (2004) Ltd:

- a. Judgment in the amount of the Amounts Outstanding with a direction as to payment terms for the Amounts Outstanding in accordance with the Agreements;
- b. Further, or in the alternative, set off of any and all amounts that this Honourable Court determines are payable by Arres to Access as alleged in the within Statement of Claim, up to the amount of the Amounts Outstanding;
- c. Interest on all amounts payable by Access to Arres pursuant to the interest provisions of the relevant Agreements, or alternatively, pursuant to the *Judgment Interest Act*;
- d. Costs of this Action;
- e. Such further and other relief as this Honourable Court determines is just and reasonable.

NOTICE TO THE DEFENDANT BY COUNTERCLAIM

You only have a short time to do something to respond to this counterclaim:

20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

2 months if you are served outside Canada.

You can respond by filing a statement of defence or a demand for notice to counterclaim in the office of the clerk of the Court of Queen's Bench at Calgary, Alberta, AND serving your statement of defence or a demand for notice to counterclaim on the plaintiff by counterclaim's address for service.

WARNING

If you do not file and serve a statement of defence or a demand for notice to counterclaim within your time period, you risk losing the law suit automatically. If you do not file, or do not serve, or are late in doing either of these things, a court may give a judgment to the plaintiff by counterclaim against you after notice of the application has been served on you.

This is **Exhibit "E"**
to the affidavit of **David Murphy** sworn
before me this 12th day of June, 2017

R. Comstock

.....
A Commissioner for Oaths/Notary Public
in and for the Province of Alberta

Richard Comstock
My Commission Expires September 21, 2018

COURT FILE NUMBER 1401 - 14106

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

PLAINTIFF ARRES CAPITAL INC.

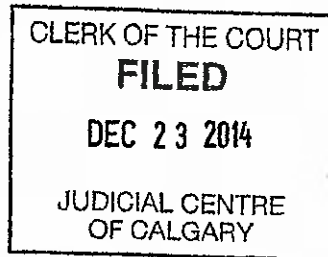
DEFENDANT ACCESS MORTGAGE CORPORATION (2004) LTD.

DOCUMENT STATEMENT OF CLAIM

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT
PELLETIER LAW
#350, 444 - 5th Avenue SW
Calgary, AB T2P 2T8
T. 403.407.2600
F. 403.407.2601

Ryan P. Pelletier
D. 403.407.2630
F. 13004.002

CLERKS STAMP



NOTICE TO DEFENDANT

You are being sued. You are a defendant.

Go to the end of this document to see what you can do and when you must do it.

Statement of facts relied on:

The Parties

1. The Plaintiff, Arres Capital Inc. ("Arres" or the "Plaintiff") is a corporation incorporated pursuant to the laws of the Province of Alberta and which has its head office in Calgary.
2. The Defendant, Access Mortgage Corporation (2004) Ltd. is a corporation incorporated pursuant to the laws of the Province of Alberta and which has its head office in Calgary.

The Claim

3. For the purposes of this Action, Arres incorporates, refers to and otherwise adopts herein the contents of the Affidavits of Jim Brander, filed November 14 and 20, 2013, respectively, in the related Action No. 1101-03481 (together the "Brander Affidavits").

4. At various times throughout 2007 and 2008 Arres, as Trustee or Manager, and Access, as Co-Lender or Investor, entered into a number of Loan Administration Agreements and Trust Agreements (collectively the "Agreements") respecting mortgage loans and investments by Access in various properties located in Alberta and British Columbia.
 5. Pursuant to the Agreements, including the further written agreements and materials which are related, ancillary and complimentary to the Agreements, Arres is entitled to receive from Access the total amount of \$5,587,426.04 as of November 17, 2014 (the "Amounts Outstanding").
 6. The Amounts Outstanding represent Access' *pro rata* share with the other Co-Lenders and Investors of the amounts owing to Arres pursuant to the Agreements.
 7. Further, the Amounts Outstanding are amounts; (i) previously paid by Arres to the credit of Access and the other Co-Lenders and Investors on account of the various Agreements and the mortgage loans and investments to which they relate, (ii) previously incurred by Access and the other Investors or Co-Lenders to the credit of Arres on account of the various Agreements and the mortgage loans and investments to which they relate, and (iii) outstanding to Arres in priority and from the principle amounts of and advances on the relevant loans and mortgages to which the Agreements relate.
 8. Still further, Arres states that it is entitled to receive the Amounts Outstanding in priority to any amounts payable on the Agreements to Access and the other Investors or Co-Lenders. As such, all of the Outstanding Amounts should be applied by this Honourable Court to reduce any indebtedness owed or allegedly owed by Arres to Access.
 9. Still further, on various dates in November 2014, Arres served written demand upon Access on account of expenses and related amounts paid by Arres to the credit of Access in respect of five of the Agreements (the "Demand Letters" which included the "Demands").
 10. The amounts owing from Access to Arres pursuant to the Demands totaled \$972,763.65 and such amounts became due and payable by Access either 5 days or 30 days after service of the relevant Demand Letter (the respective "Waiting Period").
-

11. The Waiting Period for all of the Demands has lapsed and Access has not made payment on account of any of the Demands.

12. For clarity, the total amount of the Amount Outstanding includes the amounts set out in the Demands, with the Demands being the amount of the Amount Outstanding payable immediately and the remainder of the Amount Outstanding being contingent upon a subsequent event such as the sale and realization of the underlying mortgage or real estate.

Remedy sought:

13. The Plaintiff, Arres Capital Inc., seeks the following relief against the Defendant, Access Mortgage Corporation (2004) Ltd:

- a. Judgment in the amount of the Amounts Outstanding in the amount of not less than \$5,587,426.04 with a direction as to payment terms for the Amounts Outstanding in accordance with the Agreements;
- b. Further, Judgment for the immediate payment by Access of the full amount of the Demands, in the amount of not less than \$927,763.65;
- c. Further, or in the alternative, set off of any and all amounts that this Honourable Court has determined, or subsequently determines, is owing from Arres to Access, whether in this Action or otherwise, up to the amount of the Amounts Outstanding;
- d. Interest on all amounts payable by Access to Arres pursuant to the interest provisions of the relevant Agreements, or alternatively, pursuant to the *Judgment Interest Act*;
- e. Costs of this Action;
- f. Such further and other relief as this Honourable Court determines is just and reasonable.

NOTICE TO THE DEFENDANT(S)

You only have a short time to do something to defend yourself against this claim:

20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

2 months if you are served outside Canada.

You can respond by filing a statement of defence or a demand for notice in the office of the clerk

of the Court of Queen's Bench at Calgary, Alberta, AND serving your statement of defence or a demand for notice on the plaintiff's address for service.

WARNING

If you do not file and serve a statement of defence or a demand for notice within your time period, you risk losing the law suit automatically. If you do not file, or do not serve, or are late in doing either of these things, a court may give a judgment to the plaintiff(s) against you.

This is **Exhibit "F"**
to the affidavit of **David Murphy** sworn
before me this 12th day of June, 2017

R. Comstock

.....
A Commissioner for Oaths/Notary Public
in and for the Province of Alberta

Richard Comstock
My Commission Expires September 21, 2018

Search ID#: Z09183712

Transmitting Party

Cassels Brock & Blackwell LLP

Suite 1250, 440-2nd Avenue SW
Calgary, AB T2P 5E9

Party Code: 60006325
Phone #: 403 351 2920
Reference #: 50107-1

Search ID #: Z09183712

Date of Search: 2017-Jun-05

Time of Search: 15:55:05

Business Debtor Search For:

ARRES CAPITAL INC.

Exact Result(s) Only Found

NOTE:

A complete Search may result in a Report of Exact and Inexact Matches.
Be sure to read the reports carefully.



Search ID#: Z09183712

Business Debtor Search For:

ARRES CAPITAL INC.

Search ID #: Z09183712

Date of Search: 2017-Jun-05

Time of Search: 15:55:05

Registration Number: 14092940054

Registration Type: WRIT OF ENFORCEMENT

Registration Date: 2014-Sep-29

Registration Status: Current

Expiry Date: 2018-Sep-08 23:59:59

Issued in Calgary Judicial Centre

Court File Number is 1101-03481

Judgment Date is 2013-May-24

This Writ was issued on 2013-Nov-29

Type of Judgment is Other

Original Judgment Amount: \$1,028,879.99

Costs Are: \$15,478.54

Post Judgment Interest: \$0.00

Current Amount Owing: \$1,044,358.53

Exact Match on: Debtor

No: 1

Amendments to Registration

14102809337

Amendment

2014-Oct-28

16090814564

Renewal

2016-Sep-08

Solicitor / Agent

BRIAN E. SILVER
#201, 10836-24TH STREET SE
CALGARY, AB T2Z 4C9

Phone #: 403 723 7300

Fax #: 403 236 3882

Reference #: 9652

Debtor(s)

Block

1

Status

Current

ARRES CAPITAL INC.
#204, 1324-11TH AVENUE SW
CALGARY, AB T3C 0M6

Creditor(s)

Block

1 ACCESS MORTGAGE CORPORATION (2004) LTD.
#230, 6125-11TH STREET SE
CALGARY, AB T2H 2L6

Status

Current

Particulars

Block

Additional Information

1 SCHEDULE "A"
FORM 14-STATUTORY DECLARATION-FINANCIAL STATEMENT
OF DEBTOR (CORPORATE DEBTOR)

Status

Current By
14102809337

PROJECT	TOTAL RECEIVABLE
CHATEAU:	\$1,021,497.45
CM MILLET:	\$260,036.44
COPPER OAKS MILLET:	\$209,830.24
DOCKMAN:	\$997,397.65
GRAYBRIAR GREENS 2:	\$1,027,057.95
JERVIS:	\$980,171.38
KOELLER:	\$1,371,883.69
STRATHMORE:	\$3,407,606.98
TIMBERCREEK:	\$425,235.22
TOTAL:	\$9,700,717.00

NOTE 1: ALL AMOUNTS CALCULATED WITH INTEREST TO
SEPTEMBER 30, 2014

NOTE 2: ALL AMOUNTS DUE PURSUANT AND SUBJECT TO
TRUST AGREEMENTS/MORTGAGE ADMINISTRATION AGREEMENTS
BETWEEN ARRES CAPITAL INC. AND EACH OF THE VARIOUS
INVESTORS IN EACH PROJECT.

Search ID#: Z09183712

Business Debtor Search For:

ARRES CAPITAL INC.

Search ID #: Z09183712

Date of Search: 2017-Jun-05

Time of Search: 15:55:05

Registration Number: 14100310598

Registration Type: REPORT OF SEIZURE

Registration Date: 2014-Oct-03

Registration Status: Current

Registration Term: Infinity

Service Area 2

Property has been seized under Writ of Enforcement Registration Number 14092940054.

Property was seized on 2014-Oct-02

<u>Registration Type</u>	<u>Date</u>	<u>Registration #</u>	<u>Value</u>
Report of Seizure	2014-Oct-02	14100310598	\$0.00

Exact Match on: Debtor No: 1

Solicitor / Agent

WARREN BENSON AMANTEA LLP
1413 - 2ND STREET SW
CALGARY, AB T2R 0W7

Phone #: 403 228 8392

Fax #: 403 244 1948

Reference #: 14-0295

Civil Enforcement Agent

CONSOLIDATED CIVIL ENFORCEMENT INC.
200, 807 MANNING ROAD NE
CALGARY, AB T2E 7M8

Phone #: 403 262 8800

Fax #: 403 262 8801

Debtor(s)

Block

1

Status

Current

ARRES CAPITAL INC.
#204, 1324-11TH AVENUE SW
CALGARY, AB T3C 0M6

Creditor(s)

<u>Block</u>		<u>Status</u>
1	ACCESS MORTGAGE CORPORATION (2004) LTD. #230, 6125-11TH STREET SE CALGARY, AB T2H 2L6	Current

Collateral: General

<u>Block</u>	<u>Description</u>	<u>Status</u>
1	1 - Circular board room table	Current
2	3 - Black high back leather chair	Current
3	1 - Black high back cloth chair	Current
4	1 - Black four door lateral cabinet	Current
5	1 - Small Open grey stand on wheels	Current
6	1 - artificial plant	Current
7	2 - pieces framed art work - Campbell (back)	Current
8	1 - Staples shredder black s/n T01211300165	Current
9	Additional items have been seized. Refer to Civil Enforcement Agency file for a complete listing.	Current

Particulars

<u>Block</u>	<u>Additional Information</u>	<u>Status</u>
1	For a complete listing of seized goods as contained in the Notice of Seizure of Personal Property, contact our offices. Seized goods were left on site. Our File: 77919-WE-2C	Current

Result Complete

This is **Exhibit "G"**
to the affidavit of **David Murphy** sworn
before me this 12th day of June, 2017

R. Comstock

.....
A Commissioner for Oaths/Notary Public
in and for the Province of Alberta

Richard Comstock
My Commission Expires September 21, 2018

David Murphy

Sworn before me this 14th

day of November A.D. 2014

Brian E. Silver

COMMISSIONER FOR OATHS

In Summary Judgment Motion

1101-08481

File Number

Form 14
Statutory Declaration

Financial Statement of Debtor
(Corporate Debtor)

In accordance with section 35.10 of the *Civil Enforcement Regulation*, the Corporation must, with 15 days of being served with this form, provide the completed form to the enforcement creditor.

BRIAN E. SILVER
Barrister and Solicitor

A. Debtor Information (Please Print)

I, ARRES CAPITAL INC
Full Name of Deponent

of 204 1324 11 AVE SW 403 261 9955
Address of Deponent Telephone Number of Deponent

am the President of ARRES CAPITAL INC
Position with Corporate Debtor Name of Corporate Debtor

of 204 1324 11 AVE SW 403 261 9955
Address of Corporate Debtor Telephone Number of Corporate Debtor

and I solemnly declare that the contents of this document are true and accurate.

B. Assets

Real Estate

List all real estate (homes, rental properties, cottages, condominiums, etc.) both within and outside the Province of Alberta in which the corporation owns an interest, including municipal address, legal description, purchase price, balance owing and current market value.

	Municipal Address	Legal Description	Purchase Price	Balance Owing	Current Market Value
1.	<u>NA</u>				
2.					
3.					

List the name and address of any mortgagee for each property described above, as well as the date the mortgage was granted and the amount outstanding on the mortgage.

	Name of Mortgagee	Address of Mortgagee	Date of Mortgage Granted	Amount Outstanding on Mortgage
1.	<u>NA</u>			
2.				
3.				

Motor Vehicles

List all motor vehicles, including cars, trucks, farm machinery, construction equipment, recreational vehicles, aircraft, etc. in which the Corporation owns an interest.

	Type - Make - Model - Year	Serial No.	Purchase Price	Current Market Value
1.	NA			
2.				
3.				

If any of the above vehicles are subject to any liens or encumbrance, specify.

	Holder of Lien or Encumbrance	Date of Lien or Encumbrance	Balance Owing on Lien or Encumbrance
1.	NA		
2.			
3.			

List all fixtures, equipment and inventory.

	Type - Make - Model - Year	Serial Number, if Applicable	Purchase Price	Current Market Value
1.	NA			
2.				
3.				

Bank Accounts

List all deposit accounts, term deposits, annuities, etc., specifying the following:

	Type of Deposit	Name of Institution	Account No.	Branch Address	Amount
1.	Checking	BoFM	25159-1068898	OXY branch	Ø
2.					
3.					

Also, specify whether there are any conditions attached to redemption of the account, and, if applicable, any expiry dates.

	Conditions Attached to Redemption	Expiry Date, if Applicable
1.	N/A	
2.		
3.		

Receivables and Ongoing Contracts
List all receivables and ongoing contracts.

SEE ATTACHED schedule "A"

	Name	Address	Amount Owing
1.			
2.			
3.			

Shares and Securities

If the corporation has holdings in a corporation, complete the following:

List all shares, options, warrants, etc., and their current market value.

	Name of Corporation	Type	Number	Current Market Value	Dividends Payable (if any)	Date Payable
1.	NA					
2.						
3.						

List all bonds and debentures held and their current market value.

	Name of Issuer	Class or Series	Quantity Held	Total Market Value
1.	N/A			
2.				
3.				

List location of all certificates for all corporate holdings and their respective name(s) and address(es).

	Location of Security Certificates or Other Evidence of Ownership of Securities	Name and Address of Broker(s)
1.	N/A	
2.		
3.		

Trust Properties

List all properties or interests held by a Trustee on the Corporation's behalf.

	Description of Assets Held	Location of Assets	Name and Address of Trustee
1.	NA		
2.			
3.			

Other Assets

List all other assets, specifying kind, value and location, and whether solely or jointly owned.

Type of Asset	Description	Sole Owner		Location	Value
		Yes	No		
Interest in other businesses	NA				
Promissory notes, judgment debts	NA				
Loans and mortgages receivable	NA				

List all other assets, specifying kind, value and location, and whether solely or jointly owned (e.g. art, jewellery, bullion).

Description of Asset	Sole Owner		Location	Value
	Yes	No		
NA				

C. Transfer of Property

Has the corporation given away, sold, assigned or otherwise transferred any property (land, buildings, vehicles, money, equipment, inventory, etc.) outside the ordinary course of business within the past year? Specify details below.

Description of Property	To Whom Transferred	Date of Transfer	How Much Money, if Any, Was Recovered By the Corporation?
NA			

D. Insurance


List all insurance policies in which the corporation is named beneficiary, including the insurance company granting the policy, the policy number, the amount, the person insured, the premium and its cash surrender value.

Insurance Company	Policy No.	Amount	Person Insured	Premium	Cash Surrender Value
WA					

E. Additional Income and Assets

List all income and assets not itemized above (legal action claims under insurance policies, etc.).

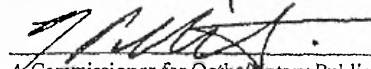
NA

 Wes Serra - Director

And I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath.

DECLARED BEFORE ME at Calgary

Alberta, on Monday, October 20, 2014



 A Commissioner for Oaths/Notary Public
 in and for the Province of Alberta

Ryan P. Pelletier

 Barrister & Solicitor
 Print Name and Expiry Date

SCHEDULE "A"

FORM 14 – STATUTORY DECLARATION – FINANCIAL STATEMENT OF DEBTOR (CORPORATE DEBTOR)

<u>Project</u>	<u>Total Receivable</u>
Chateau:	\$1,021,497.45
CM Millet:	\$260,036.44
Copper Oaks Millet:	\$209,830.24
Dockman:	\$997,397.65
Graybriar Greens 2:	\$1,027,057.95
Jervis:	\$980,171.38
Koeller:	\$1,371,883.69
Strathmore:	\$3,407,606.98
Timbercreek:	\$425,235.22
TOTAL:	\$9,700,717.00

Note 1: All amounts calculated with interest to September 30, 2014

Note 2: All amounts due pursuant and subject to Trust Agreements/Mortgage Administration Agreements between Arres Capital Inc. and each of the various Investors in each project.

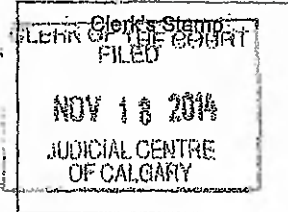
This is **Exhibit "H"**
to the affidavit of **David Murphy** sworn
before me this 12th day of June, 2017

R. Comstock

.....
A Commissioner for Oaths/Notary Public
in and for the Province of Alberta

Richard Comstock
My Commission Expires September 21, 2018

COURT FILE NUMBER 1401- 12431
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY
APPLICANT(S) ACCESS MORTGAGE CORPORATION
(2004) LIMITED
RESPONDENT(S) ARRES CAPITAL INC.
DOCUMENT ORIGINATING APPLICATION
(on the Commercial List)



ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT Warren Benson Amantea LLP
Attention: Brian E. Silver
1413 - 2nd Street S.W.
Calgary, Alberta T2R 0W7
Tel: 403-228-7007 Fax: 403-244-1948
File No. 14-3518

NOTICE TO THE RESPONDENT(S)

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the Court.

To do so, you must be in Court when the application is heard as shown below:

Date: January 15, 2015
Time: 10:00 am
Where: Calgary Court's Centre, 601 - 5th Street S.W., Calgary, Alberta
Before: Justice In Chambers

Go to the end of this document to see what you can do and when you must do it.

Basis for this claim:

1. Access Mortgage Corporation (2004) Limited ("Access") is a judgment creditor of the Respondent Arres Capital Inc. ("Arres");
2. The judgment against Arres is in excess of \$1,050,000.00;
3. Arres is insolvent and claims to have no assets other than accounts receivable listed in Schedule "A" to the Statutory Declaration of Arres Capital Inc. sworn on October 20, 2014 in QB Action No. 1101-03481 (the "Statutory Declaration");
4. Arres appears to have assigned some of these accounts receivable to related entities;
5. Arres has wrongfully attempted to realize funds for itself from the sale of assets which were either previously managed or administered by Arres for various investors;

6. Arres has transferred assets to other related entities or otherwise dealt with assets in order to hinder, delay and prejudice its creditors, and specifically Access, since the date that Arres' indebtedness to Access arose;
7. It is just and convenient to appoint a Receiver of Arres;
8. Arres has carried on business in a manner which is oppressive, unfairly prejudicial to and unfairly disregards the interests of Access and other creditors of Arres.

Remedy sought:

9. For an Order appointing Grant Thomson as Receiver of Arres;
10. An Order restraining Arres from sending demand letters to any party with respect to monies allegedly owing to Arres with respect to the projects listed in Schedule "A" to the Statutory Declaration;
11. An Order restraining Arres from commencing any legal proceedings to collect monies from any parties with respect to the Accounts Receivable listed in Schedule "A" of the Statutory Declaration;
12. An Order staying enforcement of any legal proceedings already commenced by Arres to collect monies allegedly owing to Arres with respect to the Receivables listed in Schedule "A" to the Statutory Declaration;
13. An Order removing Wes Serra as the director of Arres;
14. An Order requiring Arres to deliver financial statements for the fiscal years 2008 to 2014 inclusive in the form required by section 155 of the *Business Corporations Act* or an accounting in any other form as determined by the Court to the Applicant, Access Mortgage Corporation (2004) Limited ("Access") within a time specified by the Court;
15. An Order directing an investigation of Arres to be made under Part 18 of the *Business Corporations Act*;
16. Such further and other relief as this Honourable Court deems appropriate;
17. Costs of this action on a solicitor and his own client basis or on such scale as this Honourable Court determines is reasonable and appropriate;

Affidavit or other evidence to be used in support of this application:

18. Affidavit of David Murphy.

Applicable Acts and regulations:

19. Section 242 of the *Business Corporations Act*, RSA 2000, Chapter B-9, as amended and the regulations thereunder;
20. Section 85 of the *Civil Enforcement Act* RSA 2000, Chapter C-15, as amended and the regulations thereunder; and
21. Section 13 of the *Judicature Act* RSA 2000, Chapter J-2, as amended and the regulations thereunder.

WARNING

You are named as a respondent because you have made or are expected to make an adverse claim in respect of this originating application. If you do not come to Court either in person or by your lawyer, the Court may make an order declaring you and all persons claiming under you to be barred from taking any further proceedings against the applicant(s) and against all persons claiming under the applicant(s). You will be bound by any order the Court makes, or another order might be given or other proceedings taken which the applicant(s) is/are entitled to make without any further notice to you. If you want to take part in the application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of this form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant(s) a reasonable time before the application is to be heard or considered.

This is **Exhibit "I"**
to the affidavit of **David Murphy** sworn
before me this 12th day of June, 2017

R. Comstock

.....
A Commissioner for Oaths/Notary Public
in and for the Province of Alberta

Richard Comstock

My Commission Expires September 21, 2018

Action No.: 1401-12431
E-File No.: CVQ15ACCESS2
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

BETWEEN:

ACCESS MORTGAGE CORP. 2004 LTD.

Plaintiff

and

ARRES CAPITAL INC.

Defendant

P R O C E E D I N G S

Calgary, Alberta
February 13, 2015

Transcript Management Services, Calgary
Suite 1901-N, 601-5th Street SW
Calgary, Alberta T2P 5P7
Phone: (403) 297-7392 Fax: (403) 297-7034

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Submissions by Mr. Pelletier (Other)		12
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1 Proceedings taken in the Court of Queen's Bench of Alberta, Calgary Courts Centre, Calgary,
2 Alberta

3

4 February 13, 2015

Morning Session

5

6 The Honourable

Court of Queen's Bench of Alberta

7 Madam Strekaf

8

9 B. Silver

For the Plaintiff

10 T. Derksen

For the Plaintiff

11 R. Pelletier

For the Defendant

12 R. Bales

Court Clerk

13

14

15 THE COURT CLERK:

Order in Court, all rise.

16

17 THE COURT:

Good morning.

18

19 MR. PELLETIER:

Good morning.

20

21 MR. SILVER:

Good morning, My Lady.

22

23 THE COURT:

Please be seated.

24

25 MR. SILVER:

Just to let you know before we start, in case

26 we're not finished by 9:30, my colleague, Mr. Derksen may have to leave the Court for

27 another Court appearance.

28

29 THE COURT:

Okay.

30

31 MR. SILVER:

So no offence taken.

32

33 THE COURT:

Okay.

34

35 MR. SILVER:

Thank you.

36

37 THE COURT:

I won't be concerned if he has to walk out mid

38 sentence. As well, I don't expect that it will be a problem. I should have the decision

39 dealt with, but I am waiting on a jury right now so if they come back and need

40 something, we may need to just interrupt this briefly to make sure that everybody can be

41 called together. So you are aware of that as well.

1
2 MR. SILVER:

Thank you.

3
4 **Reasons for Judgment**

5
6 THE COURT: So we are here for delivery of my decision on
7 the application that I heard which had been brought by Access Mortgage Corporation
8 2004 Ltd. They were applying pursuant to sections 85 and 86 of the *Civil Enforcement*
9 *Act* and section 242 of the *Alberta Business Corporations Act* to appoint a Receiver of
10 Arres Capital. Now while other relief was outlined and sought in the originating notice,
11 the application was limited to those items as I understand. Correct, Mr. Silver?

12
13 MR. SILVER: Yes.

14
15 THE COURT: Access commenced a debt action against Arres
16 in March of 2011 and in the course of that action, on May 24th of 2013, Justice Hunt
17 McDonald granted Access summary judgment in the amount of \$1,028,879.99 less
18 amounts already paid and applied by Access. Those amounts were subsequently
19 determined by Justice Hunt McDonald to be in the neighborhood of \$12,000. A writ of
20 execution was filed on November 29th, 2013 and an appeal of that judgment was
21 dismissed by the Alberta Court of Appeal on September 29, 2014.

22
23 In September of 2011, Access and several other parties had filed an originating
24 application for a bankruptcy order against Arres. Arres filed a notice denying any
25 indebtedness to the bankruptcy applicants. A consent order staying the bankruptcy
26 application was granted on April 10th, 2012 pending Access's summary judgment
27 application. To date no further steps had been taken on the bankruptcy application.

28
29 Access has been unsuccessful in enforcing its judgment against Arres other than to the
30 extent of approximately \$53,000. Access attempted to enforce its judgment against Arres
31 by garnisheeing bank accounts at the Bank of Montreal where Arres had banked and trust
32 accounts of various law firms without any success. Access effected a seizure at Arres'
33 business premises which resulted in a notice of objection being filed by Arres who claim
34 that the seized assets belonged to a third party and which resulted in the assets being left
35 with Arres on a Bailey's undertaking.

36
37 Wes Serra, a director of Arres executed a Form 14 statutory declaration of debtor on
38 October 20th, 2014 which identified the only asset of Arres to be receivables totalling
39 \$9.7 million, all of which were described as pursuant and subject to trust agreements or
40 mortgage administration agreements between Arres Capital Inc. and various investors in
41 nine projects. I will refer to those amounts that are owing under the trust agreements and

1 mortgage administration agreements as receivables for a shorthand for purposes of this
2 judgment.

3
4 In the course of cross-examination of Mr. Serra that was conducted on November 6 of
5 2014 on the statutory declaration, he advised that some of the accounts receivable had
6 been assigned and undertook to provide details. The response to the undertakings
7 indicated that Arres' interest in the projects and its receivables with respect to the projects
8 had been assigned to a numbered company, 875892 Alberta Ltd. and/or Stacey Serra who
9 is Mr. Serra's wife or to Gordon and Mona Schneider pursuant to various agreements that
10 were dated between March 15th, 2010 and July 11, 2012. In his examination, Mr. Serra
11 indicated that Arres' monthly expenditures were between 26 and \$30,000 per month, the
12 difference relating to an employee who was on maternity leave who was not replaced. He
13 claimed that Arres received some funds from related companies to cover its expenses but
14 refused to provide any details. Based upon the evidence before me it does not appear that
15 Arres has any source of revenue from business operations or that it has any exigible
16 assets, if in fact those assignments are valid, other than any moneys it receives from
17 related companies in respect of which Arres refused to provide any further information.
18

19 Mr. Murphy, who is a director and officer of Access swore an affidavit in support of the
20 application for the appointment of a receiver in which he states that he believes that most
21 of the charges that Arres claims are owing as accounts receivable are not contemplated in
22 the administration agreements or fabricated, their financial disclosure is invalid or they are
23 statute barred. Now, I note that while Mr. Murphy makes these statements, if in fact
24 those receivables aren't valid, then that reduces the likelihood of Access being able to
25 realize on the judgment.
26

27 Access seeks to appoint a receiver to independently and impartially wade through the
28 books of Arres to get a true picture of the status and hold all cash flows intact to protect
29 all stakeholders, tax authorities, creditors and assignees. Access' application is brought
30 pursuant to sections 85 and 86 of the *Civil Enforcement Act* and section 242 of the
31 ABCA. These sections provide statutory remedies. The Court may only grant the remedy
32 sought if the specific requirements set out in each section have been established.
33

34 In the course of his submissions, Access' counsel specifically advised that the application
35 for the appointment of a receiver that was before me was not being brought pursuant to
36 the provisions of the *Judicature Act* nor at that point was it brought pursuant to the
37 provisions of the *Bankruptcy and Insolvency Act*. Sections 85 and 86 of the *Civil*
38 *Enforcement Act* state and I quote (as read)
39

40 Notwithstanding any rule of law or equity to the contrary where
41 certain exigible property of an enforcement debtor cannot

1 otherwise be conveniently realized. The Court on application of
2 an enforcement creditor may do one or more of the following:

3
4 (a) appoint a receiver of the property;

5
6 (b) order the enforcement debtor or any person in
7 possession or control of the property to deliver up the
8 property to an agency or to any other person named in the
9 order;

10
11 (c) enjoin the enforcement debtor or any other person from
12 disposing that or otherwise dealing with the property;

13
14 (d) make any other or additional order that the Court
15 considers necessary or appropriate to facilitate realization on
16 the property.

17
18 85(2), (as read)

19
20 Where the Court appoints a receiver under subsection 1, the Court
21 may in the order direct that the order apply to property acquired
22 by the enforcement debtor after the order is granted.

23
24 Section 86, (as read)

25
26 In determining whether to appoint a receiver under section 85 the
27 Court must consider at least the following:

28
29 (a) whether it would be more practical to realize on the
30 property through other proceedings authorized by the Act;

31
32 (b) whether the appointment of a receiver would be an
33 effective means of realizing on the property;

34
35 (c) the probable cost of the receivership in relation to the
36 probable benefits to be derived by the appointment of a
37 receiver;

38
39 (d) whether the appointment of a receiver would cause
40 undue hardship or prejudice to the enforcement debtor or a
41 third person;

1
2 (e) the likelihood of writs against the enforcement debtor
3 being satisfied without resorting to the property in question.
4

5 These sections permit the Court to appoint a receiver of the exigible property of a
6 judgment debtor and grant related relief where the property cannot otherwise be
7 conveniently realized, having regard to the considerations in section 86.
8

9 There are a number of questions or issues that arise in the context of this case. First of
10 all, number one, what exigible property is the subject of this application? Access is
11 seeking the appointment of a receiver of Arres, however, section 85 does not contemplate
12 the appointment of a receiver over a judgment debtor but, rather, the appointment of a
13 receiver over the exigible property of a judgment debtor. The Court could, under this
14 section, appoint a receiver over all of the exigible property of a judgment debtor but, in
15 my view, not over the judgment debtor. Now there is some real uncertainty in this case as
16 to whether Arres has any exigible property.
17

18 The evidence put forward in Mr. Murphy's affidavit, the financial statement of the debtor
19 statutory declaration provided by Wes Serra and the transcript of the examination of
20 Mr. Serra and the undertaking responses provided may suggest that Arres has no exigible
21 assets. I note that Mr. Serra nor any of the purported assignees did not put forward any
22 affidavit evidence on this matter. Access questions the validity of the receivables which
23 appear from the undertaking response information may have been assigned to related
24 parties, i.e., Mr. Serra's wife and a company controlled by her. I understand that Access
25 also questions the validity of the assignments. Am I correct on that, Mr. Silver?
26

27 MR. SILVER: Yes, Ma'am.
28

29 THE COURT: So in my view, it appears that Arres may have
30 exigible property. The only exigible property it would appear to have would be the
31 receivables and whether that property belongs to Arres or whether that property belongs to
32 the assignees is a question that would need to be determined.
33

34 Number two, would it be more practical to realize on the property through other
35 proceedings authorized by this Act? Access has unsuccessfully attempted to realize on the
36 judgment it obtained over a year ago through various other means. There are no apparent
37 other practical ways to determine what exigible property, if any, of Arres is available to
38 satisfy the judgment and to proceed to realize on same.
39

40 I note that Access, as I indicated, has questioned the validity of the receivables which
41 would appear to be the only available asset that could satisfy its judgment. Access, while

1 it is a judgment creditor is also an investor and so it wears numerous hats in its
2 relationship with Arres. It is involved in litigation with Arres and is, as I mentioned, one
3 of the investors who Arres is pursuing with respect to these receivables. While this may
4 demonstrate that there is a conflict between Access's interests as an investor and Access's
5 interests as a judgment creditor, a receiver would be in a position to evaluate the validity
6 of the receivables and the feasibility of realizing on the receivables as well as the extent
7 of the interest, if any, of Arres in those receivables.

8
9 I note that it appears that Arres may have purported to deal with some of the proceeds of
10 property that was subject to the assignments without regard to the assignments.

11
12 While the evidence is not completely clear, it does appear that Arres purported to take
13 title to certain units in the foreclosure action and then sell those interests to a numbered
14 company, 1798582 Alberta which was another company controlled by Mr. Serra's wife at
15 a value that may be less than fair market value. Rather than having title go to the
16 assignees, Arres also apparently settled a lawsuit involving another numbered company,
17 125, and again, there is no indication that the assignees were involved in that process.

18
19 So in my view there are some real issues raised as to the extent of Arres' exigible
20 property. Arres' behaviour has also raised some potential concerns about the feasibility
21 and prospect of Access being able to realize on his judgment in the absence of a receiver
22 being appointed. Some of these concerns include its failure to give notice to the Grey
23 Briar investors, including Access, before proceeding to obtain the second order in the
24 foreclosure action notwithstanding it was aware that the investors were taking the position
25 that they had terminated the Arres' right to proceed. In my view, a receiver would be
26 able to determine what exigible property is available to satisfy Arres' judgment and how
27 that could be realized.

28
29 So that I am satisfied that the appointment of a receiver could be an effective means of
30 realizing the property assuming that there is exigible property at the end of the day.

31
32 Number three, what would the probable cost of the receivership be in relation to the
33 probable benefits to be derived by the appointment of a receiver? There is no doubt that
34 receivers are an expensive remedy, however, here the benefits would be a potential ability
35 to satisfy a judgment creditor who has already obtained a judgment against Arres for in
36 excess of \$1 million.

37
38 Number four, what is the likelihood of the writs being satisfied without resorting to the
39 property in question? In my view, there appears to be no reasonable prospect of the writs
40 being satisfied unless a receiver is appointed.

41

1 A receiver is, in my view, an extreme remedy, however, it is a remedy that is available in
2 unusual situations and, in my view, this is an unusual situation. Section 85 is designed to
3 provide an exceptional remedy in circumstances where other remedies will not be
4 effective in enabling a judgment creditor who has obtained a judgment to realize on that
5 judgment.

6
7 I now turn to section 87 of the *Civil Enforcement Act* which states as follows, (as read)

8
9 With respect to receivers, the following applies:

10
11 (a) a person may not be appointed as a receiver unless that
12 person,

13
14 (i) has satisfied the qualifications, if any, set out in
15 the regulations and,

16
17 (ii) has agreed in writing to act as a receiver in
18 respect of the matter for which the appointment is to
19 be made.

20
21 (b) the Court may give a receiver those powers that the
22 Court considers necessary or appropriate for the realization
23 of the property including, without limiting, the generality of
24 the foregoing, the power to manage or sell the property or
25 bring any proceedings in relation to the property and,

26
27 (c) unless otherwise ordered by the Court, a receiver may
28 take into the receiver's custody and control the property
29 over which the receiver is being appointed.

30
31 I turn first to the identity of the receiver. Access originally proposed that Grant Thornton
32 be appointed as a receiver which was opposed by Arres. I make no comment on Grant
33 Thornton being in a conflict or in any way perhaps being inappropriate but, in my view, it
34 is not appropriate to appoint an entity as a receiver where there is some questions raised
35 and there are real questions raised by Arres. There are lots of good, qualified receivers.
36 In my view, where there are good, qualified other receivers available, it is not in anyone's
37 interest to appoint a receiver who would be controversial so I am not prepared to appoint
38 Grant Thornton as the receiver in this case. I understand that in correspondence, other
39 individuals have been proposed, those being Orest Konowalchuk at Alvarez and Marsal,
40 Deryck Helkaa at FTI Consulting, Kevin Meyler at Hardie & Kelly and Neil Narfason at
41 Ernst and Young. Now, no formal consents as yet have been obtained; is that correct,

1 Mr. Silver?

2

3 MR. SILVER: That is correct.

4

5 THE COURT: And Mr. Pelletier, does your client have any
6 specific objection to any of those individuals?

7

8 MR. PELLETIER: Not that I'm aware of, no.

9

10 THE COURT: Okay. So then any of those individuals upon
11 filing a consent could be appointed as the receiver. Now this is not a typical receivership
12 and this is not a situation where, in my view, a boilerplate receivership order is
13 appropriate. Obviously there are specific issues that will need to be addressed and the
14 receivership in this instance is going to need to address those circumstances so that the
15 receivership can be managed in an effective and efficient way. Mr. Silver, do you have a
16 proposed form of order?

17

18 MR. SILVER: I haven't prepared one. Of course, we were
19 relying on the boilerplate receivership order but I'm sure with directions from Your
20 Ladyship that we can craft an appropriate form of order.

21

22 THE COURT: Well, I guess what I would like to have you
23 propose is a form of receivership order that is not boilerplate that addresses the
24 circumstances in this case.

25

26 MR. SILVER: Yes.

27

28 THE COURT: What we have is a situation where the first
29 issue that needs to be determined is the nature of the exigible property that is available
30 and that seems to me, to involve at least a number of questions, obviously, between the
31 parties you would be able to determine what those other questions are. But I would
32 assume that that would be the first issue for the receiver to determine, what exigible
33 property is available and that would involve some kind of an assessment being done of
34 these receivables, the validity of the receivables and the practicality of enforcing them and
35 the validity of the assignments.

36

37 Now, if it turns out that the assignments are in fact valid, then that may be the first
38 question but I leave, in terms of the practicality, I would want there to be a receivership
39 order put forward that proposes how this matter can be dealt with in a practical manner.
40 That order will also need to deal with how the costs of the receivership are going to be
41 handled and who is going to be responsible for those costs. Receivership orders often

1 provide that the costs of the receiver come out of the estate but here there may well be, if
2 in fact the information that the assignments are valid is correct, no exigible property and
3 no assets to cover those receivership costs. If that's the case, then presumably Access
4 will need to make some arrangements so that it or somebody will be responsible for the
5 receiver's costs, at least in the first instance. Those issues will need to be addressed in
6 the context of the receivership order.

7
8 So if there is no proposed receivership order other than just the blanket order, then I am
9 going to suggest, Mr. Silver, that you put together a receivership order that be discussed
10 with Mr. Pelletier and that then the receivership order be provided to me in advance so
11 that I can look at the receivership order and that if there are some issues as to the parties
12 aren't able to agree on what the terms of that receivership order, then you can reattend
13 back before me so that we can deal with those matters in a reasonable fashion.

14
15 **Submissions by Mr. Silver (Other)**

16
17 MR. SILVER: Just a couple of things I would like the
18 receivership order to include which we might be able to get direction from yourself this
19 morning. One, is to go back to review the accounting of Arres Capital to May 1st, 2009,
20 I think it will be, which is the date that our debt arose which is the subject of a summary
21 judgment to see whether there has been any transactions that may result in finding
22 exigible assets that may have been transferred out of Arres to other parties.

23
24 The second thing is that there are, as you may recall, a number of funds, if I can refer to
25 them, that are being held in various party's hands that Arres has laid claim to that Access
26 may also have claimed to in other parties such as Y2K and Ridgebrook and Kenzy
27 Financial may have Access to but they're sort of up in the air pending some determination
28 through the judicial process in various actions. So I would like to include that and not
29 just limit it to the receivables per se, although technically those may fall within the
30 broader definition of receivables. I just don't know exactly what Arres' claim is. But the
31 receiver would have to determine whether they form part of Arres' claim, they
32 (INDISCERNIBLE) to Arres' claim and then whether or not there are residual assets for
33 the purposes of enforcement.

34
35 THE COURT: So what is it you are proposing?

36
37 MR. SILVER: Just that the receivables, well, include these
38 other funds that we're talking about.

39
40 THE COURT: Okay. Well, sorry, the receivables seem to be
41 the only assets that have been identified but, in my view, it is appropriate that the receiver

1 be appointed overall to determine the exigible property of Arres and over that exigible
2 property. And so if those funds, if Arres has an interest in those funds such that they
3 would constitute exigible property, then they would be caught by the receivership order.
4 It seems that there is no point having the receiver deal with those funds other than simply
5 there be an order that those funds, that they be specifically identified and that they not be
6 disbursed, so to speak, most of them have already been tied up in some fashion, I believe,
7 the funds that you are identifying, without further Court order. Would that address your
8 concerns, Mr. Silver?

9
10 MR. SILVER: You certainly would have the preservation
11 aspect that you refer to, yes. I mean, the receivership should be over all the assets,
12 property and undertakings of Arres with a view to determining which of those assets,
13 property and undertakings are exigible for the purposes of enforcing any judgment by any
14 judgment creditor it would seem to me. So what I'm looking at is in the wording, right,
15 that would say the receiver, whoever the receiver is going to be, is receiver over the
16 property and assets and undertakings of Arres as opposed to the words exigible assets.
17 That's something that the receiver would have to determine.

18
19 THE COURT: Well, how do you deal with that in the context
20 then of section 87? 87 says, (as read)

21
22 Notwithstanding any rule of law or equity to the contrary where
23 certain exigible property of an enforcement debtor cannot
24 otherwise be conveniently realized, the Court on application may
25 do one or more of the following:

26
27 (a) appoint a receiver of the property.

28
29 MR. SILVER: So to me if I'm understanding that provision
30 correctly, we would appoint a receiver over the property and then we determine whether
31 it's exigible.

32
33 THE COURT: Well, how do I do that under the section? I
34 mean, this is a situation where you have applied for statutory remedy.

35
36 MR. SILVER: Yes.

37
38 THE COURT: You could have gone under the *Bankruptcy*
39 *Act*. You could have proceeded under Section 13 of the *Judicature Act* but you didn't.
40 And so we are under a statutory remedy. Now, the statutory remedy is designed not to
41 deal with your client's interest as an investor but to deal with your client's interest as a

1 judgment creditor.

2

3 MR. SILVER: Yes.

4

5 **Ruling (Other)**

6

7 THE COURT: As a judgment creditor your client is only
8 entitled to the exigible property. You have satisfied me that Arres' behaviour has been
9 such that it raises some real questions as to whether it has exigible property and if
10 anybody other than a receiver is able to determine if it has exigible property.

11

12 So my order is going to direct that it is appointed over the exigible property. Now, I
13 appreciate that may be a bit of a chicken and egg.

14

15 MR. SILVER: Yes.

16

17 THE COURT: But there could be property that it has that
18 would not be exigible. For example, if you had property that was covered by an
19 exemption, that would not be exigible property.

20

21 MR. SILVER: Yes.

22

23 THE COURT: I have no jurisdiction under section 85 to
24 appoint a receiver over something other than exigible property.

25

26 MR. SILVER: Yes. Well, I don't know what exemption might
27 apply in this case so I'll just withdraw that --

28

29 THE COURT: Well, I'm just saying, Mr. Silver, when you
30 have chosen a statutory remedy, this is not a boilerplate receivership and so you are going
31 to need to draft your order in such a fashion that it addresses and responds to the limits
32 contained in the statute.

33

34 Now, if it turns out that assets are properly assigned then those assets may well not
35 constitute exigible property and even under your characterization they would not fall
36 within the undertaking of Arres because it's not Arres' undertaking.

37

38 MR. SILVER: Yes.

39

40 THE COURT: But I am satisfied that somebody needs to get
41 in there and determine what Arres owns and which assets of Arres should be made

1 available to your client. Because your client has a million dollar judgment --

2

3 MR. SILVER: Yes.

4

5 THE COURT: -- that they have had for over a year and that
6 they are entitled to realize upon. So this is not going to be a boilerplate order. You are
7 going to need to craft your order so that it addresses the concerns that I have identified.

8

9 I am prepared to give a receiver and I am satisfied that I have the authority to do that
10 under the section, in particular section D, I can give the Court any order that is necessary
11 or appropriate to facilitate realization of the exigible property. But you are going to need
12 to craft your order in accordance with the limits contained in the provision under which
13 you have applied.

14

15 MR. SILVER: I understand that. Thank you.

16

17 THE COURT: Okay. Mr. Pelletier, do you have any
18 comments with respect to anything that Mr. Silver was raising or anything that I have
19 raised?

20

21 **Submissions by Mr. Pelletier (Other)**

22

23 MR. PELLETIER: Yes, My Lady. First of all, I have had a little
24 bit of trouble just in my own mind conceptualizing how this receiver is to be appointed
25 without impacting all of the various actions that are outstanding between Access and
26 Arres. I think -- well, in 2014 there were, I think four actions filed by either Access or
27 Arres in order to address issues which, I believe, the receiver is now directed to address.
28 That's my first concern.

29

30 The second concern, of course, is the outstanding foreclosure actions as well as the
31 outstanding -- well, for example, the Greybriar matter obviously, how that is to -- how
32 exactly that will properly continue or not depended upon the powers granted to the
33 receiver from your order today.

34

35 And the third thing is, it seems to me that what is really being directed here in appointing
36 a receiver is as you have identified, it is not a typical receiver, it is not -- really what I
37 think the Court is trying to get at here is the issue of and as you have mentioned, I'm
38 sorry, is the issue of what are Arres assets and what is available. What is exigible
39 property that is available. Well that, to me strikes me as more of an accounting report. I
40 mean, we're within the *Civil Enforcement Act*, 85, 86, 87 which grants the availability of
41 a broad spectrum of remedies. I'm a little bit worried that we may be getting caught up

1 in the use of the word "receiver" when, in fact, we mean something collectively slightly
2 different than an actual receiver and in that way -- based on your direction that this
3 receiver appointed needs to identify the exigible property, needs to identify the validity of
4 the receivables, needs to address the practicality of enforcing and address the validity of
5 the assignments, my suggestion is that that -- it is really an accounting report. More of the
6 nature of sort of like a part 18 investigation to figure out what are the assets, what is
7 specific to the exigible property.

8

9 I don't really have a solution to all of these issues I have just raised. I'm just saying I'm
10 having a tough time conceptualizing how to make this work.

11

12 THE COURT: Well, and I think that's why -- that's why I
13 think some of those points will need to be addressed in the receivership order. For
14 example -- and I don't think I am in a position to tell the parties here today how one
15 should address some of the facts that there appear to be certain, as you have identified
16 conflicts between Access's interests in certain aspects and what the best way to address
17 some of those issues would be, because the matter needs to be addressed in kind of a
18 practical way. And so the form of the order.

19

20 Now, with respect to a -- it is a different kind of receivership order because a lot of times
21 what you would do is you would appoint a receiver and, in fact, to carry on somebody's
22 business. And as I understand, Arres is not carrying on business other than proceeding
23 with enforcement of various actions. And unless I have got that wrong, that's my
24 understanding.

25

26 MR. PELLETIER: Arres Capital was my understanding as well.

27

28 THE COURT: Arres Capital. I think you want here more than
29 a simple accounting investigation because if there are exigible assets in Arres Capital, at
30 this point in time I am satisfied that Arres Capital should not be disposing of those assets
31 and in that context what a receiver would do is, in effect, hold those assets.

32

33 Now, the section 85 is a very flexible remedy so there may be more practical ways of
34 dealing with some of those issues but it seems that the receiver in this case is going to
35 need some quite different powers than somebody else might need.

36

37 And the receivership order is going to need to address the fact that this is not the usual
38 case. While I appreciate that Access is questioning the validity of the assets that it is
39 really seeking to enforce in order to get its million dollar judgment paid, it creates a
40 somewhat unusual circumstance and the receivership order is going to need to address
41 that. To the extent that these claims are, in fact, legitimate, that is not going to be

1 Access's call. That is going to be why a receiver needs to be involved where the receiver
2 is a Court-appointed receiver under this section who has statutory duties and to the extent
3 that there are circumstances where there is a conflict between Arres and Access, then that
4 is going to need to be addressed in such a way. Because Access is not the only person
5 who is going to be the beneficiary of this receivership order but it would certainly apply
6 to other judgment creditors as well. And there may be some.

7
8 MR. PELLETIER: The other judgment creditor issue actually I
9 believe is a non-issue. I think my friend is a little bit -- he is not counsel on that matter.
10 The Kenzy money is paid into Court. Arres has absolutely no claim to that. So when
11 we're talking about other --

12
13 THE COURT: No, no, but if there were other judgment
14 creditors who came forward so to the extent that Arres takes the position that Access
15 owes it a bunch of money as I understand which Access denies. That is potentially an
16 asset of Arres if it is, in fact, a valid claim. And if it is a valid claim, by the time things
17 get realized there may be other judgment creditors of Arres who come out of the
18 woodwork and those judgment creditors would be entitled to get their money from Access
19 if, in fact, Access properly owes money to Arres that hasn't been assigned to somebody
20 else.

21
22 The receivership order in this context is going to need to make sure that all of those
23 interests are, in fact, protected. This will be a very expensive exercise and I expect that
24 the receiver is going to be looking to make sure that its costs are going to be taken care
25 of. So all of those things are the nuts and bolts issues of the receivership order that are
26 going to need to be proposed.

27
28 And what I am, I indicated what I'm prepared to grant is an order within the scope of
29 section 85 and section 86 which has some fairly broad powers but it is going to need to
30 take into account all of the particular and somewhat unusual interests that are at play here.
31 And I don't think I can tell you today how to best handle those. Those are things that
32 you and Mr. Silver are going to have to either work out or if you can't work them out,
33 come back before me with each of your proposals as to how they would need to be
34 addressed in the context of a receivership order. And perhaps before you do that, once
35 the identity of the receiver has been determined, then it may be useful to sit down and
36 have some discussions. It may or may not, I don't know. It may be useful and I leave
37 that to counsel to figure out where you go.

38
39 MR. PELLETIER: One more request for direction. There are
40 effectively, in my mind there are sort of two types of actions that Arres Capital is
41 involved in, correct. The one type of action relates to foreclosures, Arres taking steps as

1 trustee in certain projects to get them through a process and get the investors and itself
2 paid out. That's one group.

3
4 The other group are the number of actions between Access and Arres relating to
5 addressing the assets of Arres, the assignments, the transfers, those sorts of things
6 effectively following from the judgment. I guess I would just like a little bit of
7 confirmation that the actions which are between Access and Arres dealing with Arres'
8 assets are to be sort of lumped together and included in this receivership order and the
9 actions that Arres is undertaking as trustee are to be effectively left alone. Because the
10 typical order, of course, would state everything because it would be over everything that
11 Arres has but I can see this becoming a ridiculous, even more of a ridiculousness if the
12 asset actions are not lumped together. It's part of that whole consolidation application
13 that my client has brought. There has been a new action started since then.

14
15 So I guess what I'm asking for is confirmation that when Mr. Silver and I are dealing
16 with this we are to lump together the asset actions and try to include them some way
17 practically in the receiver order and meanwhile leave the, I will call them the foreclosure
18 actions, those sort of enforcement steps alone except to the extent that Arres may
19 receive --

20

21 THE COURT: May realize.

22

23 MR. PELLETIER: -- may realize (INDISCERNIBLE) some assets
24 in the future.

25

26 THE COURT: Okay. Mr. Silver?

27

28 **Submissions by Mr. Silver (Other)**

29

30 MR. SILVER: I have no difficulty with my friend's proposal
31 to isolate the foreclosure actions. It is the foreclosure actions that produce funds that are
32 potentially available to Arres as well as the investors, including Access and Access in its
33 capacity as judgment creditor or anybody else who may be now or later a judgment
34 creditor. And it's the foreclosure actions, for example, the Greybriar situation that
35 produces the fertile ground or the most mischief to be undertaken by Arres. If we don't
36 include --

37

38 THE COURT: What do you mean the most mischief to be
39 undertaken?

40

41 MR. SILVER: Well, an example, if you go to the Greybriar

1 matter where the attempt was made to get titles to these condominium units to sell them
2 to a non-assignee, third party company controlled by Mr. Serra's wife and then put those
3 funds out of the reach --
4

5 THE COURT: Right. But that is all something that is
6 subsequent, as I understand it, to the realization. As I understand what Mr. Pelletier was
7 saying is he's saying that in order to be efficient to the extent that there is the foreclosure
8 aspect, that that foreclosure aspect should go ahead but any moneys that flow out of that
9 foreclosure action be held. So that the mischief that you are now talking about is
10 mischief that is post realization rather than pre-realization, is that --
11

12 MR. PELLETIER: Yes, that's accurate.
13

14 MR. SILVER: Well, post-realization or not post-realization. I
15 mean if you take a look at what transpired in the Greybriar matter, the titles hadn't even
16 been transferred yet but with the benefit of the Western Canadian protocol with the
17 mortgage being advanced by Terrapin to the purchaser before the titles were registered, I
18 think the funds came into 179's possession, I think there is still about \$138,000 sitting
19 around there somewhere. And then there is other titles that weren't subject of the sale
20 which have yet to be dealt with. So that's a problem. If we don't include -- especially
21 since it is the subject of the assignment in the first place so if we don't include Arres'
22 interest as it perceives it, whether it's a receivable now or becomes a fee claim which it
23 would then grab the funds and apply it against its fees, if we don't attach that and
24 preserve those funds that may come about or those titles that may be provided to Arres,
25 then we will have left a large hole for Arres to drive its truck through and create problems
26 which are going to result in more litigation and we will have lost the opportunity to
27 preserve those assets for the benefit of Access and all other creditors. We have to close
28 that hole.
29

30 **Ruling (Other)**
31

32 THE COURT: Well, this is clearly in my view something that
33 you are going to have to give me actual wording. Because in terms of what is being
34 talked about, I need to understand what it is that is, in fact, being proposed specifically.
35 And so, you know, looking at the situation, the order is going to need to be crafted in
36 such a way that it is practical and that what is occurring is going to protect the various
37 interests at play. So how is it, Mr. Silver, that you are suggesting that we deal with the
38 claims that are being made against Access?
39

40 MR. SILVER: Against Access by Arres, there is only the one
41 action which is the \$9.7 million claim which you may recall we had brought an

1 application to dismiss. That -- well in the context of the receivership, the receiver is
2 going to have ownership, so to speak, of the claim because they have to determine if that
3 claim which is part of the \$9.7 million -- I think you were claiming 5.6 million, sorry, but
4 as part of the receivables that Arres claims to have. The receiver is going to have to
5 determine if that is in fact a valid claim. But it wouldn't be -- it is an offsetting claim
6 against our judgment supposedly if it was real.

7
8 So one of the problems that my friend is implying, I guess, when he addresses this
9 question to the Court is, you know, what is his future role as counsel for Arres, and I
10 know he mentioned this in his representations when we were before you in the middle of
11 January, what is his future role as counsel for Arres in these various actions. And here
12 we have whatever assets that are exigible which would include this potential claim are
13 covered by the receivership. So it seems to me that the receiver would come to this Court
14 and say we need advice and directions as to what to do with this. We have looked at this
15 and we've said, one, we don't feel it is valid or, two, we do feel it is valid. Now what do
16 we do.

17
18 THE COURT: Okay, so you're saying -- let's just take that
19 forward. The receiver looks at the claim and let's say the receiver decides the claim is
20 valid.

21
22 MR. SILVER: Yes.

23
24 THE COURT: Then the receiver -- the receiver, what is it
25 you're suggesting? The receiver might go, hum, all this expensive litigation, Mr. Pelletier
26 knows all sorts of things about this, I'm going to continue to use Mr. Pelletier.

27
28 MR. SILVER: The receiver would have that option certainly.

29
30 THE COURT: But that -- you're suggesting that all of that will
31 need to be a decision to be made by the receiver.

32
33 MR. SILVER: By the receiver, yes.

34
35 THE COURT: Well, okay. And all I'm saying again, this is
36 why I think we get the detail that -- that will need to be determined in the order.

37
38 MR. SILVER: Yes, I appreciate there is going to be a lot of
39 discussion, I think, between Mr. Pelletier and myself as to what this order should look
40 like and then if we are unable to reach agreement, I suppose we will be presenting it to
41 yourself after you had a chance, of course, to look at it and then we can perhaps have that

1 discussion at that point in time. Because I think we are probably in the realm of
2 speculation at this point in time.

3
4 **THE COURT:** Yeah, I think, let's be clear. There are definite
5 conflicting interests that need to be addressed in appropriate fashion. And I'm sure that
6 the two of you can put your minds to where those issues are and if you can't agree, then
7 the matter will be brought back. But the focus will need to be on being practical because
8 I am extremely mindful of the conflict that Access faces in the various position it has
9 taken. I mean it is trying to realize -- and so that will need to be addressed in a way that
10 this is all addressed in the context of the order. And that's I guess one of the reasons why
11 I suggest there be some real meaningful discussions with a receiver because this will be
12 an extremely expensive process, and I'm sure that the receiver will be looking for some
13 assurance from somebody where that money is going to be coming from, recognizing that
14 who ultimately pays that money at the end of the day may be somebody else, I don't
15 know, but also recognizing that the receiver's duties will be to the Court, and, therefore,
16 whoever is ultimately financially responsible for the receiver may turn to be paying for
17 things that turn to not necessarily be things that are in their best interests at this point in
18 time until it is determined where things shake out. So those, I think, are things that
19 everybody will have to take into account.

20

21 **MR. SILVER:** Fair enough. Thank you.

22

23 **THE COURT:** Okay. Thank you. Anything else?

24

25 **Submissions by Mr. Silver (Costs)**

26

27 **MR. SILVER:** I don't know if it is a moot point but is there
28 any order with respect to costs with respect to our application?

29

30 **THE COURT:** With respect to costs, what are you seeking?

31

32 **MR. SILVER:** Whether Arres should be responsible for paying
33 costs of our application since we were successful in the appointment of the receiver.

34

35 **THE COURT:** Mr. Pelletier?

36

37 **Submissions by Mr. Pelletier (Costs)**

38

39 **MR. PELLETIER:** I suggest that we put that off until later today
40 depending upon what the order actually says. We won't be able to determine exactly how
41 successful they've been until we get the final determination as to what the order states and

1 there will be submissions to be made at that point in time in relation to without prejudice
2 communication. And to me it doesn't make sense, given your instructions this morning,
3 we won't know what that looks like.

4
5 **Ruling (Costs)**

6
7 THE COURT: What I'm going to do is simply reserve on
8 costs at this point in time. If we need to get into issues like that this is not the time to
9 address and as you see we have just had some other people come into the courtroom to
10 deal with something that I need to deal with at 10:00.

11
12 At the outset of this application Arres had brought a cross application for consolidation
13 that was adjourned. Ultimately what I simply wanted to direct with respect to that
14 application is those kind of applications should properly be brought before a master rather
15 than on the commercial list. I appreciate it was a cross-application against a receivership
16 application. But I just wanted to direct that when that application or if that application
17 ultimately proceeds and by whom it is going to proceed, I think you need to deal with this
18 receivership issue first, it should be before the master, not on the commercial list.

19
20 MR. PELLETIER: Yes, I honestly believe that that consolidation
21 issue will be addressed by the receivership order anyway.

22
23 THE COURT: Okay. Thank you.

24
25 MR. SILVER: Thank you very much.

26
27 MR. PELLETIER: Thank you.

28
29 THE COURT CLERK: Order in Court.

30
31 _____
32 PROCEEDINGS CONCLUDED
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1 **Certificate of Record**

2

3 I, R. Bales, certify that this recording is the record made of the evidence in the
4 proceedings in Court of Queen's Bench held in courtroom 1204 at Calgary, Alberta on the
5 13th day of February, 2015, and that I was the court official in charge of the
6 sound-recording machine during the proceedings.

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1 **Certificate of Transcript**

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