

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

PERCY LEVY

Plaintiff

- and -

NELBAR FINANCIAL CORPORATION, ESSEX CAPITAL MANAGEMENT LTD.,
GEORGE NELSON ALLEN, ROBIN MORIARTY, BARBARA ALLEN, WOODBINE
DRIVING RANGE LIMITED, FORMERLY KNOWN AS 884085 ONTARIO LIMITED,
1272327 ONTARIO INC., NELSON ALLEN FINANCIAL CORPORATION
and KUKOKE HOLDINGS INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

NOTICE OF MOTION
(returnable December 17, 2004)

Class Counsel will make a motion to the Honourable Mr. Justice Nordheimer on December 17, 2004, at 10:00 a.m., or as soon after that time as the motion can be heard, at 361 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING:

The motion is to be heard orally.

THE MOTION IS FOR:

- a) An Order approving the Retainer Agreement entered into with the Representative Plaintiff, Percy Levy, pursuant to Section 32(2) of the *Class Proceedings Act, 1992*;
- b) An Order approving Class Counsel's fees and disbursements, together with applicable taxes, in the total amount of \$900,000.00;

- c) An Order authorizing and directing payment forthwith to Class Counsel the sum of \$596,257.81, which sum is currently being held in trust pursuant to the Order of the Honourable Mr. Justice Cumming dated December 18, 2001;
- d) In the alternative, an Order varying the aforesaid Order of Mr. Justice Cumming to authorize Class Counsel to render accounts to successful Canadian Investor Protection Fund (“CIPF”) claimant class members for 15% of the sums awarded by CIPF and who have yet to remit 15% of any such award, and for an Order authorizing and directing that the sum of \$596,257.81 currently held in trust be paid to Class Counsel as payment on account of the said accounts;
- e) Costs of this motion; and
- f) Such further and other relief as counsel may advise and this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

- a) By direction dated October 15, 2004, the Court fixed December 17, 2004 for the hearing of this motion.
- b) On July 15, 1999, the Plaintiff commenced this action by Statement of Claim;
- c) In the Statement of Claim, the Plaintiff sought damages for breach of fiduciary duty and conspiracy to defraud investors arising from dealings with the defendant Allen and the corporations he controlled, Nelbar Financial Corporation (“Nelbar”) and Essex Capital Management Ltd. (“Essex”);
- d) On January 4, 2000, this action was certified as a Class Proceeding and the class was defined as:

“All persons in Canada who, prior to March 22, 1999, invested through the Defendants, Nelbar Financial Corporation or Essex Capital Management Limited in any of Nelbar Financial Corporation "Corporate Investment Certificates" or in any private company who remain unpaid.”;
- e) In the conduct of this action and related proceedings, Class Counsel:

- (i) attended organizational and informational meetings with class members;
 - (ii) established and regularly updated a website to provide information to class members and interested parties;
 - (iii) responded to numerous telephone inquiries from class members on the status of the proceedings;
 - (iv) commenced and conducted the class action;
 - (v) obtained default judgment against the class action defendants Nelbar Financial Corporation (“Nelbar”) and Essex Capital Management Limited (“Essex”);
 - (vi) obtained various interlocutory orders within the class action to preserve assets;
 - (vii) on references to the Master, proved the individual damages of class members;
 - (viii) obtained the appointment of a receiver of the assets of Nelbar and Essex and participated in the conduct of the receivership;
 - (ix) made application to the Canadian Investor Protection Fund (“CIPF”), prepared for CIPF hearings and made presentations to the CIPF on hearings and appeals;
 - (x) monitored and, where appropriate, participated in various criminal and regulatory proceedings involving the defendants Nelson Allen and Robin Moriarity; and
 - (xi) considered other remedies which may be available.
- f) Class Counsel undertook risk in pursuing the action and other proceedings given the alleged lack of recoverable assets of Nelbar and Essex, as advised by

the Director of Credit Unions and Co-Operatives Branch of the Financial Services Commission of Ontario (“FSCO”) and the appointed Receiver.

- g) As a result of the apparent lack of recoverable assets, Class Counsel were compelled to develop a strategy which featured a number of separate but related initiatives.
- h) One initiative was to file class and individual claims for compensation from the CIPF. Following hearings and appeals, CIPF paid approximately \$6 million to various class members.
- i) By order dated December 18, 2001, Mr Justice Cumming ordered that 15% of awards made by CIPF be withheld and paid into trust to be available for Class Counsels’ fees and disbursements on further order to the Court.
- j) A significant amount of time and expense was expended by Class Counsel on a contingency basis in these various proceedings. The results from these efforts have been favourable to many of the claimants who would have otherwise suffered substantial financial harm;
- k) The *Class Proceedings Act, 1992*, S.O. 1992, c. 6 section 12, 32 and 33; and
- l) Such further and other grounds that counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- a) The Affidavit of David Robins, sworn November 24, 2004 and exhibits thereto;
- b) The pleadings and proceedings herein; and
- c) Such further and other material as counsel may advise and this Honourable Court may permit.

November 24, 2004

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Co-Counsel for the Plaintiff

PERCY LEVY
Plaintiffs

and

NELBAR FINANCIAL CORPORATION et al.
Defendants

Court File No: 31902/99

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at London

NOTICE OF MOTION

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Co-Counsel for the Plaintiff

Ontario
SUPERIOR COURT OF JUSTICE

BETWEEN:

PERCY LEVY

Plaintiff

- and -

NELBAR FINANCIAL CORPORATION, ESSEX CAPITAL MANAGEMENT LTD.,
GEORGE NELSON ALLEN, ROBIN MORIARTY, BARBARA ALLEN, WOODBINE
DRIVING RANGE LIMITED, FORMERLY KNOWN AS 884085 ONTARIO LIMITED,
1272327 ONTARIO INC., NELSON ALLEN FINANCIAL CORPORATION and KUKOKE
HOLDINGS INC.

Defendants

Proceeding Under the *Class Proceedings Act, 1992*

AFFIDAVIT OF DAVID ROBINS
(sworn November 24, 2004)

I, **DAVID ROBINS**, barrister and solicitor of the City of Windsor, in the
Province of Ontario, **MAKE OATH AND SAY:**

1. I am a member of the Sutts, Strosberg LLP law firm, co-counsel for the Plaintiff in
this class proceeding, and as such have knowledge of the matters to which I hereinafter
depose.

2. This affidavit is made in support of a motion to approve the Fees and Disbursements
Agreement entered into by the representative Plaintiff and approve fees and disbursements
and for directions concerning the funds held in trust pursuant to the Order of Mr. Justice
Cumming dated December 18, 2001.

I. Overview

3. Pursuant to the terms of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, Percy Levy,
as Client and Plaintiff in the within action, entered into an Agreement Respecting Fees and
Disbursements (the "Fees and Disbursements Agreement") with Harvey T. Strosberg (the

“Solicitor”). A copy of the Fees and Disbursements Agreement is annexed hereto as Exhibit “A”.

4. As a term of the Fees and Disbursements Agreement, Percy Levy authorized the Solicitor to work in conjunction with the law firms of Siskind, Cromarty, Ivey & Dowler LLP and Genest Murray. The principal counsel appointed to the matter at Genest Murray moved their practices from Genest Murray to Heenan Blaikie LLP in July 2000, where they continued to participate in the class action. The three law firms are hereinafter referred to as “Class Counsel”.

5. Since 1999, Class Counsel have worked, without compensation, to achieve financial recovery for class members. As hereinafter set out in greater detail, Class Counsel have, *inter alia*:

- (i) attended organizational and informational meetings with class members;
- (ii) established and regularly updated a website to provide information to class members and interested parties;
- (iii) responded to numerous telephone inquiries from class members on the status of the proceedings;
- (iv) commenced and conducted the class action;
- (v) obtained default judgment against the class action defendants Nelbar Financial Corporation (“Nelbar”) and Essex Capital Management Limited (“Essex”);
- (vi) obtained various interlocutory orders within the class action to preserve assets;
- (vii) on references to the Master, proved the individual damages of class members;
- (viii) obtained the appointment of a receiver of the assets of Nelbar and Essex and participated in the conduct of the receivership;
- (ix) made application to the Canadian Investor Protection Fund (“CIPF”), prepared for CIPF hearings and made presentations to the CIPF on hearings and appeals;

(x) monitored and, where appropriate, participated in various criminal and regulatory proceedings involving the defendants Nelson Allen and Robin Moriarity; and

(xi) considered other remedies which may be available.

6. On December 18, 2001, Mr. Justice Cumming ordered that 15% of all compensation awards made by the CIPF be withheld and paid into trust. The funds paid into trust are available, subject to the approval of the court, to pay Class Counsel's fees and disbursements. A copy of the Order dated December 18, 2001 is annexed hereto as Exhibit "B".

7. The sum of \$596,257.81 is currently being held in trust pursuant to the aforesaid Order of Mr. Justice Cumming. The CIPF proceedings are now complete. The receivership and class action proceedings are substantially completed. In the judgment of Class Counsel, it is now convenient and appropriate to deal with Class Counsel's fees and disbursements and the sum held in trust pursuant to the Order of Mr. Justice Cumming.

II. Strategic Planning

8. I am informed by Ray Leach and William Pepall that on June 7, 1999, Class Counsel attended a general meeting, at which time John Harper, the director of Credit Unions and Co-Operatives Branch of the Financial Services Commission of Ontario ("FSCO"), concluded that it was unlikely that class members would achieve a substantial recovery in this class action against Nelbar and Essex.

9. An Information Package, prepared by FSCO and distributed at the meeting, stated: "[T]here are no assets of Nelbar which are likely to be recoverable in the short term. The majority of assets of Nelbar against which recovery could be attempted can be classified (at best) as unsecured, speculative and long term."

10. Despite FSCO's assessment, which Class Counsel agreed with, Class Counsel attended five meetings with investors and conducted research into possible avenues of recovery.

11. Based on these efforts and faced with the anticipated difficulties in making any substantial recovery from Nelbar and Essex, Class Counsel developed and recommended a three-pronged strategy, which included the following initiatives:

- (1) prosecute the class action and add defendants where necessary to deal with fraudulent conveyance issues;
- (2) apply within the class action for the appointment of a Receiver of the assets of Nelbar and Essex; and
- (3) file and pursue class and individual claims for compensation available from the CIPF.

12. In addition to these primary recovery initiatives, Class Counsel also recommended monitoring all criminal and regulatory proceedings and pursuing individual law suits where class members had claims against brokers and investment advisors.

13. Although these initiatives were, to some extent separate, they were undertaken to benefit the class and information and arguments developed in one context was frequently important and useful in another context. For example, information obtained concerning the relationship between Nelbar and Essex discovered in the Receivership and class action was used in the CIPF proceedings.

III. The Class Action

14. On July 15, 1999, following an investigation by FSCO and the issuance of a permanent Cease and Desist Order against Nelbar, Essex and Nelson Allen (“Allen”) prohibiting them from conducting business in Ontario, the class action was commenced through the issuance of a Statement of Claim. A copy of the Fresh Statement of Claim is annexed as Exhibit “C”.

15. At all times, Class Counsel was committed to identifying and securing an interest in any assets that could ultimately respond to a judgment in favour of the class. In keeping with this commitment, Class Counsel sought and obtained the Order of the Honourable Mr. Justice Haines dated July 15, 1999, granting leave to register a Certificate of Pending Litigation on

title to certain lands in Newmarket, Ontario. The resulting Certificate of Pending Litigation was subsequently registered, thereby assuring the class members maintained an interest in this potential asset.

16. On January 4, 2000, the class action was certified as a class proceeding pursuant to the *Class Proceedings Act*, S.O. 1992, as amended. A copy of the January 4, 2000 Certification Order is annexed as Exhibit "D". The class is defined in the Certification Order as:

All persons in Canada who, prior to March 22nd, 1999, invested through the Defendants, Nelbar Financial Corporation or Essex Capital Management Limited in any of Nelbar Financial Corporation "Corporate Investment Certificates" or in any private company and who remain unpaid.

17. In this action, the representative plaintiff, on behalf of the class of investors, seeks, *inter alia*, damages for breach of fiduciary duty, fraudulent misrepresentation and conspiracy to defraud investors arising from their dealings with the defendant Allen and the corporations he controlled, Nelbar and Essex. Similar allegations are made against the defendant, Robin Moriarity ("Moriarity").

18. Allen and the defendant Moriarity have defended the class action. A copy of Allen's statement of defence is annexed hereto as Exhibit "E". A copy of Moriarity's statement of defence is annexed hereto as Exhibit "F".

19. As no defence was filed on behalf of Nelbar or Essex, the class sought default judgment.

20. Through their investigations, Class Counsel learned of a transfer of the Allen matrimonial home that had taken place. Once again, in order to ensure that all possible assets remain available to respond to a judgment in favour of the class, Class Counsel sought and obtained the Order of Mr. Justice Cumming dated March 10, 2000 granting leave to register a Certificate of Pending Litigation against the Allen property. The resulting Certificate of Pending Litigation was subsequently registered, thereby assuring the class members maintained an interest in this potential asset.

21. On October 23, 2000, Mr. Justice Cumming granted judgment against Nelbar and Essex and directed a reference to quantify the amounts of the individual claims. A copy of Mr. Justice Cumming's Order dated October 23, 2000 is annexed as Exhibit "G".

22. In accordance with the October 23, 2000 Order, a reference was held before Master Linton, which resulted in two interim reports, Interim Report #1 and Interim Report #2 (the "Interim Reports"). Copies of the Interim Reports are annexed hereto as Exhibit "H".

23. Class Counsel appeared on the references and assisted individual class members in proving their claims. 129 distinct claims on behalf of 109 class members were proven in the references.

24. On December 27, 2001, Mr. Justice Cumming confirmed the Interim Reports and ordered that Nelbar and Essex jointly pay the sum of \$10,610,807.94 to the persons listed in the Interim Reports, as allocated. A copy of the judgment of Mr. Justice Cumming dated December 27, 2001 is annexed hereto as Exhibit "I".

25. Mr. Justice Cumming's December 27, 2001 endorsement states that "*...subject to a determination of liability against the individual defendants Allen and Moriarty, the claims of the individual class members and the class as a whole, as set out in the Interim Reports, shall be determinative of the amounts owing by the said two individual defendants.*" This statement is consistent with the last sentence of paragraph 9 of the October 23, 2000 order (Exhibit "G") which states "*The Judgment for the aggregate amount of the individual Class Members' Claims or individual judgments for the individual Class Members shall be proof of the individual claims if the Plaintiff is successful for the purposes of the common issues as against Allen and Moriarty.*" A copy of Cumming, J's December 27, 2001 endorsement is annexed hereto as Exhibit "J".

26. On November 1, 2004, Class Counsel brought a motion for summary judgment against Allen. The motion is based upon Allen's guilty plea and admissions in criminal proceedings based upon the same facts and transactions as the class action. The motion was adjourned on November 1, 2004 to permit Allen to retain counsel.

27. In addition to the foregoing, Class Counsel considered whether class members had a cause of action against one or more regulatory agencies for negligence in the regulation of Essex and/or Nelbar.

IV. Receivership Proceedings

28. In June and July 1999 Class Counsel undertook steps to locate and have appointed a Receiver of the assets of Nelbar and Essex. By Order dated July 29, 1999, on motion brought by Class Counsel, the Court appointed Solursh Feldman and Goldberg Inc. as Receiver. Annexed hereto as Exhibit "K" is a copy of the Receivership Order.

29. The purpose of the receivership was to utilize the power of a court appointed receiver to identify, secure and realize upon the assets of Nelbar and Essex for the benefit of the class. During the period 1997 to 1999 substantial funds invested by class members flowed into Nelbar and/or Essex. It was the view of Class Counsel that a receivership would be the most efficient and effective way to obtain an accounting of the funds invested by class members. Unfortunately substantial funds cannot or have not been accounted for.

30. Since the appointment, the Receiver has filed six reports with the Court and has brought several motions seeking directions and approval. Class Counsel attended on and participated in all receivership proceedings. Class Counsel reviewed the reports and provided submissions to the Court on recommendations made by the Receiver.

V. CIPF Proceedings

31. During the relevant time period, CIPF was a trust funded by its members, Canadian financial institutions and investment dealers. CIPF trust funds were available in the discretion of CIPF and in accordance with guidelines to compensate investors who lost money due to the insolvency of a member institution. Essex was a member institution. Nelbar was not.

32. After a detailed review of CIPF by-laws and other public information, Class Counsel determined that all class members should file claims with the CIPF, whether they held accounts with Essex or not. It was the view of Class Counsel that Nelbar and Essex were indistinguishable insofar as the class was concerned.

33. On September 8, 1999 (4 months prior to the Certification Order), and following an initial meeting with the CIPF on August 27, 1999, Class Counsel notified the CIPF of their intention to file claims on behalf of class members.

34. CIPF advised Class Counsel that the limitation period for filing claims would expire on September 21, 1999. Within a limited time frame, Class Counsel created a claim form and retainer agreement, arranged for approximately 136 individual class members to sign the forms, delivered the completed forms to CIPF, and advised several class members who chose to represent themselves so that they could meet CIPF's deadline.

35. Commencing in or about September 1999 Class Counsel remained involved in the CIPF claim adjudication process. Among other activity, Class Counsel:

- (i) met and corresponded with CIPF counsel and representatives;
- (ii) met with class members to brief them on the CIPF process and to assist in organizing class member's documents;
- (iii) attended on CIPF hearings at first instances;
- (iv) made submissions to the CIPF;
- (v) appealed CIPF findings which denied compensation;
- (vi) processed and argued claims to CIPF based upon the investment made by certain class members;
- (vii) attended and made submissions on appeals;
- (viii) assisted class members who received awards in understanding and executing releases and subrogation documents.

36. Class Counsel acknowledge that some class members attended before the CIPF unrepresented. I believe that these class members benefited from the claim form prepared by Class Counsel and the submissions made by Class Counsel on behalf of represented class members.

37. The claim form/retainer signed by Percy Levy and the class CIPF claim are annexed hereto as Exhibit "L".

38. From November 2000 to April 2003 the CIPF made payments to class members in the total amount of \$6,020,092.84.

39. The \$6,020,092.84 paid by CIPF out of the confirmed \$10,610,807.94 said to be lost by the class members, translates to a 57% recovery. A copy of the CIPF Schedule setting out particulars of the money awarded to the class members is available to the Court, but for confidentiality reasons is not appended to this affidavit.

40. In addition to the foregoing, Class Counsel considered whether class members who were denied an award by CIPF have any remedy by way of application or judicial review to the court on this issue. David Stratas, a leading administrative law counsel, was consulted.

VI. Other Related Proceedings

41. As early as the initial meeting on June 7, 1999, Class Counsel have been mindful of the various related proceedings and have taken measures to ensure that class members' interests were advanced and protected in those proceedings. The Related Proceedings include the following:

A. The Investment Dealers' Association

42. Commencing January 28, 2000, Class Counsel communicated with the Ontario District Counsel of the Investment Dealers' Association ("IDA"), the regulatory body that oversees investment dealers and advisors. The IDA had certain regulatory jurisdiction over Allen and Moriarity.

43. On July 3, 2001, the IDA issued a press release stating that on June 26, 2001 it found the defendants, Allen and Moriarty, guilty of failing to observe high standards of ethics and conduct in the transaction of their business and of engaging in conduct unbecoming to the public interest while they were registered representatives with Essex.

44. The IDA fined Allen \$525,000, plus costs and Moriarty \$160,000, plus costs. Class Counsel obtained the IDA's undertaking that the IDA would not assert priority to class members in the collection of these fines.

45. Class Counsel considered whether class members had a reasonable cause of action against the IDA on the basis of regulatory negligence. After extensive research, Class Counsel determined that pursuit of such an action would be ill founded.

B. Criminal Proceedings

46. Class Counsel encouraged class members to co-operate with the police who were investigating the conduct of Allen and Moriarty. On March 1, 2000, when the defendants Allen and Moriarty were charged with 30 counts of fraud over \$5,000, defrauding the public and falsifying books and records, contrary to the *Criminal Code of Canada*, Class Counsel commenced a watching brief of the criminal proceedings. Counsel attended at court appearances, contacted investigating police officers, made notes, attended meetings with the Crown and class members, and reported to the class on the progress of these proceedings.

47. Through its watching brief, Class Counsel learned that:

- (i) on or about February 21, 2003, Allen pleaded guilty to three counts of defrauding members of the public of more than \$5,000. The plea was the result of a plea bargain in which the Crown agreed to consolidate the charges against Allen and withdraw the charges against Moriarty.
- (ii) on or about March 31, 2003, the Ontario Superior Court sentenced Allen to a four-year penitentiary term for fraud.

48. Class counsel have obtained the transcripts of Allen's guilty plea and the sentencing. Class Counsel have also obtained the reports and exhibits which were filed with the criminal court. This information forms the basis for the summary judgment motion against Allen.

49. In addition, Class Counsel prepared and made submissions to the Court requesting a restitution or compensation Order as a term of Allen's sentence. The court declined to impose

a restitution Order on the basis that the civil court is the more appropriate forum to pursue compensation, and a class action was already pending in the court.

C. *Individual Lawsuits and Separate Retainers*

50. Class Counsel have entered into separate retainers with persons who have individual causes of action for the losses sustained. Some investors had distinctive CIPF claims or causes of action against professionals who provided them with advice or professional services. Time docketed and billed in relation to these individual issues is not included in the materials in support of Class Counsel's fee request herein.

D. *Proceedings under the Loan and Trust Companies Act*

51. Charges were also laid under the *Loans and Trust Companies Act* for accepting deposits without a license. After the guilty plea in the criminal proceedings these charges were withdrawn. The offence alleged forms part of the class action and these proceedings were monitored by Class Counsel.

VII. Accounting of Fees and Disbursements

Genest Murray and Heenan Blaikie

52. I am advised by William E. Pepall of Heenan Blaikie LLP, co-counsel herein, and verily believe that the lawyers at both Genest Murray and Heenan Blaikie kept accurate time recordings of their time spent on these matters, as particularized in the dockets captured in their respective accounting systems.

53. For the purposes of this motion, the time for these two firms has been joined together and allocated into four categories, as detailed below.

Class Representation (632.4 hours)

- i. Preparation (which includes co-counsel meetings and strategic planning)
- ii. Class Action General (which includes interlocutory and summary judgment)

M. Mason 208.2 hours x \$190 = \$39,558.00

W. Pepall 127.2 hours x \$375 = \$47,700.00

A. Block 130.9 hours x \$225 = \$29,452.50

D. Stratas 12.7 hours x \$380 = \$4,826.00

S. Bee 24.5 hours x \$205 = \$5,022.50

Students 93.2 hours x \$105 = \$9,786.00
G. Oxtoby (Clerk) 35.7 hours x \$140 = \$4,998.00

Receivership (136 hours)

iii. Receivership Proceedings

M. Mason 72.7 hours \$190 = \$13,813.00
W. Pepall 53.6 x \$375 = \$20,100.00
A. Block 3.2 hours x \$225 = \$720.00
Students 6.5 hours x \$105 = \$682.50

CIPF Proceedings (789.9 hours)

- iv. Investor Meetings (related to Class instructions and CIPF)
v. CIPF (which includes preparation for and attendance at hearings and meetings)

M. Mason 397.1 hours x \$190 = \$75,449.00
W. Pepall 145.1 x \$375 = \$54,412.50
A. Block 96.1 hours x \$225 = \$21,622.50
G. Oxtoby (Clerk) 11.2 hours x \$140 = \$1,568.00
Students 140.4 hours x \$105 = \$14,742.00

Other Proceedings (99.1 hours)

- vi. IDA (which includes monitoring and participating in proceedings)
vii. Criminal (which includes monitoring and participating in proceedings)
viii. FICC (which includes making claims and meetings)

M. Mason 14.5 hours x \$190 = \$2,755.00
W. Pepall 3.4 hours x \$375 = \$1,275.00
A. Block 21.8 hours x \$205 = \$4,469.00
Students 59.4 hours x \$105 = \$6,237.00

54. It is clear from the foregoing that almost half of the time spent by counsel at these two firms was devoted to investor meetings and CIPF claims.

55. The sum total of all hours docketed by members of these two firms on all matters to November 2, 2004 is 1,657.4, with a total dollar value calculated at the rates provided to the Class in 1999 being \$359,188.00. Disbursements have been incurred on this matter in the grand total of \$8,109.49. Strict adherence to the prescribed hourly rates together with the inclusion of the Goods and Services Tax, where applicable, gives a grand total of fees and disbursements incurred by these two firms of \$393,008.31. No amounts to correct for the ageing of rates, nor premium, despite the terms of the Retainer Agreement and the 57% success rate have been included.

Siskind Cromarty, Ivey & Dowler

56. For the purposes of this motion, Siskind's has allocated its time into four categories, as detailed below.

Class Representation (550.95 hours)

- i. Preparation (which includes co-counsel meetings and strategic planning)
- ii. Class Action General (which includes interlocutory and summary judgment)

Raymond Leach 322.6 x \$375 = \$120,975.00
Michael Eizenga 7.2 x \$260 = \$1,872.00
Fred Rose 134.6 x \$200 = \$26,920.00
Charles Wright 28.35 x \$200 = \$5,670.00
Montgomery Shillington 20.8 x \$150 = \$3,120.00
Students 37.4 x \$105 = \$3,927.00

Receivership (159.75 hours)

- iii. Receivership Proceedings

Raymond Leach 134.25 x \$375 = \$50,343.75
Fred Rose 14.6 x \$200 = \$2,920.00
Michael Eizenga .2 x \$260 = \$52.00
Montgomery Shillington 5 x \$150 = \$750.00
Students 5.4 x \$105 = \$567.00
Clerk .3 x \$140 = \$42.00

CIPF Proceedings (267.6)

- iv. Investor Meetings (related to Class instructions and CIPF)
- v. CIPF (which includes preparation for and attendance at hearings and meetings)

Raymond Leach 221.7 x \$375 = \$83,137.50
Fred Rose 24.10 x \$200 = \$4,820.00
Student .8 x \$105 = \$84.00
Clerk 21 x \$140 = \$2,940.00

Other Proceedings (39.2 hours)

- vi. IDA (which includes monitoring and participating in proceedings)
- vii. Criminal (which includes monitoring and participating in proceedings)
- viii. FICC (which includes making claims and meetings)

Raymond Leach 31.5 x \$375 = \$11,812.50
Fred Rose 2.5 x \$200 = \$500.00
Students 5.2 x \$105 = \$546.00

57. It is clear from the foregoing that over half of the time expended by this firm was devoted to investor meetings and CIPF claims.

58. The sum total of all hours docketed by members of Siskind, Cromarty, Ivey & Dowler LLP on all matters to November 2nd, 2004, is 1,017.5, with a total dollar value calculated at

the rates provided to the Class in 1999, being \$320,998.75. Disbursements have been incurred on this matter in the grand total of \$21,041.96. Strict adherence to the prescribed hourly rates, together with the inclusion of the Goods and Services Tax, where applicable, give a grand total of fees and disbursements incurred by Siskind, Cromarty, Ivey & Dowler LLP of \$365,959.62. No amounts to correct for the ageing of rates, nor premium, despite the terms of the Retainer Agreement and the 57% success rate have been included.

Sutts, Strosberg

59. The lawyers at my firm kept accurate time recordings of their time spent on these matters, as particularized in the dockets captured in my firm's accounting system. For the purpose of this motion, the time of Sutts, Strosberg LLP has been allocated into four categories, as detailed below:

Class Representation (263.1 hours)

- i. Preparation (which includes co-counsel meetings and strategic planning)
- ii. Class Action General (which includes interlocutory and summary judgment)

H. Strosberg 30.5 hours x \$550 = \$16,775.00
J. Kalajdzic 59.6 hours x \$225 = \$13,410.00
D. Robins 169.9 hours x \$225 = \$38,227.50
J. Strosberg 3.10 hours x \$200 = \$620.00

Receivership (17 hours)

- iii. Receivership Proceedings

H. Strosberg 1.8 hours x \$550 = \$ 770.00
J. Kalajdzic 3.4 hours x \$225 = \$ 765.00
D. Robins 12.2 hours x \$225 = \$ 2,745.00

CIPF Proceedings (135.5 hours)

- iv. Investor Meetings (related to Class instructions and CIPF)
- v. CIPF (which includes preparation for and attendance at hearings and meetings)

H. Strosberg 4 hours x \$550 = \$ 2,200.00
J. Kalajdzic 4.1 hours x \$225 = \$ 922.50
D. Robins 92.9 hours x \$225 = \$ 20,902.50
J. Strosberg 30.5 hours x \$200 = \$ 6,100.00

Other Proceedings (23.6 hours)

- vi. IDA (which includes monitoring and participating in proceedings)
- vii. Criminal (which includes monitoring and participating in proceedings)
- viii. FICC (which includes making claims and meetings)

H. Strosberg 1.8 hours x \$550 = \$ 990.00
D. Robins 21.8 hours x \$225 = \$ 4,905.00

60. The sum total of all hours docketed by members of this firm on all matters to November 2, 2004 is 439.2, with a total dollar value calculated at the rates provided to the Class in 1999 being \$109,332.50. Disbursements have been incurred on this matter in the grand total of \$9,189.86. Strict adherence to the prescribed hourly rates together with the inclusion of the Goods and Services Tax, where applicable, gives a grand total of fees and disbursements incurred by Sutts, Strosberg LLP of \$126,175.63. No amounts to correct for the ageing of rates, nor premium, despite the terms of the Retainer Agreement and the 57% success rate have been included.

61. A detailed brief containing the dockets and supporting materials of each of the firms involved will be available at the hearing of the motion.

VIII. Justification of Fees and Disbursements

62. Class Counsel undertook significant risk in pursuing this litigation given the alleged lack of exigible assets of Nelbar and Essex, as advised by the FSCO on June 7, 1999 and subsequently by the Receiver's Reports.

63. In recognition of the tremendous financial losses suffered by the class, Class Counsel developed a multi-part strategy that involved complex issues in a variety of legal proceedings. It could not be foreseen, at the outset, which, if any, of the initiatives would be successful. Fortunately, the CIPF claims resulted in recovery for many class members.

64. A significant amount of time and expense was expended by Class Counsel on a contingency basis in these various proceedings with favourable results.

65. Class Counsel's success in recovering monies for class members from the CIPF trust was, in part, a result of the time and effort Class Counsel spent locating and understanding the CIPF and the terms of its trust, ensuring the timely submission of accurate and complete claim forms, preparing for hearings, filing relevant documents and making submissions to the CIPF in support of the claims. Although the submission was ultimately rejected by CIPF, Class Counsel investigated the close relationship between Nelbar and Essex and urged the CIPF, in

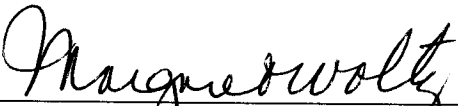
the exercise of its trust discretion, to treat Nelbar and Essex as one entity. CIPF did not accept this submission and seemed to require that claimants establish a connection with Essex, which was the CIPF member.

66. I believe that at all times Class Counsel worked professionally and co-operatively to ensure that the time expended was efficient and reasonable.

67. I believe that the amount claimed by way of fees and disbursements is in keeping with the representative plaintiff's expectations, as set out in section 9 of the Fees and Disbursements Agreement, and is within reasonable limits considering the net recovery achieved.

68. I make this Affidavit in support of the within motion and for no other or improper purpose.

SWORN BEFORE ME at the City of Windsor, in the Province of Ontario, on November 24, 2004.


Commissioner for Taking Affidavits

MARGARET LORRAINE WOLTZ, a Commissioner,
etc., Counsel of Essex, for Sutts, Strosberg LLP,
Barristers and Solicitors,
Expires December 18, 2005.


DAVID ROBINS

Levy and Nelbar Financial Corporation, et al.
Plaintiff Defendants

Court File No: 31902/99

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at London

**AFFIDAVIT OF DAVID ROBINS
(sworn November 24, 2004)**

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