COURT FILE NUMBER QBG-SA-00766-2022

COURT OF KING'S BENCH FOR SASKATCHEWAN

JUDICIAL CENTRE SASKATOON

PLAINTIFFS / RESPONDENTS CAITLIN ERICKSON, JENNIFER SOUCY (BEAUDRY) and STEFANIE HUTCHINSON ~~and COY NOLIN~~

DEFENDANT / APPLICANT MILE TWO CHURCH INC.

DEFENDANTS / RESPONDENTS KEITH JOHNSON, JOHN OLUBOBOKUN, KEN SHULTZ, NATHAN RYSAVY, DUFF FRIESEN, LYNETTE WEILER, JOEL HALL, ~~FRAN THEVENOT~~, LOU BRUNELLE, JAMES RANDALL, ~~TRACEY JOHNSON~~, ~~SIMBO OLUBOBOKUN~~, ~~ELAINE SCHULTZ~~, ~~CATHERINE RANDALL~~, KEVIN MACMILLAN, ~~ANNE MACMILLAN~~, DAWN BEAUDRY, NATHAN SCHULTZ, AARON BENNEWEIS, ~~DEIDRE BENNEWEIS~~, ~~STEPHANIE CASE~~, DARCY SCHUSTER, RANDY DONAUER, JOHN THURINGER, THE GOVERNMENT OF SASKATCHEWAN, JOHN DOES and JANE DOES

Brought under *The Class Actions Act*

BRIEF OF LAW OF THE APPLICANT (DEFENDANT), MILE TWO CHURCH INC.

Re Stay Application

1500-1881 Scarth Street
Regina, SK S4P 4K9
Telephone: (306) 757-1641
Facsimile: (306) 359-0785
Lawyers in Charge: Gordon J. Kuski, K.C. and Amanda M. Quayle, K.C.

PART I INTRODUCTION

1. Any partial settlement of an action between a plaintiff and select defendants must be immediately disclosed to non-settling defendants and approved by the Court. The failure to immediately disclose and produce information about an agreement amongst parties to an action that has the effect of changing the adversarial landscape of the litigation is an abuse of process. Such an abuse may only be remedied by a stay of proceedings.

2. The Plaintiffs entered into settlement agreements with select former Defendants in the within Action. The Plaintiffs failed to immediately disclose the fact of the settlements or the settlement agreements to the non-settling Defendants. The Applicant (Defendant), Mile Two Church Inc. ("**Mile Two**"), only learned of the settlement agreements through repeated requests for information following the discontinuance of the Action against the settling defendants.

3. The settlement agreements change the adversarial landscape of the within Action. The Plaintiffs' failure to immediately disclose the settlement agreements constitutes an abuse of process. Mile Two submits that the only appropriate remedy is an Order staying the Action.

PART II FACTS

4. Thirteen Defendants, including Mile Two, have applied to stay the within Action as an abuse of process as a consequence of the Plaintiffs' failure to immediately disclose settlement agreements that they entered into with select former Defendants.[1]

5. Mile Two filed the Affidavit of Bryan Reynolds sworn November 1, 2024 (the "**Reynolds Affidavit**") in support of its application. Other Defendants have also filed

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[1] The Stay Applications include the following three applications:

a. An application by Mile Two, dated November 1, 2024;

b. An application by The Government of Saskatchewan, dated November 29, 2024; and

c. An application by James Randall, Duff Friesen, Ken Schultz, Joel Hall, Randy Donauer, John Olubobokun, John Thuringer, Lou Brunelle, Nathan Rysavy, Aaron Benneweis, and Kevin MacMillan, dated November 29, 2024.

affidavits in support of their applications to stay the within Action. The Plaintiffs, Caitlin Erickson, Jennifer Soucy (Beaudry), and Stefanie Hutchinson (together, the "**Plaintiffs**"), rely on the Affidavit of Caitlin Erickson affirmed October 3, 2024 (the "**Erickson Affidavit**") and the Affidavit of Mark Drapak sworn January 21, 2025 (the "**Drapak Affidavit**").

A. The Claim

6. The Action was commenced by Statement of Claim issued August 8, 2022. The Statement of Claim names 22 individual Defendants, excluding John Does and Jane Does. Through two successive amendments to the Statement of Claim, four Defendants were added, and one deceased Defendant was removed. The operative Second Amended Statement of Claim is dated June 29, 2023 (the "**Claim**").

7. The Action is a proposed class action, but the Plaintiffs have not yet applied for certification.

B. The Discontinuances

8. The Plaintiffs have filed Discontinuances of Claim (together, the "**Discontinuances**") against the following Defendants:

a. Stephanie Case, dated November 6, 2023 and filed on November 7, 2023;[2]

b. Fran Thevenot, dated February 5, 2024 and filed on February 6, 2024;

c. Tracy Johnson, dated February 21, 2024 and filed on February 21, 2024;

d. Anne MacMillan, dated April 25, 2024 and filed on April 29, 2024;

e. Catherine Randall, dated April 26, 2024 and filed on April 29, 2024;

f. Deirdre Benneweis, dated April 26, 2024 and filed on April 29, 2024; and

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[2] The Affidavit of Caitlin Erickson affirmed October 3, 2024 at para 5 [Erickson Affidavit] indicates that the Claim was discontinued against Stephanie Case on November 26, 2023. This is incorrect. A filed copy of the document is attached at Exhibit "A" to the Affidavit of Bryan Reynolds sworn November 1, 2024 [Reynolds Affidavit]. The Discontinuance concerning Ms. Case is dated November 6, 2023 and was filed on November 7, 2023.

g. Simbo Olubobokun, dated April 29, 2024 and filed on April 29, 2024.[3]

9. By letter dated March 7, 2024, and before being served with any of the Discontinuances, Mile Two's counsel wrote to Plaintiffs' counsel, indicating that "[i]t appears the Plaintiffs have discontinued the Action against several defendants".[4] Mile Two requested copies of all Discontinuances as well as copies of all communications or other documents relating to the arrangements on which the Discontinuances were provided.[5]

10. Following the request by Mile Two's counsel, Plaintiffs' counsel provided copies of the Discontinuances against Ms. Case, Ms. Thevenot, and Ms. Johnson.[6] However, the Plaintiffs refused to provide copies of all communications or other documents relating to the arrangements on which the Discontinuances were provided.[7] Instead, Plaintiffs' counsel stated that "[t]here is no requirement whatsoever to provide you any communications or other documents relating to the Discontinuances and we will not be doing so".[8]

11. By letter dated March 11, 2024, Mile Two's counsel wrote to Plaintiffs' counsel, providing judicial authority on the obligation on settling parties for immediate disclosure of all agreements relating to settlements.[9] Mile Two restated its "request for copies of all communications or other documents relating to the arrangements on which the discontinuances were provided".[10] No immediate response was received.[11] Mile Two's counsel delivered a follow-up letter dated April 3, 2024.[12]

12. On April 8, 2024, and following the requests made March 7, March 11, and April 3, 2024, Plaintiffs' counsel provided copies of settlement agreements entered into by the

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[3] Affidavit of Bryan Reynolds sworn November 1, 2024 at para 2 and Exhibit "A" [Reynolds Affidavit]. See also Affidavit of Caitlin Erickson affirmed October 3, 2024 at paras 5–10 [Erickson Affidavit].
[4] Reynolds Affidavit at para 3 and Exhibit "B". See also Erickson Affidavit at para 11.
[5] Reynolds Affidavit at para 3 and Exhibit "B". See also Erickson Affidavit at para 11.
[6] Reynolds Affidavit at para 4 and Exhibit "C".
[7] Reynolds Affidavit at para 4 and Exhibit "C".
[8] Reynolds Affidavit at para 4 and Exhibit "C".
[9] Reynolds Affidavit at para 5 and Exhibit "D". See also Erickson Affidavit at para 14.
[10] Reynolds Affidavit at para 5 and Exhibit "D".
[11] Reynolds Affidavit at para 6.
[12] Reynolds Affidavit at para 6 and Exhibit "E".

Plaintiffs and Ms. Case, Ms. Thevenot, and Ms. Johnson, respectively (the "**Settlement Agreements**").[13]

13. After receiving the Settlement Agreements, Mile Two's counsel wrote to Plaintiffs' counsel by letter dated April 10, 2024 seeking all communications or other documents relating to the Settlement Agreements, including specific documents referred to in the Settlement Agreements.[14] The Plaintiffs refused to disclose and produce the records requested by Mile Two.[15]

14. On April 29, 2024, the Discontinuances against Ms. MacMillan, Ms. Randall, Ms. Benneweis, and Ms. Olubobokun were served on the remaining Defendants, including Mile Two.[16] Following receipt of these Discontinuances, Mile Two requested the same records it had requested in relation to the Discontinuances and Settlement Agreements reached with Ms. Case, Ms. Thevenot, and Ms. Johnson.[17] Mile Two did not receive an immediate response to its request,[18] but Plaintiffs' counsel ultimately indicated, by May 17, 2024 email, that there "are no agreements or arrangements with any of the Defendants against whom we recently discontinued the action, other than the Discontinuances filed, which we have provided to you".[19]

C. The Settlement Agreements

15. The Settlement Agreement between the Plaintiffs and Ms. Case was executed on behalf of Ms. Case on October 19, 2023, and on behalf of the Plaintiffs on November 1, 2023 (the "**Case Settlement Agreement**").[20]

16. The Settlement Agreement between the Plaintiffs and Ms. Thevenot was executed on behalf of Ms. Thevenot on January 24, 2024 and on behalf of the Plaintiffs on February 24, 2024 (the "**Thevenot Settlement Agreement**").[21]

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[13] Reynolds Affidavit at paras 7–11 and Exhibits "F", "G", "H", and "I". See also Erickson Affidavit at para 16.
[14] Reynolds Affidavit at paras 12–13 and Exhibit "J". See also Erickson Affidavit at para 17.
[15] Reynolds Affidavit at para 14 and Exhibit "K". See also Erickson Affidavit at para 18.
[16] Reynolds Affidavit at para 16.
[17] Reynolds Affidavit at para 17 and Exhibit "M".
[18] See Reynolds Affidavit at para 18 and Exhibit "N".
[19] Reynolds Affidavit at para 19 and Exhibit "O".
[20] Reynolds Affidavit at para 9 and Exhibit "G".
[21] Reynolds Affidavit at para 10 and Exhibit "H".

17. The Settlement Agreement between the Plaintiffs and Ms. Johnson was executed on behalf of Ms. Johnson on February 16, 2024 and on behalf of the Plaintiffs on February 20, 2024 (the "**Johnson Settlement Agreement**").[22]

18. None of the Settlement Agreements were provided to Mile Two until April 8, 2024[23] – over five months after the Case Settlement Agreement was entered into and nearly two months after the Thevenot Settlement Agreement and Johnson Settlement Agreement were entered into.

19. The Case Settlement Agreement contains the following notable provisions:

> 1. **The Settling Defendant will reasonably cooperate and make herself available to the Plaintiffs, their experts or consultants, and their counsel, in the investigation and prosecution of the matters which are the subject of the Action against the Other Defendants, including**, without limiting the generality of the foregoing, **providing sworn responses to written interrogatories and/or attending for Questioning** as contemplated by *The Queen's Bench Rules* **and, if required, swearing an affidavit or affidavits and attending as a witness at trial**, on service of a subpoena and appropriate witness fees.
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> 2. **The Settling Defendant will not take any adversarial position against the Plaintiffs in the Action**.
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> 3. The Settling Defendant shall preserve, disclose, and (subject to any valid claims of privilege) produce to the Plaintiffs all relevant documents in her possessing, custody, or control, as if she were a party, pursuant to Rule 5-6 of *The Queen's Bench Rules*. **The Settling Defendant shall disclose and produce all relevant documents within 90 days of the date of this Agreement**.
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> …
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> 5. The parties expressly acknowledge and agree that this Agreement is a settlement of a contested claim, and that it is made without an admission of liability.
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> 6. The Plaintiffs shall serve and file a Notice of Discontinuance of the Action as against the Settling Defendant. The Settling Defendant will consent to the discontinuance of the Action against her, without costs.
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> 7. **It is understood by the parties hereto that no Court approval of this Agreement is necessary** as no Statements of Defence have been filed in the Action. However, in the event that it is determined that Court approval of this Agreement is necessary the Plaintiffs and the Settling Defendant shall apply to the Court for approval (to the extent that such approval may be necessary) of this settlement.
>
> …

[22] Reynolds Affidavit at para 11 and Exhibit "I".
[23] Reynolds Affidavit at paras 7–11.

9. **It is the intent of the parties that the Settling Defendant shall not be liable to make any payment or payments whatsoever to the Plaintiffs which in any way might relate to the matters which are the subject of the Action**.

…

14. **The terms of the settlement and this Agreement are intended to be confidential and, unless otherwise agreed to in writing and subject always to the direction or order of the Court otherwise, shall be kept confidential from any intentional disclosure**, except to the extent that such disclosure is required by law or Court Order, or is necessary to obtain advice of professional advisors, or to carry out the terms of this Agreement, provided that the fact that this Agreement has been entered into, and the general terms, but not the amounts to be paid by the Settling Defendant, may be disclosed to the Court and to the extent required by law, the Other Defendants.

…

[Emphasis added]

20. Through the Erickson Affidavit, the Plaintiffs confirmed that Ms. Case "has provided an affidavit answering some written questions, which was obtained solely for the purpose of this litigation".[24] Notably, the Case Settlement Agreement also required Ms. Case to "disclose and produce all relevant documents" to the Plaintiffs within 90 days of the date of the Case Settlement Agreement. The Erickson Affidavit is silent about whether Ms. Case has provided documents to the Plaintiffs.[25]

21. The Thevenot Settlement Agreement and the Johnson Settlement Agreement are similar to the Case Settlement Agreement, but with several notable distinctions. The following provisions of the Thevenot Settlement Agreement are materially distinct from the provisions of the Case Settlement Agreement:

1. **The Settling Defendant will reasonably cooperate and make herself available to the Plaintiffs' counsel, in the investigation and prosecution of the matters which are the subject of the Action against the Other Defendants. This reasonable cooperation shall include**, without limiting the generality of the foregoing: **providing responses to the twenty-two (22) Written Questions provided to the Settling Defendant on or about September 19, 2013 within a without prejudice document, which shall be protected by litigation privilege; providing responses to further reasonable written questions that may be submitted to the Settling Defendant at a later date on the same basis noted above; and attending as a witness at trial**, on service of a subpoena and appropriate witness fees. **The Settling Defendant agrees that any testimony to**

[24] Erickson Affidavit at para 21(a).

[25] Paragraph 22 of the Erickson Affidavit indicates that Plaintiffs' counsel has "not received an Affidavit of Documents nor performed any Questioning of any of the said former defendants pursuant to *The King's Bench Rules*".

be provided at trial will not vary in any unreasonable way from the written responses provided pursuant to this Settlement Agreement. However, the parties agree that it is not possible to anticipate all questions which may be asked of the Settling Defendant, and nothing shall prevent the Settling Defendant from providing full, honest and complete answers to questions that she may be asked in Court proceedings.

> 2. **The Settling Defendant will not take any formal adversarial position against the Plaintiffs in the Action.** This is not to restrict the Settling Defendant from giving honest and forthright answers to questions asked of her under oath, even if such answers may be perceived as adverse to any individual, including the Plaintiff or member of any certified class action.
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> 3. The Settling Defendant has no relevant documents in her possession, custody, or control. **In the event that the Settling Defendant discovers or comes to possess or control any relevant documents the Settling Defendant shall promptly disclose such documents to the Plaintiffs.**
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> …
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> [Emphasis added]

22. Notably, the Thevenot Settlement Agreement required Ms. Thevenot to provide responses to written questions posed by the Plaintiffs on or about September 19, 2023. However, the Erickson Affidavit suggests that "Mrs. Thevenot has not provided any further documentation at this time".[26]

23. The Johnson Settlement Agreement contains terms that are materially similar to the terms of the Case Settlement Agreement that are quoted above. However, paragraph 2 of the Johnson Settlement Agreement, which prohibits Ms. Johnson from taking any formal adversarial position against the Plaintiffs in the Action, is identical to paragraph 2 of the Thevenot Settlement Agreement, which is also set out above.

24. The Erickson Affidavit suggests that "Mrs. Johnson has not provided any further documentation at this time".[27] Like the Case Settlement Agreement, however, the Johnson Settlement Agreement required Ms. Johnson to "disclose and produce all relevant documents" to the Plaintiffs within 90 days of the date of the Johnson Settlement Agreement.

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[26] Erickson Affidavit at para 21(b).
[27] Erickson Affidavit at para 21(c).

25. Ms. Case, Ms. Thevenot, and Ms. Johnson are referred to herein as the "**Settling Defendants**". The remaining Defendants, including Mile Two, are referred to as the "**Non-Settling Defendants**".

D. The solicitation of Defendants by the Plaintiffs and the circumstances that led to the Settlement Agreements

26. The Plaintiffs have provided no evidence concerning the circumstances that led to the Settlement Agreements, indicating only that communication with the Settling Defendants "was in the context of settlement discussions and in the interest of moving the litigation forward".[28] Accordingly, the Non-Settling Defendants and this Honourable Court are left to speculate about much of the factual matrix around the Settlement Agreements.

27. Mile Two's counsel obtained a copy of a September 19, 2023 letter (the "**Solicitation Letter**") sent by Plaintiffs' counsel to counsel for the former Defendant, Catherine Randall.[29] The Solicitation Letter indicated that the Plaintiffs were seeking "to explore an opportunity to have [the Plaintiffs] discontinue the … action as against … Catherine Randall".[30] The Solicitation Letter went on to state as follows:

> As the first step in making the determination as to whether to discontinue the action as against your client we would want to meet with your client (and counsel) to have a general discussion and conversation, without prejudice and without any promise that we would move on to the next step. Based on how that meeting goes and if we decide to discontinue the claim against your client, we would require your client to sign the attached Settlement Agreement and swear an Affidavit responding to the questions attached. At that point, we would then discontinue the action against your client.

28. A draft settlement agreement was enclosed with the Solicitation Letter.[31] The draft agreement is very similar to the Settlement Agreements that the Plaintiffs ultimately entered into with the Settling Defendants. A list of 22 written questions was also enclosed with the Solicitation Letter.[32] Similar documents were also sent to at least two other Defendants.[33] It

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[28] Erickson Affidavit at para 21.
[29] Reynolds Affidavit at para 20 and Exhibit "P".
[30] Reynolds Affidavit at para 20 and Exhibit "P".
[31] See Reynolds Affidavit at para 20 and Exhibit "P".
[32] See Reynolds Affidavit at para 20 and Exhibit "P".
[33] See the Affidavit of John Olubobokun sworn November 25, 2024 [Olubobokun Affidavit]. The Olubobokun Affidavit describes a package similar to the Solicitation Letter and its enclosures that was sent to counsel for John Olubobokun and Simbo Olubobokun, but concerning only Simbo Olubobokun: Olubobokun Affidavit at para 3 and Exhibits "A" and "B". Ms. Olubobokun rejected the

is reasonable to infer that a similar solicitation could have precipitated each of the Settlement Agreements.

PART III ISSUE

29. The sole question before this Court is as follows:

a. Should the Action be stayed as an abuse of process as a consequence of the Plaintiffs' failure to immediately disclose the Settlement Agreements?

30. Mile Two submits that the answer is yes.

PART IV ARGUMENT

A. The action should be stayed as an abuse of process as a consequence of the Plaintiffs' failure to immediately disclose the Settlement Agreements

1) The immediate disclosure rule

31. Settlement agreements concluded "between some parties, but not others, need to be immediately disclosed to non-settling parties if they entirely change the litigation landscape" (*Skymark Finance Corporation v Ontario*, 2023 ONCA 234 at para 46, 166 OR (3d) 131 [*Skymark Finance*]). This immediate disclosure rule is intended "to preserve fairness to the parties" (*Skymark Finance* at para 55). The important rule "is also designed to preserve the integrity of the court process" (*Skymark Finance* at para 55).

32. The contours of the immediate disclosure rule have been most clearly defined by *Skymark Finance* and other case law from the Ontario Court of Appeal discussed below. Courts in other provinces have acknowledged and adopted this cogent approach. To date,

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Plaintiffs' proposal: Olubobokun Affidavit at para 4 and Exhibit "C". The Plaintiffs later discontinued the Action as against Ms. Olubobokun.

See also the Affidavit of Aaron Benneweis sworn January 7, 2025 [Benneweis Affidavit]. The Benneweis Affidavit also describes a package similar to the Solicitation Letter and its enclosures that was sent to counsel for Aaron Benneweis and Deirdre Benneweis, but concerning only Deirdre Benneweis: Benneweis Affidavit at para 3 and Exhibits "A" and "B". Like Ms. Olubobokun, Ms. Benneweis rejected the Plaintiffs' proposal: Benneweis Affidavit at para 4. The Plaintiffs later discontinued the Action as against Ms. Benneweis without any further correspondence: Benneweis Affidavit at para 5.

similar issues have not been considered in a published decision from a Saskatchewan court. However, there is no reason why the same principles developed and applied in other provinces should not apply with equal force in Saskatchewan.

33. In *CHU de Québec-Université Laval v. Tree of Knowledge International Corp.*, 2022 ONCA 467, 162 OR (3d) 514 [*Tree of Knowledge*], the Court outlined the following principles explaining why the failure to immediately disclose a settlement agreement that alters the landscape of the litigation constitutes an abuse of process. In *Tree of Knowledge* at para 55, the Court stated:

> [55] **The following principles can be drawn from this court's decisions on the abuse of process that arises from a failure to immediately disclose an agreement which changes the litigation landscape:**
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> a) **There is a "clear and unequivocal" obligation of immediate disclosure of agreements that "change entirely the landscape of the litigation". They must be produced immediately upon their completion**: *Handley Estate*, at para. 45, citing *Aecon Buildings v. Stephenson Engineering Limited*, 2010 ONCA 898, 328 D.L.R. (4th) 488 ("*Aecon Judgment*"), at paras. 13 and 16, leave to appeal refused, [2011] S.C.C.A. No. 84; see also *Waxman*, at para. 24;
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> b) **The disclosure obligation is not limited to pure *Mary Carter* or *Pierringer* agreements. The obligation extends to any agreement between or amongst the parties "that has the effect of changing the adversarial position of the parties into a co-operative one" and thus changes the litigation landscape**: *Handley Estate*, at paras. 39, 41; see also *Tallman*, at para. 23; *Waxman*, at paras. 24, 37; *Poirier*, at para. 47;
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> c) **The obligation is to immediately disclose information about the agreement, not simply to provide notice of the agreement, or "functional disclosure"**: *Tallman*, at paras. 18-20; *Waxman*, at para. 39;
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> d) **Both the existence of the settlement and the terms of the settlement that change the adversarial orientation of the proceeding must be disclosed**: *Poirier*, at paras. 26, 28, 73;
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> e) **Confidentiality clauses in the agreements in no way derogate from the requirement of immediate disclosure**: *Waxman*, at para. 35;
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> f) **The standard is "immediate", not "eventually" or "when it is convenient"**: *Tallman*, at para. 26;
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> g) **The absence of prejudice does not excuse a breach of the obligation of immediate disclosure**: *Handley Estate*, at para. 45; *Waxman*, at para. 24; and

> h) **Any failure to comply with the obligation of immediate disclosure amounts to an abuse of process and must result in serious consequences**: *Handley Estate*, at para. 45; *Waxman* at para. 24; *Poirier*, at para. 38. **The only remedy to redress the abuse of process is to stay the claim brought by the defaulting, non-disclosing party. This remedy is necessary to ensure the court is able to enforce and control its own processes and ensure justice is done between the parties**: *Handley Estate*, at para. 45; *Tallman*, at para. 28; *Waxman*, at paras. 24, 45-47; *Poirier*, at paras. 38-42.
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> [Emphasis added]

34. In *Handley Estate v DTE Industries Limited*, 2018 ONCA 324, 421 DLR (4th) 636 [*Handley Estate*], the Court emphasized that the immediate disclosure rule extends to any agreement that changes the adversarial position of parties into a co-operative one. The Court observed that "[t]he disclosure obligation extends to any agreement between or amongst parties to a lawsuit that has the effect of changing the adversarial position of the parties set out in their pleadings into a co-operative one" (*Handley Estate* at para 39).

35. The immediate disclosure rule does not serve to prevent or limit the ability of parties to reach settlement agreements, even where those agreements alter the landscape of the litigation. The rule simply requires that such agreements be disclosed immediately to non-settling defendants and the Court. In *Aecon Buildings v Stephenson Engineering Limited*, 2010 ONCA 898 at para 13, 328 DLR (4th) 488, leave to appeal to SCC refused, 2011 CanLII 38818 [*Aecon*], the Court stated:

> [13] We do not endorse the practice whereby such agreements are concluded between or among various parties to the litigation and are not immediately disclosed. While it is open to parties to enter into such agreements, the obligation upon entering such an agreement is to *immediately* inform all other parties to the litigation as well as to the court….
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> [Emphasis in original]

36. The immediate disclosure rule is required in order to "maintain the fairness of the litigation process" and ensure the Court knows "'the reality of the adversity between the parties' and whether an agreement changes 'the dynamics of the litigation' or the 'adversarial orientation'" (*Handley Estate* at para 39, quoting *Moore v Bertuzzi*, 2012 ONSC 3248 at paras 75–79, 110 OR (3d) 611).

37. In *Skymark Finance*, the Court provided substantive guidance on the type of change that must be inflicted upon the litigation landscape in order to trigger the immediate disclosure rule. In *Skymark Finance* at paras 51–53, the Court stated:

> [51] **What does the expression, "to change the entirety of the litigation landscape", mean?** That is an often recurring issue in this line of cases. As the cases cited above demonstrate, **the determination is fact-specific, based on the configuration of the litigation and the various claims among the parties**….
>
> [52] This concept – a change to the entire litigation landscape – has been explained in similar, yet not identical ways in this court's cases. In *Laudon*, at para. 39, MacFarland J.A. described such an agreement as one that "significantly alters the relationship among the parties to the litigation." In *Aecon Buildings*, at para.13, she referred to agreements that "change entirely the landscape of the litigation", restated by Brown J.A. in *Handley Estate*, at para. 37.
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> [53] More recently, **in *Crestwood Preparatory College Inc v. Smith*, 2022 ONCA 743, at para. 57, Feldman J.A. referred to agreements that have "the effect of changing entirely the landscape of the litigation <u>in a way that significantly alters the dynamics of the litigation</u>" (emphasis added). I would adopt this more specific language.**
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> [Bolding added, underling in original]

38. The Court went on to note that "[t]he necessary magnitude of the change to the litigation landscape must be informed by the values that the rule is meant to advance" (*Skymark Finance* at para 55). In *Poirier v Logan*, 2022 ONCA 350 at para 49, leave to appeal to SCC refused, 2022 CanLII 115635 [*Poirier*], the Court provided the following guidance relevant to the assessment of whether a settlement agreement altered the litigation landscape:

> [49] … The status that the parties assume in their pleadings as either cooperative with or adversarial to the plaintiff's claim is clearly an essential starting point in determining whether there has been a significant alteration in the adversarial relationship. The pleadings should therefore be consulted, but a motion judge need not and should not supplant the established inquiries I have just described with a comparison between the litigation positions reflected in the pleadings and the litigation relationship after the settlement agreement. Certainly, the motion judge is not required to identify specific changes arising from the settlement that have been made to the pleaded factual and/or legal positions of the settling party.

39. Following its decision in *Skymark Finance*, the Ontario Court of Appeal once again considered the immediate disclosure rule in *Kingdom Construction Limited v Perma Pipe Inc.*, 2024 ONCA 593 [*Kingdom Construction*]. There, the Court emphasized that immediate disclosure of a settlement agreement is required if that agreement fundamentally alters the

landscape of the litigation. In *Kingdom Construction* at para 46, the Court observed that "[a] settlement will entirely change the landscape of the litigation when it involves a party switching sides from its pleaded position, changing the adversarial position of the parties set out in pleadings into a cooperative one".

40. In *Waxman v Waxman*, 2022 ONCA 311, 471 DLR (4th) 52, leave to appeal to SCC refused, 2022 CanLII 96459 [*Waxman*], the Court noted that "the key question for the court in applying *Handley Estate* is whether the agreement, *at the time it was entered into*, changed the litigation landscape and, in so doing, altered the adversarial position of the parties to one of cooperation" (*Waxman* at para 37, emphasis in original).

41. A helpful framing of the issue, later endorsed by the Court in *Handley Estate* at para 40, is set out *Aviaco International Leasing Inc. v Boeing Canada Inc.* (2000), 9 BLR (3d) 99 (CanLII) (Ont SC) at para 23, where the Court stated:

> [23] …I would put the issue as follows: **Do the terms of the agreement alter the apparent relationships between any parties to the litigation that would otherwise be assumed from the pleadings or expected in the conduct of the litigation?** …
>
> [Emphasis added]

42. Importantly, the "absence of prejudice" to non-settling defendants does not excuse or justify the delayed disclosure of a litigation landscape-altering settlement agreement: *Aecon* at para 16. The immediate disclosure obligation "is clear and unequivocal", and "[i]t is not optional" (*Aecon* at para 16).

43. The only remedy capable of addressing the failure to disclose a settlement agreement that alters the litigation landscape is a stay of proceedings. Because the immediate disclosure rule serves to preserve both fairness between the parties to litigation and the integrity of the court process, the remedy for non-disclosure is severe. In *Skymark Finance* at para 55, the Court explained as follows when referring to *Handley Estate* and quoting from *Tallman Truck Centre Limited v K.S.P. Holdings Inc.*, 2022 ONCA 66 at para 28, 466 DLR (4th) 324, leave to appeal to SCC refused, 2022 CanLII 96460:

> [55] … This court has repeatedly held that the rule is meant to preserve fairness to the parties. It is also designed to preserve the integrity of the court process. That is why the failure to observe the immediate disclosure rule is considered to be an abuse of the court's process, which can only be remedied by a stay of proceedings: see *Handley*, at para. 45. In *Tallman*, this court said, at para. 28: "This remedy is

> designed to achieve justice between the parties. But it does more than that – it also enables the court to enforce and control its own process by deterring future breaches of this well-established rule."

44. In *Ball v 1979927 Alberta Ltd.*, 2024 ABKB 229 [*Ball*], a class action proceeding, the Court permanently stayed an action as against certain defendants. One reason for the stay was that "an abuse of process … occurred because the Plaintiffs failed to immediately disclose to the Defendants and the Court the existence" of a Pierringer agreement: *Ball* at para 103. The Court in *Ball* applied the immediate disclosure rule, acknowledging that while the Ontario case law was not binding on Alberta courts, the "jurisprudence is both compelling and persuasive" (*Ball* at para 62). The Court determined that the principles underlying the Ontario jurisprudence were equally applicable in Alberta: see *Ball* at para 63.

45. The Court in *Ball* noted that "[s]ettlement agreements that alter the litigation landscape entirely include those that change the relationship between or amongst certain parties from adversarial to co-operative" (Ball at para 74). The Court went on to observe that "[i]f a settlement agreement meets these criteria, there is an obligation to immediately disclose it to the non-settling parties and the court" and that "[f]ailure to do so is… an automatic abuse of process" (*Ball* at para 74).

46. The Court in *Ball* concluded that "[w]hen the immediate disclosure obligation is invoked, a party's failure to disclose amounts to an abuse of process. The absence or presence of prejudice is not part of the analysis" (*Ball* at para 79). The Court also observed that it was "of no consequence that the Defendants have not yet filed defences or crossclaims" (*Ball* at para 80).

47. In *Kim v 1048656 B.C. Ltd.*, 2023 BCSC 192 [*Kim*], the Court applied the Ontario Court of Appeal's decisions in *Waxman* and *Tallman*, among other decisions: see *Kim* at paras 70–93. The Court in *Kim* also invoked the Supreme Court of British Columbia's earlier decision in *Bilfinger Berger (Canada) Inc. v Greater Vancouver Water District*, 2014 BCSC 1560. There, the Court stated as follows at para 160:

> [160] Since the court must never be misled about the position of a party in the adversarial process, I conclude that it is necessary to disclose immediately any agreement which affects the party's position in a way that is different than that revealed by the pleadings. An agreement between parties who are adverse on the pleadings, such as between a plaintiff and defendant, or a defendant and third party, which contains a full or partial settlement or release or reservation of rights, or a

> degree of cooperation not to be expected between adverse parties, should therefore be disclosed immediately.

See also *Kim* at para 80.

48. The requirement for disclosure and approval of settlement agreements has also been considered by this Court. However, this consideration occurred against a different factual backdrop that did not engage the abuse of process that requires a stay of proceedings, as in the cases from Ontario, Alberta, and British Columbia cited above. In *Bioriginal Food & Science Corp. v Sascopack Inc.*, 2012 SKQB 469, 410 Sask R 158 [*Bioriginal Food*], Smith J. directed that a Pierringer agreement be disclosed to non-settling defendants after the plaintiff and the settling defendant applied for court approval of the agreement at issue. In *Bioriginal Food*, Smith J. drew from the Ontario Court of Appeal's decision in *Aecon*: see *Bioriginal Food* at para 10. He also stated as follows in *Bioriginal Food* at para 9:

> [9] Court approval of a settlement agreement between a plaintiff and one of several defendants, also intersects the issue of disclosure. It seems well settled that there is an obligation on the settling parties for immediate disclosure of at least the existence of such an agreement both to the court and to the other parties in the litigation.

49. Critically, the non-settling defendants in *Bioriginal Food* agreed that the plaintiff and the settling defendant had "acted properly in terms of immediately disclosing the fact of the Settlement Agreement" (*Bioriginal Food* at para 19). When directing that the settlement agreement itself be disclosed to the non-settling defendants, Smith J. observed that "[i]ts existence substantially changes the litigation landscape and the relationship between the defendants" (*Bioriginal Food* at para 26). Justice Smith directed that the agreement at issue be disclosed, "however without the particulars of the actual consideration paid" by the settling defendant: *Bioriginal Food* at para 35.

50. The application of the law described in the preceding paragraphs to this Action is discussed in the subsections that follow.

2) The Settlement Agreements alter the litigation landscape

51. The Settlement Agreements alter the litigation landscape. The effect of the Settlement Agreements is to transform the adversarial relationship between the Plaintiffs

and the Settling Defendants into a co-operative one: see *Tree of Knowledge* at para 55(b); *Handley Estate* at para 39.

52. The Claim raises serious allegations of misconduct against the Defendants. The Plaintiffs continue to assert these claims against the Non-Settling Defendants. Until the Discontinuances were entered, these claims were also asserted against the Settling Defendants. The Plaintiffs also assert that Mile Two "is vicariously liable for the wrongdoing of its employees, agents, and representatives including the Individually Named Defendants and Unidentified Parties".[34] In effect, the Claim continues to assert that Mile Two is vicariously liable for any wrongdoing perpetrated by the Settling Defendants, even though the Settling Defendants have been removed from the Action.

53. The terms of the Settlement Agreements sharply contrast with the allegations set out in the Claim. Through the Settlement Agreements, the Plaintiffs have secured the co-operation of the Settling Defendants, each of whom is precluded from taking an adversarial position against the Plaintiffs in the Action.

54. The Thevenot Settlement Agreement requires Ms. Thevenot to provide responses to written questions previously posed by the Plaintiffs, as well as any further questions the Plaintiffs elect to pose to her. Ms. Thevenot has also committed to attend as a witness at trial, and has agreed that her evidence at trial will not vary unreasonably from the written responses provided to the Plaintiffs. The Case Settlement Agreement and the Johnson Settlement Agreement similarly require Ms. Case and Ms. Johnson to co-operate with the Plaintiffs by providing responses to written interrogatories, attending for questioning, and by providing sworn evidence either by affidavit or at trial. The Plaintiffs have already obtained an affidavit from Ms. Case, responding to written questions posed by the Plaintiffs.[35]

55. While the Settling Defendants have been removed from the Action, the Settlement Agreements impose disclosure and production obligations on each of the Settling Defendants. However, these obligations only benefit the Plaintiffs. Ms. Case and Ms. Johnson were required to disclose and produce all relevant documents in their possession to the Plaintiffs within 90 days of entering into the Case Settlement Agreement and the

[34] Claim at para 65. See also Claim at para 75.
[35] Erickson Affidavit at para 21(a).

Johnson Settlement Agreement, respectively. While the Thevenot Settlement Agreement indicates that Ms. Thevenot does not have any relevant documents in her custody, care, or control, she is nonetheless required to provide relevant documents to the Plaintiffs if such documents come into her possession. The Settlement Agreements impose pre-certification action-like disclosure and production obligations on the Settling Defendants, but only to the benefit of the Plaintiffs.

56. Another facet of the Settlement Agreements is the requirement that the Settling Defendants not take an adversarial position against the Plaintiffs in the Action. This important feature further underlines how the Settlement Agreements alter the litigation landscape.

57. Determining whether the litigation landscape has been changed entirely is a "fact-specific" inquiry "based on the configuration of the litigation and the various claims among the parties" (*Skymark Finance* at para 51). The fundamental issue is whether the agreement at issue "significantly alters the dynamics of the litigation" (*Skymark Finance* at para 53). The palpable shift between the allegations made in the Claim and the commitments reflected in the Settlement Agreements reflect a significantly altered dynamic in the litigation. The result of the Settlement Agreements is that the three Settling Defendants have switched sides. As was the case in *Kingdom Construction*, the Settlement Agreements transform the positions of the Settling Defendants from being the Plaintiffs' adversaries to their co-operative allies.

58. Until the Settlement Agreements were eventually disclosed by the Plaintiffs after repeated inquiries were made by Mile Two, Mile Two – and all other Non-Settling Defendants – understood that the allegations made against the Settling Defendants in the Claim remained extant, in the same way they remained extant against the Non-Settling Defendants. Instead, the Settling Defendants were cooperating with the Plaintiffs. The Settlement Agreements, received by the Non-Settling Defendants months after they were concluded, revealed that co-defendants were not, in fact, co-defendants at all.

59. The Settlement Agreements transform the adversarial position of the Plaintiffs and the Settling Defendants into a co-operative one. The Settlement Agreements fundamentally alter the litigation landscape. It follows that the Plaintiffs were required to immediately

disclose the Settlement Agreements to the Non-Settling Defendants. The Plaintiffs did not immediately disclose the Settlement Agreements to the Non-Settling Defendants. In fact, they only did so when compelled by the Mile Two's requests, and, ultimately, a court application was brought.

3) The Plaintiffs failed to immediately disclose the Settlement Agreements

60. The Settlement Agreements were not provided to Mile Two until April 8, 2024[36] – <u>over five months</u> after the Case Settlement Agreement was entered into and <u>nearly two months</u> after the Thevenot Settlement Agreement and Johnson Settlement agreement were entered into. The Plaintiffs failed to meet the immediate disclosure requirement.

61. The Settlement Agreements were only disclosed after Mile Two learned of the Discontinuances and made repeated requests for information from the Plaintiffs. These requests were met by consistent refusals from the Plaintiffs, along with the incorrect assertion that there was "no requirement whatsoever" for the Plaintiffs to provide any disclosure relating to the Discontinuances.[37]

62. The immediate disclosure rule leaves little room for interpretation. The obligation "is clear and unequivocal" (*Aecon* at para 16). As the Court noted in *Tallman* at para 26, "[t]he standard is 'immediate'; it is not 'eventually' or 'when it is convenient'". The Settlement Agreements were not immediately disclosed to the Non-Settling Defendants.

63. Critically, "[o]ther parties to the litigation are not required to make inquiries to seek out such agreements" (*Aecon* at para 15). Instead, "[t]he obligation is that of the parties who enter such agreements to immediately disclose the fact" (*Aecon* at para 15). In *Tallman*, the Court was troubled by the fact that it was unclear whether the Plaintiff would have disclosed the agreement at issue had it not been requested by a non-settling party: see *Tallman* at para 26. In this case, there can be no doubt the Non-Settling Defendants would have obtained disclosure of the Settlement Agreements but for their efforts to compel them. All of the evidence supports this conclusion.[38]

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[36] Reynolds Affidavit at paras 7–11.
[37] Reynolds Affidavit at para 4 and Exhibit "C".
[38] Indeed, the Settlement Agreements themselves provide that the agreements are to remain confidential, and were made on the specific condition that Court approval was unnecessary.

64. The Plaintiffs' failure to disclose the Settlement Agreements for months after they were concluded offends the immediate disclosure rule.

4) The only remedy capable of addressing the Plaintiffs' abuse of process is a stay of the Action

a. The law provides that a stay is the only suitable remedy

65. The only remedy capable of addressing the Plaintiffs' failure to immediately disclose the Settlement Agreements is to stay the within Action as an abuse of process. This remedy is required to ensure fairness for Mile Two and the rest of the Non-Settling Defendants. It is also required to protect and promote the Court's ability to enforce and control its own process.

66. In *Tree of Knowledge*, the Court noted that when confronting the failure to immediately disclose a settlement agreement, "[t]he only remedy to redress the abuse of process is to stay the claim brought by the defaulting, non-disclosing party" (*Tree of Knowledge* at para 55(h)). This remedy is required "to ensure the court is able to enforce and control its own processes and ensure justice is done between the parties" (*Tree of Knowledge* at para 55(h)).

67. In *Poirier* at para 41, the Court highlighted why a stay is the only appropriate remedy in these circumstances:

> [41] It follows that the usual principles that apply in granting a stay, an otherwise discretionary remedy that is to be used only in the clearest of cases, do not apply. **Essentially, any breach of the obligation to disclose falls among the clearest of cases that require a stay.** There is a one-part test, not a two-part test. Put simply, **if it is found that immediate disclosure of a settlement was required but not made, it follows automatically that an abuse of process has occurred and that the action must be stayed.**
>
> [Emphasis added]

68. The Court in *Poirier* at para 42 went on to state as follows, drawing from *Aecon* at para 16:

> [42] **In *Aecon*, MacFarland J.A. explained by a stay is required for any breach of the obligation to disclose a settlement agreement: "Only by imposing consequences of the most serious nature on the defaulting party is the court able to enforce and control its own process and ensure that justice is done between and among the parties"**: at para. 16. As Ferrier J. elaborated in *Pettey v.*

Avis Car Inc. (1993), 13 O.R. (3d) 725 (Gen. Div.), at para. 32, **justice between and among the parties requires immediate disclosure**:

> **The [non-settling] defendants must be advised immediately because the agreement may well have an impact on the strategy and line of cross-examination to be pursued and the evidence to be led by them. The [non-settling] parties must also be aware of the agreement so that they can properly assess the steps being taken from that point forward** […].
>
> [Emphasis added]

69. In *Aecon* at para 16, the Court warned that "[t]o permit the litigation to proceed without disclosure of agreements" that alter the landscape of the litigation "renders the process a sham and amounts to a failure of justice".

70. In *Tallman*, the plaintiff argued that its failure to immediately disclose a settlement agreement did not warrant a stay of proceedings. The plaintiff suggested that because the failure to disclose the agreement was not a result of bad faith, the period of non-disclosure was of a relatively short duration,[39] and the non-settling defendant suffered no prejudice, the plaintiff should escape a stay of its action. Importantly, the Court rejected this argument, stating as follows in *Tallman* at paras 27–28:

> [27] Lastly, Tallman submits that, to the extent that this case crossed the line in the *Handley* [*sic*], it did not warrant a stay of proceedings. He relies on the fact that the missteps of Tallman's counsel were not taken in bad faith, the delay was comparatively brief, and K.S.P. suffered no prejudice as a result of what happened.
>
> [28] This argument was firmly rejected in *Aecon*, in which MacFarland J.A. held, at para. 16: "Any failure of compliance amounts to an abuse of process and must result in consequences of the most serious nature for the defaulting party." Reinforcing this principle, in *Handley*, Brown J.A. confirmed that, "[t]he only remedy to redress the wrong of the abuse of process is to stay the claim asserted by the defaulting, non-disclosing party": at para. 45. **This remedy is designed to achieve justice between the parties. But it does more than that – it also enables the court to enforce and control its own process by deterring future breaches of this well-established rule.**
>
> [Emphasis added]

71. A stay is a serious remedy, but the only remedy available to address the circumstances at hand. The case law makes clear that a stay is the only appropriate remedy where a plaintiff fails to immediately disclose a settlement agreement that alters the litigation

[39] The period of non-disclosure at issue in *Tallman* was three weeks: see *Tallman* at para 10.

landscape. That is the case here. A stay of this Action is necessary to achieve justice between the parties and preserve the Court's ability to control its own process.

b. The evidence in the Drapak Affidavit is irrelevant

72. The Plaintiffs rely on the Drapak Affidavit in response to this application. In the Drapak Affidavit, Mr. Drapak indicates that if the Action is certified, he would be a member of the class.[40] He indicates that if the Action is stayed, he intends "to bring a new proposed class action lawsuit in substantially the same form".[41]

73. Through their reliance on the Drapak Affidavit, the Plaintiffs appear to suggest that an Order staying the Action would be futile as a new action could simply be commenced by a putative class member after this Action is stayed. This is not a relevant consideration.

74. In *Huard v The Winning Combination Inc.*, 2022 SKCA 130 [*Huard*], the Court upheld the dismissal of a proposed class action that had been dismissed for want of prosecution pursuant to Rule 4-44 of *The King's Bench Rules*. One argument confronted on appeal suggested that the dismissal of the action was futile because there was "nothing to stop others from commencing a new action since they would not be bound by the dismissal order" (*Huard* at para 65). Writing for the Court, Leurer J.A. (as he then was), noted two complete answers to this argument, stating as follows in *Huard* at para 68:

> [68] I need not decide this point because there are two complete answers to the plaintiffs' arguments that the dismissal of their action accomplishes nothing. First, as I see it, it is largely up to the defendants to assess whether a practical purpose is served if the plaintiffs' action is dismissed. At least in this context, I do not consider it the courts' role to second guess this assessment. Second, and in any event, as I have noted, there is no evidence that there is any person, other than the plaintiffs, who is interested in prosecuting a claim against the defendants.

75. This Court confronted the second complete argument relied on by Leurer J.A. in *Huard* in *Allison v Janssen-ortho Inc.*, 2023 SKKB 283 [*Allison*]. There, the plaintiffs argued that the dismissal of a "claim for delay is futile because another person with a similar claim could commence an action" (*Allison* at para 74). In that case, Klatt J. noted that the plaintiffs had filed an affidavit from an individual indicating that he was willing to serve as a representative plaintiff in response to the application to dismiss the action. Rejecting this

[40] Drapak Affidavit at para 2.
[41] Drapak Affidavit at para 3.

affidavit as an attempt to keep the action alive, Klatt J. reasoned as follows in *Allison* at para 76:

> [76] I am aware that on October 22, 2020, Greg McLean filed an affidavit on behalf of the plaintiffs. He deposed that he was willing to act as a representative plaintiff because he understood the plaintiff, Louise Joy Allison, had decided to step down as a the representative plaintiff. Although I am not casting doubt on Mr. McLean's sincerity, I see this as a "Hail Mary" attempt, made after the applications to strike were made, to keep an inordinately delayed action alive. It does not tip the balance for me in favour of allowing the claim to proceed.

76. The Drapak Affidavit may be viewed in a similar light to the affidavit before the Court in *Allison*. The Drapak Affidavit is a "Hail Mary" effort to preserve the Action. It should have no bearing on the Court's assessment of whether the Action should be stayed as an abuse of process.

77. In any event, whether Mr. Drapak will, in fact, commence an action, and if so, whether that action may be maintained, is for another day. In other words, any such argument advanced by the Plaintiffs is premature.

PART V CONCLUSION

78. The Plaintiffs failed to immediately disclose the Settlement Agreements. The Settlement Agreements alter the adversarial landscape of the litigation. The Plaintiffs' failure to immediately disclose the Settlement Agreements constitutes an abuse of process. The only appropriate remedy is an Order staying the Action.

79. Mile Two respectfully requests that the Action be stayed as against Mile Two. Mile Two seeks the costs of its application and the Action.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of February, 2025.

McDOUGALL GAULEY LLP

Per: ______________________
GORDON J. KUSKI, K.C. and
AMANDA M. QUAYLE, K.C.,
Solicitors for the Defendant,
Mile Two Church Inc.

CONTACT INFORMATION AND ADDRESS FOR SERVICE

If prepared by a lawyer for the party:

Name of firm:	McDougall Gauley LLP
Name of lawyer in charge of file:	Gordon J. Kuski, K.C. / Amanda M. Quayle, K.C.
Address of legal firm:	1500 – 1881 Scarth Street Regina, Saskatchewan S4P 4K9
Telephone number:	(306) 565-0785 / (306) 565-5100
Fax number:	(306) 359-0785
Email address:	gkuski@mcdougallgauley.com / aquayle@mcdougallgauley.com

PART VI LIST OF AUTHORITIES

Case Law

Tab	Case Name	Legal Principle(s)	Para(s)	Case Citation
	Aecon Buildings v Stephenson Engineering Limited	The Court refused to endorse the practice of failing to immediately disclose agreements concluded between or amongst various parties to the litigation. The Court noted that while it is open for parties to enter into such agreements, the obligation upon entering such an agreement is to immediately inform all other parties to the litigation as well as the Court. Other parties are not required to make inquiries to seek out settlement agreements that are entered into. The obligation is that of the parties who enter such agreements to immediately disclose the fact. The absence of prejudice to non-settling defendants does not excuse or justify the delayed disclosure of a litigation landscape-altering settlement agreement. The immediate disclosure obligation is clear and unequivocal, and it is not optional. A stay is required for any breach of the obligation to disclose a settlement agreement. Only by imposing consequences of the most serious nature on the defaulting party is the Court able to enforce and control its own process and ensure that justice is done between and among the parties. Justice between and among the parties requires immediate disclosure. To permit litigation to proceed without disclosure of settlement	13, 15–16	2010 ONCA 898, 328 DLR (4th) 488, leave to appeal to SCC refused, 2011 CanLII 38818

		agreements that alter the landscape of the litigation renders the process a sham and amounts to a failure of justice.		
	Allison v Janssen-ortho Inc.	The plaintiffs argued that the dismissal of a proposed class action for delay is futile because another person with a similar claim could commence an action. The Court rejected the plaintiffs' attempt to file an affidavit from an individual indicating that he was willing to serve as a representative plaintiff in response to the application to dismiss the action as a "Hail Mary" attempt to keep an inordinately delayed action alive.	74, 76	2023 SKKB 283
	Aviaco International Leasing Inc. v Boeing Canada Inc.	The Court indicated that when considering whether a settlement agreement is litigation landscape-altering, the issue is whether the terms of the agreement alter the apparent relationships between any parties to the litigation that would otherwise be assumed from the pleadings or expected in the conduct of the litigation.	23	(2000), 9 BLR (3d) 99 (CanLII) (Ont SC)
	Ball v 1979927 Alberta Ltd.	The Court permanently stayed an action as against certain defendants. The Court determined that an abuse of process occurred because the plaintiffs failed to immediately disclose to the defendants and the Court the existence of a Pierringer agreement. The Court applied the immediate disclosure rule and noted that settlement agreements that alter the litigation landscape entirely include those that change the relationship between or amongst certain parties from adversarial to co-operative. If a settlement agreement meets these criteria,	62–63, 74, 79–80, 103	2024 ABKB 229

		there is an obligation to immediately disclose it to the non-settling parties and the Court. The failure to disclose a settlement agreement is an automatic abuse of process. When the immediate disclosure rule is invoked, a party's failure to disclose amounts to an abuse of process. The absence or presence of prejudice is not part of the analysis.		
	Bilfinger Berger (Canada) Inc. v Greater Vancouver Water District	Since the Court must never be misled about the position of a party in the adversarial process, it is necessary to disclose immediately any agreement that impacts a party's position in a way that is different than that revealed by the pleadings. An agreement between parties who are adverse on the pleadings, such as between a plaintiff and defendant, or a defendant and third party, which contains a full or partial settlement or release or reservation of rights, or a degree of cooperation not to be expected between adverse parties, should therefore be disclosed immediately.	160	2014 BCSC 1560
	Bioriginal Food & Science Corp. v Sascopack Inc.	The Court directed that a Pierringer agreement be disclosed to non-settling defendants after the plaintiff and the settling defendant applied for court approval of the agreement at issue. The Court noted that the agreement at issue substantially changed the litigation landscape and the relationship between the defendants. The Court noted that court approval of a settlement agreement intersects with the issue of disclosure. The Court noted that it seems well settled	9–10, 19, 26, 35	2012 SKQB 469, 410 Sask R 158

		that there is an obligation on the settling parties for immediate disclosure of at least the existence of such an agreement both to the Court and to other parties in the litigation.		
	CHU de Québec-Université Laval v. Tree of Knowledge International Corp.	The Court outlined the following principles on the abuse of process that arises from a failure to immediately disclose an agreement which changes the litigation landscape: - There is a clear and unequivocal obligation of immediate disclosure of agreements that change entirely the landscape of the litigation. They must be produced immediately upon their completion; - The disclosure obligation is not limited to pure *Mary Carter* or *Pierringer* agreements. The obligation extends to any agreement between or amongst the parties that has the effect of changing the adversarial position of the parties into a cooperative one and thus changes the litigation landscape; - The obligation is to immediately disclose information about the agreement, not simply to provide notice of the agreement, or functional disclosure; - Both the existence of the settlement and the terms of the settlement that change the adversarial orientation	55	2022 ONCA 467, 162 OR (3d) 514

		of the proceeding must be disclosed; - Confidentiality clauses in the agreements in no way derogate from the requirement of immediate disclosure; - The standard is immediate, not eventually or when it is convenient; - The absence of prejudice does not excuse a breach of the obligation of immediate disclosure; - Any failure to comply with the obligation of immediate disclosure amounts to an abuse of process and must result in serious consequences. The only remedy to redress the abuse of process is to stay the claim brought by the defaulting, non-disclosing party. This remedy is necessary to ensure the Court is able to enforce and control its own processes and ensure justice is done between the parties.		
	Handley Estate v DTE Industries Limited	The Court emphasized that the immediate disclosure rule extends to any agreement that changes the adversarial position of parties into a cooperative one. The obligation extends to any agreement between or amongst parties to a lawsuit that has the effect of changing the adversarial position of the parties set out in their pleadings into a cooperative one.	39–40	2018 ONCA 324, 421 DLR (4th) 636

		The immediate disclosure rule is required in order to maintain the fairness of the litigation process and ensure that the Court knows the reality of the adversity between the parties and whether an agreement changes the dynamics of the litigation or the adversarial orientation.		
	Huard v The Winning Combination Inc.	The Court upheld the dismissal of a proposed class action that had been dismissed for want of prosecution. The Court confronted the argument that the dismissal of the action was futile because there was nothing to stop others from commencing a new action since they would not be bound by a dismissal order. The Court dismissed this argument, noting that it was up to the defendants to assess whether a practical purpose was served if the action was dismissed as well as the absence of evidence suggesting that a person other than the plaintiffs was interested in prosecuting a claim against the defendants.	65, 68	2022 SKCA 130
	Kim v 1048656 B.C. Ltd.	The Court invoked and applied the Ontario Court of Appeal's decisions in *Waxman v Waxman*, *Tallman Truck Centre Limited v K.S.P. Holdings Inc.*, as well as other decisions concerning the immediate disclosure rule.	70–93	2023 BCSC 192
	Kingdom Construction Limited v Perma Pipe Inc.	The Court emphasized that immediate disclosure of a settlement agreement is required if that agreement fundamentally alters the landscape of the litigation. A settlement will entirely change the landscape of the litigation when it involves a party switching sides from its pleaded position, changing the	46	2024 ONCA 593

		adversarial position of the parties set out in pleadings into a cooperative one.		
	Moore v Bertuzzi	The Court must know the reality of the adversity between the parties and whether any agreement changes the dynamics of the litigation or the adversarial orientation of the matter.	75–79	2012 ONSC 3248, 110 OR (3d) 611
	Poirier v Logan	The Court noted that the status that the parties assume in their pleadings as either cooperative with or adversarial to the plaintiff's claim is the staring point in determining whether there has been a significant alteration in the adversarial relationship. The pleadings should be consulted, but the Court need not and should not supplant other established inquiries with a comparison between the litigation positions reflected in the pleadings and the litigation relationship after the settlement agreement. The Court is not required to identify specific changes arising from the settlement that have been made to the pleaded factual and/or legal positions of the settling party. Any breach of the immediate disclosure rule falls among the clearest of cases that require a stay. If the immediate disclosure of a settlement was required but not made, it follows automatically that an abuse of process has occurred and the action must be stayed.	41–42, 49	2022 ONCA 350, leave to appeal to SCC refused, 2022 CanLII 115635
	Skymark Finance Corporation v Ontario	Settlement agreements concluded between some parties, but not others, need to be immediately disclosed to non-settling parties if they entirely change the litigation landscape.	46, 51–53, 55	2023 ONCA 234, 166 OR (3d) 131

		The immediate disclosure rule is intended to preserve fairness to the parties. The rule is also designed to preserve the integrity of the court process. The determination of whether a settlement agreement entirely changes the litigation landscape is a fact-specific determination based on the configuration of the litigation and the various claims among the parties. Agreements that have the effect of changing entirely the landscape of the litigation in a way that significantly alters the dynamics of the litigation are agreements that entirely change the litigation landscape. The necessary magnitude of the change to the litigation landscape must be informed by the values that the immediate disclosure rule is meant to advance. The immediate disclosure rule is meant to preserve fairness to the parties and to preserve the integrity of the court process. Failure to adhere to the immediate disclosure rule is an abuse of process that can only be remedied by a stay of proceedings. The remedy is designed to achieve justice between the parties, but also enables the Court to enforce and control its own process by deterring future breaches of the well-established immediate disclosure rule.		
	Tallman Truck Centre Limited v K.S.P. Holdings Inc.	The immediate disclosure rule requires immediate disclosure. The standard is not “eventually” or “when it is convenient”.	10, 26–28	2022 ONCA 66, 466 DLR (4th) 324, leave to appeal to SCC

		The stay remedy for the breach of the immediate disclosure rule is designed to achieve justice between the parties and enables the Court to enforce and control its own process by deterring future breaches of the well-established rule.		refused, 2022 CanLII 96460
	Waxman v Waxman	The key question for the Court in applying the immediate disclosure rule is whether the agreement, at the time it was entered into, changed the litigation landscape and, in so doing, altered the adversarial position of the parties to one of cooperation.	37	2022 ONCA 311, 471 DLR (4th) 52, leave to appeal to SCC refused, 2022 CanLII 96459

Legislation

Tab	Statutes / Rules	Section(s) / Rule(s)	Citation
	The King's Bench Rules	4-44	Sask Gaz December 27, 2013, 2684