FREE STATE HIGH COURT, BLOEMFONTEIN

(REPUBLIC OF SOUTH AFRICA)

CASE NO:

In the matter between:

JURIE JOHANNES GELDENHUYS	First Applicant
ARTHUR BRADY COCHRANE	Second Applicant
SHARRON ANN VLOK	Third Applicant

and

MICHAEL NICOLAS GEORGIOU N.O.	First Respondent
ANDROULLA GEORGIOU N.O.	Second Respondent
STAMATIOS TSANGARAKIS N.O.	Third Respondent
JOSEPH R CHEMALY N.O.	Fourth Respondent
ORTHOTOUCH LIMITED	Fifth Respondent
NICHOLAS GEORGIO	Sixth Respondent
MICHAEL NICOLAS GEORGIOU	Seventh Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

JURIE JOHANNES GELDENHUYS

do hereby make oath and say:

1. I am an adult male logistics and risk management coordinator at Garden Route Agri, Mossel Bay and reside at 42 Tienie Botha Street, Mossel Bay, Western Cape.

2. The facts contained in this affidavit are to the best of my knowledge and belief true and correct and are, save where otherwise stated or indicated by the context, within my personal knowledge.

3. To the extent that I advance legal submissions, I do so on the advice of the applicants' legal representatives, which advice I accept as being correct.

THE PARTIES

4.

4.1. I am the first applicant herein and an investor in the so-called Highveld 16 to Highveld 22 companies ("**the Highveld companies**").

4.2. Second applicant is Arthur Brady Cochrane, an adult male retiree of Unit 35, Norton Park Retirement Village, Umtata Road, Benoni, Gauteng. He is an investor and shareholder in two of the Highveld companies, namely Highveld 16 and Highveld 21.

4.3. The third applicant is Sharon Ann Vlok, a business woman residing at 14 Frank Lane, Porterville, Western Cape.

5.

5.1. The first respondent is Michael Nicolas Georgiou (ID number 7001185062008), an adult businessman in his capacity as trustee of the Michael Family Trust (Master's reference number TMP2502), who resides at 11 Webb Street, Bloemfontein, Free State, and with his place of business at 96 Raymond Mhlaba Street (Andries Pretorius Street), Naval Hill, Bloemfontein, Free State.

5.2. The second respondent is Androulla Georgiou, an adult female in her capacity as trustee of the Michael Family Trust who resides at 11 Webb Street, Bloemfontein, Free State.

5.3. The third respondent is Stamatios Tsangarakis, an adult male attorney in his capacity as trustee of the Michael Family Trust, with his principle place of business at 77 Kellner Street, Bloemfontein, Free State.

5.4. The fourth respondent is Joseph R Chemaly, an adult male in his capacity as trustee of the Michael Family Trust whose further particulars are unknown to the applicants.

5.5. The fifth respondent is Orthotouch Limited (registration number 2010/004096/06) a public company registered in terms of the company laws of South Africa with principal place of business at

corner of Willow and Cedar Road, Cedar Square Shopping Centre, First Floor, Fourways, Gauteng.

5.6. The sixth respondent is Nicolas Georgiou (ID number 4409195109086) an adult businessman and the father of the seventh respondent who resides at 1 Woodlands Avenue, Hurlingham Manor, Randburg, Johannesburg.

5.7. The seventh respondent is Michael Nicolas Georgiou (ID number 7001185062008), an adult businessman who resides at 11 Webb Street, Bloemfontein, Free State, and with his place of business at 96 Raymond Mhlaba Street (Andries Pretorius Street), Naval Hill, Bloemfontein, Free State. (The seventh respondent and the first respondent is the same individual, the first respondent cited in his capacity as trustee of the said trust).

6. No relief is sought against either the fifth respondent, the sixth respondent, the seventh respondent, or the eighth respondent. Should they oppose this application, the applicants will seek an order that any opposing party be directed to pay the cost of the application, jointly and severally, the one paying the other to be absolved.

RELIEF SOUGHT

7. The purpose of this application is to obtain an urgent interim interdict against the respondents who are trustees of the Michael Family Trust to preserve the Accelerate Property Fund Limited ("**Accelerate**") shares that were renounced to the Michael Family Trust pursuant to certain transactions referred to in a pre-listing statement of Accelerate ("**the pre-listing statement**"). A copy of the pre-listing statement is annexed hereto marked "**Annexure FA1.**".

8. The purpose of this affidavit is twofold.

   8.1. In the first instance, it provides the basis for the applicants' application for urgent interim relief.

   8.2. Secondly, this affidavit contains facts relevant to the applicants' claims of asset stripping against, *inter alia*, the sixth respondent ("**Georgiou**"), the fifth respondent ("**Orthotouch**"), the seventh respondent ("**Michael Georgiou**") and the Michael Family Trust (collectively referred to as "**the Georgiou's**") which will be used to supplement the causes of action in the application pending in the Pretoria High Court under case number 08811/12 for leave to institute a class action ("**the Pretoria application**"), as well as the grounds in the pending application to set aside (alternatively for leave to appeal against) the order granted in the Johannesburg High

Court under case number 42334/14 ("**the Johannesburg application**"), respectively.

(Copies of those two applications will be placed in the court file and I request that, insofar as may be appropriate, the contents of the founding affidavits be read as if incorporated herein. Those applications are rather lengthy and for logistical reasons I do not attach them hereto. I am advised that all the respondents herein (save for the second and third respondents) already have a copy of both those applications, as such respondents are also respondents in the said two applications. Assuming that seventh respondent (who is also the first respondent) will provide his co-trustees in this matter with such copies if they require, all the current trustees will have such copies in their possession. I am in any event advised that any respondent will be emailed a copy of any such application immediately upon request to my attorney of record herein).

ESSENTIAL FACTS

9. My co-applicants and I were, until recently, not aware of the asset stripping activities relating to Orthotouch.

10. As more fully explained hereunder, certain immovable properties transferred from the so-called Highveld companies in terms of a Business Rescue Plan to Orthotouch (a company controlled by Georgiou) were stripped-out and

transferred to Accelerate (a company controlled by his son, Michael Georgiou) pursuant to certain sale agreements. The consideration payable by Accelerate to Orthotouch (in the form of shares in Accelerate) for the assets were stripped-out when it (the share consideration) was simply renounced to the Michael Family Trust (Michael Georgiou is one of the trustees). These assets were supposed to be used to salvage the affairs of the Highveld companies through or "in" Orthotouch.

11. The pre-listing statement reveals that between 219 175 452 and 238 561 226 of the Accelerate shares currently held by the Michael Family Trust are subject to a two year lock-in period, during which the shares cannot be alienated, which period expires on 12 December 2015. Included herein are shares that were renounced to the Michael Family Trust that should have been received as consideration for the sale of the underlying assets. A portion of these shares to the value of R410 000 000 were to be encumbered by the Michael Family Trust.

12. With the assistance of the information in the pre-listing statement ("**FA1**"), the *ex parte* application for the sanctioning of the Orthotouch scheme of arrangement (annexed hereto marked as "**Annexure FA2**") also reveals that Orthotouch and Georgiou have been concealing these transactions that were implemented with the intention of nullifying (for purposes of execution) any judgment that the applicants might obtain against the parties in the class action that are being pursued in the Pretoria application.

13. Given that the two-year lock-in period expires on 12 December 2015, the applicants' attorneys of record wrote to the trustees of the Michael Family Trust on Wednesday 2 December 2015 with a request that they furnish the applicants with an irrevocable undertaking that they would for a period of four (4) months not alienate, transfer or encumber any of the shares that were renounced to the Michael Family Trust pursuant to what is described in the pre-listing statement as *'the Orthotouch Sale Agreements'*, the *'Eshowe Mall transaction'*, and any *'Conditional Deferred Payment'* received in respect of those transactions. A copy of that letter is annexed hereto marked "**Annexure FA3**". This undertaking was sought to preserve the assets that Orthotouch should have received as consideration for the sale of the underlying properties to Accelerate, and to prevent the Michael Family Trust from dissipating the Accelerate shares to a third party.

14. Since a portion of the shares were to be encumbered by the Michael Family Trust, the applicants wrote to the trustees of the Michael Family Trust to obtain information of such encumberment, in particular whether it took place and in whose favour. A copy of that letter is annexed hereto marked "**Annexure FA4**". Once such information is received by my attorney, the person or institution in whose favour the shares have been encumbered shall immediately be notified of this application.

15. The Michael Family Trust refused to provide the undertaking sought not to alienate or transfer the shares, which would otherwise have allowed this application to be brought in the ordinary course.

16. I shall set out the salient background facts relevant to this application.

BACKGROUND FACTS

17. My co-applicants and I are investors (shareholders) in one or more of the Highveld companies. Eight different Highveld companies are involved, each containing a number in its name (from number 15 to number 22), i.e. "Highveld Syndication No 15 Limited", "Highveld Syndication No 16 Limited" and so forth, to "Highveld Syndication No 22 Limited". For ease of reference, they are generally referred to as, for example, "Highveld 15" or "Highveld 22".

18. The Highveld companies are public companies that were launched as property syndication companies. Investments were sought and raised from the public through share subscriptions with a stated purpose for the companies to acquire immovable property.

19. The schemes encountered financial difficulty and the Highveld companies voluntarily placed themselves under business rescue.

20. Currently, the Pretoria application is pending for leave to institute a class action against various entities and individuals (including the Georgious) involved in the Highveld companies and their subsequent demise. No opposing affidavits have yet been filed in the Pretoria application.

21.

21.1. In the Pretoria application leave is sought (amongst others by the third applicant herein "**Vlok**") to institute a class action against various individuals in relation to the said failed investment schemes in relation to Highveld 19 to 22. The schemes are more commonly known as the "Pickvest" or "Highveld" syndications or investment schemes.

21.2. I request that, insofar as may be appropriate, the contents of the founding affidavit of Vlok be read as if incorporated herein.

21.3. I am informed that notices of intention to oppose have been filed, and that opposing affidavits are awaited.

21.4. The intended class actions are to be brought on behalf of some 12 000 prospective claimants. The Pretoria application is brought on behalf of investors who have invested in one or more of the more recent investment schemes, being Highveld 19 to 22, the total investment made in such companies by investors were about R3,6 billion.

21.5. A further class action will be brought in the Pretoria High Court in relation to Highveld 15-18, in which companies more than a billion rand has also been invested.

21.6. Prospectuses were registered for the companies in terms of the Companies Act of 1973. Each prospectus stated that the purpose was to raise capital to acquire immovable property that was identified in the particular prospectus. Many properties were alleged to have had already been acquired for such purpose. It was also stated that the funds raised would be applied to pay in full for the properties. The companies would acquire encumbered ownership in the properties in the process. The investors were therefore put at ease that their investments would be "safe" in that immovable properties were to be transferred, unencumbered, into the various Highveld companies as investment vehicles. The properties are typically smaller type shopping centres located throughout the country.

21.7. Investors were to receive regular income from their investments from rental income received from the existing shopping centres.

21.8. The prospectuses intimated that the relevant purchase contracts were available for inspection. It later transpired that the seller of the properties (i.e. Zephan Properties (Pty) Ltd – "**Zephan**", who was not named as the seller in the prospectus) had never been the owner of many of these properties. Zephan is the company controlled by Nicholas Georgiou (the sixth respondent herein and the first respondent in the Pretoria application). Nicolas Georgiou is also the managing director of "**Orthotouch**" (the fifth respondent herein and the first respondent in the Johannesburg application).

21.9. The prospectuses referred to the existence of "Head lease" agreements in terms whereof Zephan would lease the properties concerned from the particular Highveld company (by way of a so-called "lease back"). Zephan would then sublease to the existing tenants and so become or remain the landlord vis-à-vis the various lessees.

21.10. Each of the prospectuses of Highveld 21 and 22 referred to a so-called buyback agreement in terms of which Nicolas Georgiou himself, his company Zephan (then named "**Zelphy**") and the N Georgiou Trust undertook to buy-back the shares after five years at the same price at which they were originally bought. These buy-backs were included as further "assurance" to the investors that their money (investment) was safe.

22. The grounds for the claims to be instituted in the class actions can be summarised as follows:

22.1. Claims based in contract against Nicolas Georgiou, in terms of the so-called "buyback agreements" referred to in the prospectuses of the Highveld companies. The five-year period lapsed in August 2014.

22.2. Claims based in delict for fraudulent or negligent misrepresentations contained in the various prospectuses.

22.3. Claims based on delict under the common law for the fraudulent and/or reckless and/or negligent handling by the various directors and individuals concerned with the funds collected from the investors.

22.4. Claims based on the various provisions of the Companies Act of 1973, and the Companies Act of 2008, for the personal liability of the individuals concerned based on their fraudulent and/or reckless conducting of the business of the investment schemes.

22.5. Claims based on statutory provisions which prohibit (and criminalise) the release of funds received from investors in the property syndication schemes without simultaneously giving transfer of the property to the relevant investment vehicle.

23.

23.1. In the case of Highveld 19 to 22, therefore, some R3,6 billion was collected from members of the public (the investors), whilst not one of the promised immovable properties were transferred into the relevant investment vehicles (Highveld companies). Yet, the R3.6 billion paid by investors found its way into the hands of Georgiou or companies controlled by him or his family. This appears from the founding affidavit in the Pretoria application.

23.2. Georgiou, Michael Georgiou and various other entities involved in the Highveld Companies and their subsequent demise are all respondents in the said Pretoria application, and are therefore proposed defendants in the intended class action.

BUSINESS RESCUE PROCEEDINGS

24. Initially, investors received their monthly income as promised. However, the schemes soon started to experience financial difficulty and, progressively, monthly payment commitments to investors were not met.

25. During September 2011, the Highveld Companies commenced business rescue proceedings. Hans Klopper ("**Klopper**") was appointed as the business rescue practitioner. He is the third respondent in the Johannesburg application.

26. Not only the four abovementioned Highveld companies (19 to 22) were put under business rescue, but also a further four Highveld companies, namely Highveld Syndication 15 to 18. These companies had been "syndicated" to the public in a similar manner as Highveld 19 to 22. In the case of Highveld 15 to 18, the immovable properties referred to in those particular prospectuses had been transferred to the relevant Highveld companies, as opposed to in Highveld 19 to 22 where no properties have been transferred. For the purpose of business rescue, all eight Highveld companies (15 to 22) were "lumped" together and rental income distributed amongst all investors.

27. A copy of the Business Rescue Plan of November 2011 is annexed to the Johannesburg application (therein **Annexure "RA3"**). In essence, and as will be noted from its contents, the plan was that the properties of Highveld 15 to 18, and other properties, were to be transferred to Orthotouch. The affairs of Highveld 19 to 22, and also those of Highveld 15 to 18, were to be salvaged through or "in" Orthotouch, with reduced monthly payments to be made by Orthotouch to the Highveld companies, which in turn would make monthly payments to investors.

28. It will be noted that the Business Rescue Plan, read with Appendix I thereto, although allowing Orthotouch to sell "non-performing properties", expressly envisaged that the Orthotouch assets and property portfolio would be increased (and some redeveloped) to the ultimate benefit of the Highveld companies and therefore the investors concerned who, under the Business Rescue Plan were supposed to receive back after five years the full value of their initial investment. Instead of this retention or increase of assets/value occurring in Orthotouch, the opposite is occurring, namely Orthotouch is dissipating assets for no consideration as described below.

29. Also the scheme of arrangement document reflected that the assets and value in Orthotouch be maintained and increased for the benefit of the investors (the Highveld companies). I refer to, for instance, paragraphs 2.2.3.15.4 and 2.2.3.17 of the scheme of arrangement document. I submit that the asset stripping occurring in relation to Orthotouch is also contrary to

the terms of the scheme of arrangement, and also unlawful on that score, apart from the other grounds referred to herein.

30. As stated in my founding affidavit in the setting aside/appeal application in Johannesburg, the founding affidavit in Orthotouch's *ex parte* application for the court's sanctioning of the scheme of arrangement, it is stated that 2,914 votes (at a meeting of investors) were brought out in favour of the scheme of arrangement (and 155 votes against). Even if these figures were correct, the in favour votes constitute a very small percentage of the total number of investors (of which there are more than 23,000). According to my information most of those investors present at the meeting deliberately decided not to vote in favour of it and to rather abstain from voting.

31. The following activities of the Georgiou's frustrated the business plan to the detriment of the Highveld investors.

31.1. In the first instance, and as stated above, the assets that were supposed to be used to salvage the affairs of the Highveld companies through or "in" Orthotouch were, instead, stripped-out and transferred to Accelerate pursuant to certain sale agreements, and the proceeds of these sales of were stripped-out when it was renounced to the Michael Family Trust. Much of the transfer of Orthotouch's value (assets) to Accelerate therefore occurred without

any *quid pro quo* to Orthotouch, as the compensation that was supposed to be paid by Accelerate (in the form of Accelerate shares), was renounced by Orthotouch to the Michael Georgiou Family Trust. The details of these activities appear from the pre-listing statement dated November 2013 ("**Annexure FA1**"), which only recently came to the attention of the applicants, and will be addressed separately hereunder in more detail.

31.2. Second, and towards the end of 2014, Orthotouch brought an *ex parte* application for the court's sanctioning of a scheme of arrangement (under section 155 of the Companies Act of 2008) to compromise the claims of its creditors and the Highveld investors, maintaining that it is struggling to comply with its obligations under the Business Rescue Plan. Under the scheme of arrangement, the monthly payments to investors were further reduced. The scheme of arrangement also purported to thwart the proposed class action of the Highveld investors by purporting to absolve the directors and all others of all blame. Details of the grounds upon which my co-applicants and I have applied for the setting aside, alternatively leave to appeal the order granted in that *ex parte* application appear from my founding affidavit in the Johannesburg application.

31.3. What is particularly concerning to the co-applicants and myself is that the scheme of arrangement document, as well as in the supporting affidavit in the *ex parte* application by which the arrangement was

sanctioned by the Johannesburg High Court, made no mention of, and supressed, the earlier asset-stripping activities that only recently came to our attention. In addition, in the supporting affidavit to Orthotouch's said *ex parte* application for the sanctioning of the Scheme of arrangement, no mention was made of the serious allegations made in support of the Pretoria application (the class action), which had been issued some weeks earlier, and that the scheme of arrangement purports to absolve all individuals concerned.

31.4. As further background, I am informed by my attorney of record that the Johannesburg application (to set aside, alternatively to appeal against, the sanctioning of the scheme of arrangement) is currently subject to interlocutory disputes concerning the procedure of notifying investors of that application, which interlocutory disputes have been set down for hearing in March 2016. No opposing papers in the (main) application have been filed. Once the interlocutory disputes have been disposed of, it is hoped that the (main) Johannesburg application will be heard in the latter half of 2016. Once that has been adjudicated, the Pretoria application will again proceed, which has been held up by the sanctioning of the scheme of arrangement.

THE PRE-LISTING STATEMENT OF ACCELERATE

32. Unless the context indicates otherwise, the following information is set out in the pre-listing statement ("**Annexure FA1**"), and the terms in this affidavit that appear in *italics* have the same meaning given to them at pages 13 to 24 of the pre-listing statement.

Introduction

33. The pre-listing statement records that in late 2102, *Michael Georgiou* took a "strategic decision" to diversify *the Georgiou family's* sources of funding by bringing some of *the Georgiou family's* properties to market through a listing.[1] An existing private company was converted into a public company and its name was changed to *Accelerate*.[2] In anticipation of the listing, *Accelerate* concluded various agreements with *the Vendors* to acquire *the Property Portfolio* that comprised of 51 properties.

34. *The Purchase Consideration* of between R5 441 474 071 and R5 592 533 840 payable by *Accelerate* for the acquisition of *the Property Portfolio* were to be settled partly through the issue of **up to 238 561 226** Accelerate shares to *the Vendors* at the listing price per share, as well as by way of cash raised though *the Offer* by issuing up to a maximum of 480 million *Accelerate* shares.

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[1] Annexure FA1 page 31.
[2] Annexure FA1 page 31.

The remainder of *the Purchase Consideration* would be settled though bank debt.[3]

35. Settlement of *the Purchase Consideration* coincided with the date of transfer, which was scheduled for 11 December 2013 (the day before the date of *Listing*).[4]

36. Prior to the *Listing*, *Michael Georgiou*[5] was the sole shareholder of *Accelerate*.

37. On the date of the *Listing*, The *Michael Family Trust* would hold between 49,6% and 51,9% of *Accelerate* which equated to between 316 476 779 and 331 366 244 shares. Of this shareholding, between 219 175 452 **to 238 561 226 Accelerate shares** were subject to a 2 year lock-in period post-Listing. The *Michael Family Trust* encumbered a portion of the locked-in shares to the value of R410 000 000.00.[6]

38. Following the *Listing*, *the Vendors* were to jointly hold a minimum of 49,6% of *Accelerate*.[7] This shareholding was subject to a *Relationship Agreement* that regulated the manner in which those share would vote at general meetings of *Accelerate*.[8] *The Relationship Agreement* was entered into between

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[3] Annexure FA1 page 31.
[4] Annexure FA1 page 32.
[5] Annexure FA1 page 52.
[6] Annexure FA1 page 52.
[7] Annexure FA1 page 32.
[8] Annexure FA1 page 137.

Fourways Precinct (wholly owned by *Michael Georgiou*, and for reasons set out below, the only *Vendor* that retained its shares in *Accelerate*) and *the Michael Family Trust* (the other major shareholder of *Accelerate*).

39. The material transactions used to strip-out assets of *Orthotouch* are dealt with under the following headings:

39.1. The Orthotouch Sale Agreements;

39.2. The Eshowe Mall transaction; and

39.3. The Conditional Deferred Payments.

The Orthotouch Sale Agreements

40. The *Orthotouch Sale Agreements* are described on page 21 of the pre-listing statement.

41. The salient details of the *Orthotouch Sale Agreements* are set out on page 126 of the pre-listing statement.

42. In essence, and as appears from the content of the pre-listing statement, *Accelerate* purchased *the Orthotouch Letting Enterprises* and *the Orthotouch*

Land for *the Orthotouch Purchase Price*, which amounted to R1 323 440 539.00.[9]

43. *The Orthotouch Purchase Price* would be paid by *Accelerate* to *Orthotouch*. This would be done partly in cash and party in Accelerate shares.

44. The cash portion of *the Orthotouch Purchase Price* would be equal to the amount required to cancel the existing mortgage bonds registered against the title deeds of the *Orthotouch Land*, plus interest to the date of payment.

45. The share portion of *the Orthotouch Purchase Price* was the difference between *the Orthotouch Purchase Price* and the cash portion. The pre-listing statement provides that where no existing mortgage bonds were registered in respect of a property the entire purchase price would be settled solely in *Shares*.

46. The cash portion of *the Orthotouch Purchase Price* enabled a transfer of the underlying properties in the Deeds Office.

47. Ordinarily one would expect that the share portion of *the Orthotouch Purchase Price* would vest with *Orthotouch* as consideration for selling the underlying assets to *Accelerate*. But that did not happen. *Orthotouch*

[9] Annexure FA1 page 156.

renounced the share portion of the purchase price to *the Michael Family Trust,* which is clear from the pre-listing statement that provides as follows:

> *"Accelerate will procure that the Shares forming part of the Share portion of the Orthotouch Purchase Price are issued in the name of Orthotouch in unlisted "certificated form", or its renouncee. Orthotouch has renounced the Shares to the Michael Family Trust. Accelerate will deliver the shares to Ironwood Trustees to hold the unlisted Shares on escrow pending the Orthotouch Transfer. On the date of the Orthotouch Transfer, Ironwood Trustees will release the Shares to the Michael Family Trust."*[10]

48. This message is repeated on page 156 of the pre-listing statement that provides as follows:

> *"The aggregate purchase consideration of R 1 323 440 539 will be settled partly in Shares and the balance by cash raised from the Offer. Orthotouch has renounced the shares it will be receiving to the Michael Family Trust."*

49. *The Orthotouch Sale Agreements* had the effect of stripping the valuable underlying assets from *Orthotouch* and transferring them to *Accelerate* that is controlled by *Michael Georgiou.* My instructing attorney performed a deed

[10] Annexure FA1 page 126.

search, which reveals that *the Orthotouch Properties* were transferred to *Accelerate*.

50. The equity portion of the consideration for the underlying assets (i.e. the unlisted shares in *Accelerate*) was stripped-out when *Orthotouch* renounced those unlisted shares in favour of *the Michael Family Trust*. After the two-year lock-in period mentioned above, these shares will be capable of being traded on the JSE.

51. Once these shares are capable of being traded, *Michael Georgiou* would have achieved his goal of diversifying *the Georgiou family's* sources of funding. But that would be at the expense of the Highveld investors who had agreed to the Business Rescue Plan on the basis of representations that the affairs of the Highveld companies would be salvaged through *Orthotouch* to allow it (*Orthotouch*) to re-pay their monies in full by the end of 2016.

52. *Orthotouch* has not accounted for the *Orthotouch Sale Agreements*, or the fact that it had renounced the unlisted shares forming *the Orthotouch Purchase Price* to *the Michael Family Trust.*

53. *Orthotouch* also suppressed this information in its *ex parte* application where it sought to compromise the rights of its creditors and the Highveld investors in terms of section 155 of the Companies Act of 2008. A copy of the *ex parte* application is annexed hereto marked **Annexure "FA2"**. In the *ex parte* application, Orthotouch merely made reference to the listing of a property

fund in 2013 (without mentioning the name of the fund),[11] referred to certain property sales as reflected in an annexure (without mentioning the name of the buyer of these properties),[12] and made an oblique reference to the fact that certain properties were sold to (an unidentified) listed property company for the sum of R1 370 698 688 (without mentioning that it had renounced the consideration received in the form of shares in the listed entity to the Michael Family Trust).[13]

54. It is clear that *the Georgiou's* intentionally dissipated and concealed these assets as part of a strategy to nullify any judgment that the Highveld investors will in future obtain against them. The final obstacle to dissipating these assets is the two-year lock-in period that expires on 12 December 2015.

The Eshowe Mall Transaction

55. A similar *modus operandi* was used for the Eshowe Mall that was owned by Highveld Syndication No. 18, and which formed part of the Business Rescue Plan.

56. The *Eshowe Sale Agreement* is described on page 16 of the pre-listing statement.

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[11] Annexure FA2 Scheme document page 34 paragraph 2.1.36.
[12] Annexure FA2: Scheme document page 35 paragraph 2.1.45 read with Annexure E.
[13] Annexure FA2: Scheme document Annexure I, note 7.

57. The salient details of the *Eshowe Sale Agreement* are set out on page 135 of the pre-listing statement.

58. In essence, *Accelerate* purchased *the Eshowe Letting Enterprise* and *the Eshowe Land* for *the Eshowe Purchase Price,* which amounted to R47 258 149.00.[14]

59. *The Eshowe Purchase Price* would be paid by *Accelerate* to *Orthotouch* in Accelerate shares only. The pre-listing statement provides as follows:

> "*Accelerate will procure that the Shares forming the Eshowe Purchase Price are issued in the name of Orthotouch or its renouncee. Accelerate will deliver the shares to Ironwood Trustees to hold the Shares on escrow pending the Eshowe Transfer. On the date of the Eshowe Transfer, Ironwood Trustees will release the Shares to Orthotouch or its renouncee.*
> "

60. My instructing attorney has performed a deed search that reveals *the Eshowe Property* was transferred to *Accelerate*.

61. The pre-listing statement does not disclose whether the *Shares* forming the *Eshowe Purchase Price* were renounced by *Orthotouch*, and if so, the identity

[14] Annexure FA1 page 154.

of the renouncee. The respondents are called upon to provide this information.

62. What is apparent is that *Orthotouch* has not accounted for *the Shares* forming *the Eshowe Purchase Price*, which suggests such shares were renounced. That would have the same effect as the renouncement in *the Orthotouch Sale Agreement*, that is, to dissipate the assets of *Orthotouch* to nullify a future judgment against the respondents in the Pretoria application.

63. To the extent that such shares were renounced to *the Michael Family Trust*, an order is sought against the first respondent to the fourth respondent on the terms set out in the notice of motion to prevent the further dissipation of those assets pending the final determination of the issues in the Pretoria application.

The Conditional Deferred Payment

64. The *Conditional Deferred Payment* is described on page 14 of the pre-listing statement.

65. The salient details of the *Conditional Deferred Payment Agreement* are set out on page 45, and page 134 of the pre-listing statement.

66. In essence, *Accelerate* and each of *the Vendors* (including *Orthotouch)* entered into an agreement in terms of which the relevant *Vendor* is entitled to

for a period of three years from the date of *Listing* to lease *the Excess Vacant Premises* (an undefined term that is explained on page 45 of the pre-listing statement) to prospective tenants.

67. *The Vendor* would be entitled to *the Conditional Deferred Payment,* which is defined as the further purchase price payment to be made by *Accelerate* to *the Vendor* concerned in respect of *the Letting Enterprise* concerned, which payment is conditional upon the letting of *the Excess Vacant Premises*.

68. What is important is that *the Conditional Deferred Payment* would be paid by *Accelerate* to the Vendor concerned (for example *Orthotouch*) in *Additional Accelerate shares*. The pre-listing statement records it thus:

> "*The Conditional Deferred Payment will be settled by Accelerate by the issue and allotment of the Additional Shares to the Vendor at a clean 30-day VWAP, with an antecedent divestment of distributions by the Vendor to Accelerate where applicable*." [15]

69. The pre-listing statement shows the maximum *Conditional Deferred Payments* for each of *the Vendors* at pages 154 to 156. The relevant amounts are set out below:

[15] Annexure FA1 page 134.

69.1. In respect of *the Orthotouch Sale Agreements, Orthotouch* stood to receive a maximum *Deferred Payment (i.e. shares in Accelerate)* in an amount of R177 689 290.00.

69.2. In respect of *the Eshowe Mall Agreements, Orthotouch* stood to receive a maximum *Conditional Deferred Payment (i.e. shares in Accelerate)* in an amount of R3 328 445.00.

70. The respondents are called upon to inform the applicants to which extent these shares were (and are) being divested to *Accelerate,* so that legal process may be instituted for the return of such shares.

71. What is concerning to my co-applicants and myself for present purposes is the manner in which this transaction has been treated in the *ex parte* application to sanction the scheme of arrangement. *Orthotouch* made a reference to this deferred payment (in a note dealing with continent gains),[16] and placed a zero value on these payments that could potentially exceed R180 000 000.00.

Generally

72. The pre-listing statement represents that the long-term objective of *Accelerate* is to grow its asset and that it "*will seek to access the unique pipeline of off-market acquisitions available to it through its affiliation with the*

[16] Annexure FA2 Scheme document Annexure I note 7.

Georgiou Group."[17] It is also mentions that "*Accelerate has the benefit of a natural pipeline of potential property investment from within the 'Georgiou stable'.*"[18]

73. It remains a possibility that those assets that were transferred to Orthotouch pursuant to the Business Rescue Plan that have not yet been stripped out of Orthotouch are at risk of being dissipated in a similar as those properties that have to date been stripped out.

THE IRREGULAR SCHEME OF ARRANGEMENT

74. With the benefit of the information in the pre-listing statement referred to above, it is clear that the Orthotouch and Georgiou suppressed the assets stripping activities in the *ex parte* application for the sanctioning of the scheme of arrangement.

75. Instead of disclosing that the consideration that was payable in Accelerate shares in respect of *the Orthotouch Sale Agreement* and *the Eshowe Mall* transactions had been renounced, it advanced other reasons for its financial demise. For example, it blamed the so-called "detractors" for its inability to obtain funding from several banking institutions. It was stated that:

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[17] Annexure FA1 page 6. Also see page 48.
[18] Annexure FA1 page 49.

"[Orthotouch] has been unable to obtain the funding, envisaged in the [Business Rescue] Plan, required to upgrade and grow the portfolio of Properties as envisaged in and for the purposes of the Plan; although the value of the assets has been largely preserved under the management of Georgiou and the directors of the Company, at R1 902 146 800."[19]

The Georgiou's asset stripping activities are not compatible with claims that the value assets have been largely preserved.

76. The true purpose of the scheme of arrangement was to thwart the proposed class action by absolving the directors and all others of all blame.

77. I have shown the brazenness with which the *ex parte* application was pursued in the founding affidavit of the Johannesburg application, which is evident from, *inter alia,* the sequence of events (set out in paragraph 29 of that founding affidavit), the grounds of application (set out in paragraphs 30 to 34 affidavit), and also appears from the grounds set out in prayers (d)(1) – (12) of the notice of motion in that application.

78. The scheme of arrangement also resulted in the investors been paid a much reduced monthly income.

79. In essence, I submit that if the Johannesburg court had been presented with the full picture and background facts, which now include information of asset-

[19] Annexure FA2: Scheme document page 36 paragraph 2.1.47.2 and 2.1.47.3

stripping in the pre-listing statement, and those clauses in the scheme documents that suppressed these activities (particularly the renouncement of the consideration for *the Orthotouch Sale Agreements* and *the Eshowe Mall transaction*), the order in the *ex parte* application would not have been granted. Also, the Johannesburg court was not, during the *ex parte* application, informed of the fact that the scheme of arrangement sought to absolve all individuals concerned in relation to serious allegations of fraud and reckless actions, being one of the causes of actions in the proposed class action.

80. The Pretoria application, I am advised, will be supplemented to include relief sought in relation to the unlawful asset stripping of Orthotouch's assets to the detriment of the investors and the Highveld companies.

81.

81.1. I also mention that Orthotouch has, since the commencement of the Business Rescue process, been extremely reluctant to provide any information concerning its affairs. This despite it being a public company and despite the investors, through the Highveld companies, having an interest in its financial well-being.

81.2. The receiver appointed in terms of the scheme of arrangement to administer the process (Mr Derek Pedoe Cohen), was tasked under clause 4 of the scheme of arrangement document to draw a

Liquidation and Distribution Account as if he was a liquidator under a winding up order. Through such L & D account, it was hoped that some transparency concerning Orthotouch's affairs and assets would be obtained. However, instead of such L & D account painting a picture of Orthotouch's financial affairs and assets, the account entailed not much more than a mere list containing the names of the various investors, and the value of their investments in the respective Highveld companies together with the current value of their investments.

81.3. For this reason, Second Applicant hereto lodged an objection to the account on the grounds that it contained far too little information. When his objection was dismissed by Cohen, Second Applicant launched an application (in the Pretoria High Court) to review the dismissal of the

objection. This application is currently also pending (under case number 77050/2015). No opposing affidavits have yet been filed.

ENTITLEMENT TO INTERIM RELIEF

Prima facie right

82. The Georgious, I submit, intentionally dissipated and concealed the assets that were supposed to be used to salvage the affairs of the Highveld companies through or "in" Orthotouch.

83. Between 219 175 452 and 238 561 226 of the Accelerate shares currently held by the Michael Family Trust are subject to a two year lock-in period that expires on 12 December 2015. Included herein are shares that were renounced to the Michael Family Trust that should have been received by Orthotouch as consideration for the sale of the underlying assets.

Serious and irreparable harm

84. My co-applicants and I will suffer serious and irreparable harm unless interim relief is granted prior to 12 December 2015. That material harm will result because, upon the expiry of the two-year lock-in period mentioned above, these shares will be capable of being transferred or sold to third parties, including members of the public. Once that happens the shares or value would be lost to the Highveld investors. The amounts to be claimed in the

intended class action, is the full R3,6 billion initially invested in Highveld 19 to 22. These "investments" must be retained and preserved, as it is unlikely that any of the individuals concerned have, in their personal capacities, the necessary funds and assets to make payment of any judgment ultimately granted in relation to the R3,6 billion (and the further approximately R1 billion in relation to Highveld 15 to 18).

85. Given the background stated above, there is a considerable risk, if not high probability, that – should further assets or value be dissipated – the eventual judgments against the Defendants in the class action would be "empty" judgments as there would be little or no assets against which to execute.

86. Further, there would be no way for the Highveld investors to determine what consideration was received for such shares because they do not have access to the Michael Family Trust's accounting records.

87. Further and in any event, if the shares were sold at a market price there is good reason to be concerned that the proceeds of such sale would be lost to the Highveld investors because it could be used by the Michael Family Trust, for example, to pay its creditors (or any of the many other creditors of the Georgiou's). Once that happens the consideration for the shares will be lost.

88. If the shares were to be transferred to one of the Georgiou companies, there is good reason to be concerned that it would be done at value below the

market price (or no value at all). That would evidently be to the detriment of the Highveld investors.

89. In summary, any sale or transfer of these shares will clearly be at the expense of the Highveld investors who had agreed to the Business Rescue Plan on the basis of representations that the affairs of the Highveld companies would be salvaged through *Orthotouch* to allow it (*Orthotouch*) to re-pay their monies in full by the end of 2016.

90. Ultimately, the last obstacle in dissipating the assets that was supposed to be used to pay investors in full by the end of 2016 is the two-year lock-in period that expires on 12 December 2015.

Balance of convenience

91. I submit there can be no serious debate on where the balance of convenience lies, and more especially, whether the prejudice to the Highveld investors in the event that the interim relief is not granted, outweighs any prejudice that the Michael Family Trust might suffer in the event that the relief is granted.

92. In addition to what is stated in this affidavit in this regard, the present situation has arisen as a result of Michael Georgiou's "strategic decision" to diversify the Georgiou family's sources of funding by bringing some of the Georgiou family's properties to market through a listing of Accelerate, and the subsequent activities of the Georgiou's to dissipate and conceal assets that

were supposed to enable Orthotouch to re-pay the Highveld investors by the end of 2016.

93. In the circumstance the "balance of convenience" consideration is entirely in the applicants' favour. I submit that there could be little inconvenience for the Michael Georgiou family trust not to sell the shares concerned pending the resolution of the disputes/litigation referred to above. Pending the outcome of the class action the value of the shares will be preserved in the hands of the trustees.

Urgency

94. My co-applicants and I were, until recently, not aware of the asset stripping activities relating to Orthotouch that had been supressed in the *ex parte* application for the sanctioning of the scheme of arrangement heard in November 2014.

95. The pre-listing statement came to my attorneys' attention early in November 2015. Given the complexity of the pre-listing statement and the demands of the ongoing proceedings involving the Georgious, counsel's advice was sought shortly thereafter in respect of the transactions listed therein which was furnished towards the end of November 2015. This advice required some time since the pre-listing statement (a complex document in itself) had to be read and understood against the background and pending litigation referred

to above. This advice was followed-up with a consultation on 1 December 2015.

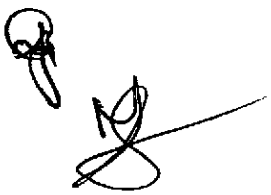
96. On 2 December 2015 my attorneys of record wrote to the trustees of the Michael Family Trust on to obtain an undertaking that was aimed at preserving the assets that Orthotouch should have received as consideration for the sale of the underlying properties to Accelerate, and to prevent the Michael Family Trust from dissipating the Accelerate shares to a third party (Annexed hereto as "**Annexure FA3**").

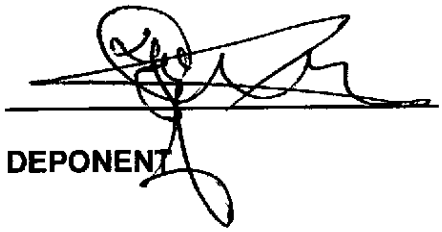
97. On 3 December 2015, my attorneys again wrote to the trustees of the Michael Family Trust to obtain information on the encumberment of a portion of the locked-in shares (Annexed hereto as "**Annexure FA4**").

98. As mentioned earlier, the trustees refused to provide that undertaking, which would otherwise have allowed this application to brought in the ordinary course (Annexed hereto as "**Annexure FA5.1 AND FA5.2**").

CONCLUSION AND RELIEF

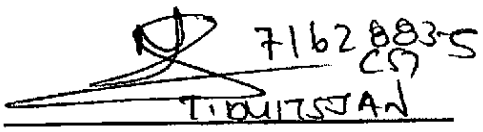
99. It is respectfully submitted that the application for urgent interim relief should be upheld, and relief should be granted in terms of the notice of motion to which this affidavit is attached.





DEPONENT

THUS SIGNED AND SWORN TO at MOSSEL BAY on this 04 day of DECEMBER 2015 the deponent having acknowledged that the deponent knows and understands the contents of this affidavit, that the deponent has no objection to taking the prescribed oath, that the oath which the deponent has taken in respect thereof is binding on the deponent's conscience, and that the contents of this affidavit are both true and correct.



COMMISSIONER OF OATHS

Name: TARRYN DUITSJAN

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CONST.