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Court File No.:

FEDERAL COURT
PROPOSED CLASS PROCEEDING

BETWEEN

JOHN PAUL INGARRA, KYLE PINNELL, PAUL TANTALO, and 5046013 ONTARIO
INC.

Plaintiffs

- and –

DYE & DURHAM LIMITED, OMERS INFRASTRUCTURE MANAGEMENT INC.,
and DOPROCESS LP

Defendants

STATEMENT OF CLAIM

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the *Federal Courts Rules*, serve it on the plaintiff's solicitor or, if the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court,

WITHIN 30 DAYS after the day on which this statement of claim is served on you, if you are served in Canada of the United States; or

WITHIN 60 DAYS after the day on which this statement of claim is served on you, if you are served outside Canada and the United States.

10 ADDITIONAL DAYS are provided for the filing and service of the statement of defence if you or a solicitor acting for you serves and files a notice of intention to respond in Form 204.1 prescribed by the *Federal Court Rules*.

Copies of the *Federal Court Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

Date: 26 April 2022

Issued by: _____

Registry Officer

Address of local office: 180 Queen Street West
Suite 200
Toronto, Ontario
M5L 3L6

TO:

Dye & Durham Limited
199 Bay Street, Suite 4610
Toronto, Ontario
M5L 1E9

AND TO:

OMERS Infrastructure Management Inc.
EY Tower
100 Adelaide Street West, Suite 900
Toronto, Ontario
M5H 0E2

AND TO:

DoProcess LP
123 Front Street West, Suite 700
Toronto, Ontario
M5J 2M2

CLAIM

1. The Plaintiffs on behalf of the Class described herein, claim:
 - (a) an order certifying this action as a class proceeding and appointing the Plaintiffs as Representative Plaintiffs for the Class;
 - (b) a declaration that the Defendants are competitors pursuant to section 45(8) of the *Competition Act*, R.S.C., 1985, c. C-34 ("*Competition Act*");
 - (c) a declaration that the Defendants conspired, agreed or arranged with each other to fix, maintain, increase or control the price for the supply of a software platform, termed "Conveyancer", that facilitates the closing of real estate transactions which may involve purchase and/or sale transactions and/or registration of mortgages and re-financing arrangements, in breach of section 45(1)(a)(b) and (c) of the *Competition Act*;
 - (d) a declaration that the Defendant Dye & Durham Limited ("Dye & Durham") aided, abetted and counselled to implement the conspiracy, combination, agreement or arrangement, in breach of section 45(1)(a)(b) and (c) of the *Competition Act*, as well as in breach of sections 21 and 22 of the *Criminal Code*, R.S.C., 1985, c. C-46 ("*Criminal Code*");
 - (e) a declaration that the Defendant OMERS Infrastructure Management Inc., ("OMERS Infrastructure") aided, abetted and counselled to implement the conspiracy, combination, agreement or arrangement, in breach of section 45(1)(a)(b) and (c) of the *Competition Act*, as well as in breach of sections 21 and 22 of the *Criminal Code*, R.S.C., 1985, c. C-46 ("*Criminal Code*");

- (f) damages or compensation, calculated on an aggregate basis or otherwise, in the amount of \$200 million, or such additional or other sum as is determined at trial, for breach of Part VI, section 45(1)(a)(b) and (c) of the *Competition Act* pursuant to Part IV, section 36 of the *Competition Act* and Rule 334.28 of the *Federal Courts Rules*, S.O.R./98/106 (the “*Rules*”);
- (g) pre-judgment and post-judgment interest in accordance with sections 36 and 37 of the *Federal Courts Act*, R.S.C., 1985, c. F-7 (“*Federal Courts Act*”);
- (h) costs of both the investigation and prosecution of the action, including applicable taxes, on a full or complete indemnity basis pursuant to section 36 of the *Competition Act* and the *Federal Courts Rules*;
- (i) the costs of notice and administering the plan of distribution of the recovery in this action, plus applicable taxes, pursuant to Rules 334.16(1) and 334.28 of the *Federal Courts Rules*;
- (j) pre-judgment and post-judgment interest; and
- (k) such further and other relief as this Honourable Court may deem just.

OVERVIEW

2. On 10 December 2020, Dye & Durham, a provider of cloud-based software solutions, announced that it acquired DoProcess LP (hereinafter, “DoProcess”), an Ontario-based provider of the leading real estate conveyancing software in Canada, with dominant market share. Dye & Durham acquired DoProcess from OMERS Infrastructure for total consideration of approximately \$530 million (hereinafter the “Acquisition”). As part of the transaction, OMERS

Infrastructure acquired approximately \$30 million in value of the common shares of Dye & Durham.

3. At the time of the Acquisition, DoProcess was an affiliated entity of Teranet Enterprises Inc. ("Teranet"), a leading provider of integrated land-based information products and services, which provides access to the Ontario Electronic Land Registration System through its proprietary application software, namely, Teraview and Tera Connect; these software platforms enable customers to conduct electronic registrations as well as title and writ searches relating to real property. Teranet had acquired DoProcess on 4 February 2008, as part of the purchase by OMERS Infrastructure.

4. At the time of the Acquisition, OMERS Infrastructure, by virtue of its ownership of DoProcess, was a competitor with Dye & Durham. Dye & Durham only had a small market share in the conveyancing software market in Canada as compared with DoProcess. In addition, by virtue of its conduct in directing and counselling DoProcess as well as Dye and Durham and in directing the completion of the Acquisition, OMERS Infrastructure thereby aided and abetted and counselled the anti-competitive agreement to give effect in Canada to the conspiracy, combination, agreement or arrangement in breach of sections 45(1) (a)(b) and (c) of the *Competition Act* as well as sections 21 and 22 of the *Criminal Code*.

5. Prior to the completion of the Acquisition and despite having a dominant market share, DoProcess had re-branded its Conveyancer software platform to Unity. Post-Acquisition, Dye & Durham continued to use the Unity brand for its

conveyancing software platform and became the dominant provider of conveyancing software in Canada with 90% of the market share.

6. Dye & Durham and DoProcess agreed to cease competition between each other by way of the Acquisition, and that Dye & Durham would have full control and use of the Unity software platform while OMERS Infrastructure (which had owned DoProcess) continued to benefit in two ways post-Acquisition:

- a. Firstly by acquiring a non-controlling number of common shares of Dye & Durham, thereby mutually benefiting by the expected increase in market share by Dye & Durham through both volume of transactions and the increase in price for use of the Unity software platform as a result of the decrease in competition; and
- b. Secondly, OMERS Infrastructure, through Teranet, can licence Teraview and Tera Connect to Dye & Durham along with preferential integration of Teranet Connect, an application programming interface which allows third party software application vendors to integrate property and writs search functionality and data into their applications, thereby providing their customers with more powerful tools, giving Dye & Durham an advantage that no other competitor or would-be competitor would be able to offer law firms. Dye & Durham could then licence its Unity software platform to law firms, which will use it to transfer title to property for its clients.

7. The Defendants mutually and unlawfully benefitted from the Acquisition and continue to do so in an ever-increasing manner as prices increased multiple

fold for use of Unity as paid by members of the Class who engaged in purchase and/or sale transactions and/or registration of mortgages and re-financing arrangements. Any other competitor has insignificant market share or is fledgling in the development and implementation of appropriate software.

8. The Acquisition gave effect to the agreement between the Defendants to fix, maintain, increase or control the price for the supply of the conveyancer software platform, Unity, in breach of section 45(1)(a)(b) and (c) of the *Competition Act* and, in addition, to fix, maintain, control, prevent, lessen or eliminate the production or supply of conveyancing software platforms by agreeing to integrate conveyancing software platforms, namely, Teraview and Tera Connect, into Unity, through a subsidiary of OMERS Infrastructure which was not part of the acquisition agreement to acquire DoProcess.

9. The Plaintiffs therefore bring this action on their own behalf of and on behalf of the Class Members in order to redress the economic injury the Defendants have already caused, and continue to cause, including by seeking remedial relief, pursuant to section 36 of the *Competition Act*, for a breach of section 45 of the *Competition Act*.

THE PARTIES

Plaintiffs

10. John Paul Ingarra (“Ingarra”) is an individual residing in Mississauga, Ontario. Between 2019 and 2020, Ingarra purchased properties throughout Ontario and paid the software transaction fee as charged by DoProcess as a disbursement

passed on to him by his lawyer in the amount of \$25.00 plus HST for each transaction. Between January 2021 and January 2022, the transaction fee charged by Dye & Durham after the Acquisition was increased to \$129.00 plus HST, which Ingarra paid as a disbursement passed on to him by his lawyer for each transaction during this time frame. Ingarra was made aware that the transaction fee increased to \$249.00 plus HST as of January 31, 2022 for which he will be obligated to pay for subsequent transactions in 2022.

11. Paul Tantalo (“Tantalo”) is an individual residing in Kleinburg, Ontario. Between 2019 and 2020, Tantalo purchased properties throughout Ontario and paid the software transaction fee as charged by DoProcess as a disbursement passed on to him by his lawyer in the amount of \$25.00 plus HST for each transaction. Between January 2021 and January 2022, the transaction fee charged by Dye & Durham after the Acquisition was increased to \$129.00 plus HST, which Tantalo paid as a disbursement passed on to him by his lawyer for each transaction during this time frame. Tantalo was made aware that the transaction fee increased to \$249.00 plus HST as of January 31, 2022 for which he will be obligated to pay for subsequent software transaction fees in 2022. 12.

5046013 Ontario Inc., (the “Corporation”), is a privately-held company incorporated in Ontario; its directors are Ingarra and Tantalo. Ingarra was the sole director until February 3, 2022 at which time Tantalo became a director. The Corporation purchased and sold real property in Ontario both prior to and after the Acquisition and paid the software transaction fees charged by DoProcess and Dye & Durham, respectively, as a disbursement passed on to it by its lawyer

for each transaction, in a manner and at the same fee structure, as paid by Ingarra and Tantalo in their respective transactions.

13. Kyle Pinnell (“Pinnell”) is an individual residing in Gooderham, Ontario. Between 2019 and 2020, Pinnell purchased properties throughout Ontario and paid the software transaction fee as charged by DoProcess as a disbursement passed on to him by his lawyer in the amount of \$25.00 plus HST for each transaction. Between January 2021 and January 2022, the transaction fee charged by Dye & Durham after the Acquisition was increased to \$129.00 plus HST, which Pinnell paid as a disbursement passed on to him by his lawyer for each transaction during this time frame. Pinnell was made aware that the transaction fee increased to \$249.00 plus HST as of January 31, 2022 for which he will be obligated to pay for subsequent software transaction fees in 2022.

The Defendants

14. Defendant OMERS Infrastructure is a Canadian company incorporated in Ontario with its principal place of business at 900-100 Adelaide Street West, Toronto, Ontario, M5H 0E2, and is the infrastructure investment advisor and manager for the Ontario Municipal Employees Retirement System (“OMERS”), the defined benefit pension plan for municipal employees in Ontario, which is governed by the *Ontario Municipal Employees Retirement Act, 2006*; pursuant to the statute, OMERS is composed of two statutory corporations, namely, OMERS Administration Corporation and OMERS Sponsors Corporation. OMERS Infrastructure acquired control of DoProcess as part of the purchase of Teranet

on 4 February 2008. As part of the Acquisition of DoProcess by Dye & Durham on 10 December 2020, OMERS Infrastructure acquired \$30 million in value of common shares in Dye & Durham, a minority interest. Subsequent to the Acquisition, OMERS Infrastructure licenced a software platform, TeraConnect, to Dye & Durham, as an integrated package to operate with the software platform, Unity, owned by Dye & Durham.

15. Defendant Dye & Durham is a Canadian corporation with its principal place of business at 199 Bay Street, Suite 4610, Toronto, Ontario, M5L 1E9. In or around 2016, Dye & Durham was acquired completely by OneMove Technologies Inc., (“OneMove”), in a share acquisition, following which the combined entity operated under the name Dye & Durham. OneMove had a popular conveyancing software platform in the western provinces, e-Conveyance, whereas Dye & Durham had a software platform for title searches. Post-acquisition, Dye & Durham had an improved conveyancing software platform and an updated software program was developed, ProSuite, licenced in British Columbia. Dye & Durham also licences Canada’s market-leading conveyancing software platform, Unity.

16. Defendant DoProcess is a Canadian limited partnership with its principal place of business at 123 Front Street West, Suite 700, Toronto, Ontario, M5J 2M2. 199 Bay Street, Suite 4610, Toronto, Ontario, M5L 1E9. DoProcess was acquired by Dye & Durham on 10 December 2020 as part of the Acquisition. Prior to the Acquisition, DoProcess had the market-leading software platform,

Conveyancer. In 2020, prior to the Acquisition, Conveyancer was updated with additional security, became web-based, and was re-branded as Unity.

THE CLASS AND CLASS PERIOD

17. The plaintiffs propose the class to include:

All persons, wherever domiciled in the world, who purchased, sold, mortgaged or refinanced real estate anywhere in Canada between December 10, 2020 and the date this action is certified (the “Class Period”), except Excluded Persons, as defined below, and paid for the use of the software platform, Unity or Conveyancer, by way of paying the disbursements incurred through their respective legal counsel who paid a licence fee the use of the software platform to close the aforementioned categories of transactions.

18. Excluded Persons are all persons who were:

- a) Spouses of the proposed class members;
- b) Beneficiaries of the proposed class members; and
- c) Any purchaser of real estate who did not pay the fee for use of the software platform, Unity or Conveyancer.

FACTS SUPPORTING THE CLAIMS AGAINST THE DEFENDANTS

Acquisition and Fee Increases

19. On 10 December 2020, Dye & Durham acquired DoProcess, an Ontario-based provider of the leading real estate conveyancing software in Canada, from

OMERS Infrastructure for a total consideration of \$530 Million as part of the Acquisition; OMERS Infrastructure likewise acquired \$30 million in value of the common shares of Dye & Durham for a minority stake in the company.

20. The Acquisition and related transaction costs were partially funded by Dye & Durham through a committed debt financing package which included a \$140 million revolving credit facility, a \$245 million term loan maturing on 24 September 2024 and a \$125 million term loan maturing on 31 July 2022.

Additionally, Dye & Durham also raised approximately \$225 million of new equity through a brokered private placement agreement, supported by five of its long-term institutional shareholders, under which approximately 6.5 million new common shares were issued at a price of \$34.65 per share, representing a discount of 1% to the closing price of Dye and Durham's common shares on the TSX as at 9 December 2020.

21. DoProcess' software platform, Conveyancer or in its re-branded form as Unity, was used in more than 700,000 real estate transactions annually in Ontario alone and in 1.4 million transactions annually throughout Canada.

22. Subsequent to the Acquisition, in January, 2021, the licencing fees for use of Unity increased dramatically from \$25 plus HST per conveyancing transaction when it had been branded as Conveyancer to \$129 plus HST per conveyancing transaction for Unity. Dye & Durham sought to advise the licensees for Unity, being primarily real estate lawyers, of the increase in fees through e-mails or "click-through pop up" windows when they engaged the Unity software platform for transactional services. Although some overtures were made by Dye &

Durham to guarantee prices to current customers, Dye & Durham knew that these licensees for Unity were law firms who as standard practice wholly pass along to their respective clients the fees for Unity as disbursements, and the clients pay these fees as part of the costs of the transaction.

23. On or about 24 January 2022, the licensing fees for Unity were dramatically increased again from \$129 plus HST up to \$249 plus HST per transaction. Other than single transaction fees, Dye & Durham began to offer volume package options which are currently \$229 plus HST for a minimum of 50 transactions per month or \$199 plus HST for a minimum of 100 transactions per month.

24. Law firms who use Conveyancer and later Unity in their respective practices integrate the software platform as a major tool for completing conveyancing transactions. The time required to transition from Conveyancer and later Unity to a competing platform is costly and prohibitive for a practice which is otherwise based on a high volume of real estate transactions that demands conveyancing to be completed efficiently and expeditiously. Further complicating the ability of licensees to transition from Conveyancer and/or Unity is the fact that the available competing platforms do not offer all the functionality of Conveyancer and/or Unity.

The Anti-Competitive Conduct in Canada

25. OMERS Infrastructure and Dye & Durham mutually benefit by each and every conveyancing transaction, as OMERS Infrastructure is not only a shareholder in Dye & Durham but also licenses the software platforms Teraview

and Teranet Connect, through Teranet, in order to permit licensees using Unity to conveniently, and in an integrated and secure manner, conduct title and writ searches as well as to complete electronic registrations.

26. Dye & Durham and DoProcess, through OMERS Infrastructure, made an agreement to not only have Dye & Durham acquire DoProcess in order to obtain the market-leading Conveyancer software platform but also to integrate software platforms belonging to a subsidiary of OMERS Infrastructure, namely Teranet, being the software platforms Teraview and Tera Connect, both of which are market leaders. In so doing, Dye & Durham and OMERS Infrastructure through DoProcess obtained an unlawful competitive advantage since Dye & Durham and OMERS Infrastructure/DoProcess are competitors with one another and elected to make an agreement whereby prior to closing the Acquisition, they agreed to control and increase the price for conveyancing software as well as to control the production and supply of other software platforms, namely Teraview and Tera Connect which were not part of the DoProcess acquisition by Dye & Durham, through integration with Unity, while ceasing to remain competitors. No other competitor or would-be competitor could offer this integrated suite of software platforms. Even where a competitor or would-be competitor could hypothetically seek to acquire a licence from the Defendants for use and integration of such software platforms, they nonetheless would not have the advantage of the Defendants who would have spent time and resources to ensure the smooth integration of their respective suite of software prior to launching and making such an integrated software platform available to the

public, and the Defendants would control or alternatively have significant leverage in setting the cost of such a licence that would prohibit any competing platform from being competitive.

27. The Defendants understood and agreed with the requisite *mens rea* as to the terms of their unlawful agreement as part of the Acquisition.

Market Definition

28. The market at issue in this action is for software to facilitate the conveyancing of real property in Canada.

29. Prior to the Acquisition, OMERS Infrastructure, through DoProcess, had the largest market share. Through the Acquisition, Dye & Durham subsequently had the largest market share.

30. Currently, Dye & Durham has 90% of the market share in Ontario and is the dominant provider of conveyancing software in Canada.

Discoverability and Fraudulent Concealment

31. The Plaintiffs and other Class Members reasonably considered the pricing of Conveyancer, and later Unity, to be in accordance with the law. A reasonable person in the circumstances of the Plaintiffs and other Class Members would not have been alerted to investigate the lawfulness of the Defendants' anti-competitive agreements and pricing of Conveyancer and later Unity.

32. The Plaintiffs and other Class Members did not discover and could not have discovered through the exercise of reasonable diligence the existence of

the illegality of the Defendants' anti-competitive agreements before filing this claim, or alternatively before the 31 January 2022 announcement by Dye & Durham of increases to the price of Unity.

33. The Defendants actively, intentionally, and fraudulently concealed the existence of its illegal conduct from the public, including the Plaintiffs and other Class Members. The Defendants represented to the public that its agreements were in accordance with the law, thereby misleading the Plaintiffs and other Class Members.

34. The Defendants actions alleged in this claim were carried out in a manner intended to preclude detection of the illegal nature of the anti-competitive agreements and pricing of Conveyancer and later Unity. The illegality of the anti-competitive agreements was self-concealing.

BREACH OF THE *COMPETITION ACT* AND THE *CRIMINAL CODE*

35. The Defendants were legally independent of one another and were competitors in the respective market for the provision of conveyancing software platforms, as per the purposes and requirements of section 45 of the *Competition Act*, when they made their agreement as particularized above.

36. As particularized above, the Defendants conspired, agreed and arranged with each other to engage in anti-competitive acts in contravention of sections 45(1)(a)(b) and (c) of the *Competition Act*:

- a. to fix, maintain, increase or control the price for conveyancing software platforms in Canada by agreeing to increase the price for such

conveyancing software platforms, namely, Unity, in the Canadian market;

- b. to allocate sales, territories, customers or markets for the production or supply for such conveyancing software platforms, namely, Unity, in the Canadian market; and
- c. to fix, maintain, control, prevent, lessen or eliminate the production or supply of conveyancing software platforms by agreeing to integrate conveyancing software platforms, namely, Teraview and Tera Connect, into Unity, through a subsidiary of OMERS Infrastructure which was not part of the Acquisition.

37. The Defendant Dye & Durham aided, abetted and counselled the anti-competitive agreement to give effect in Canada to the conspiracy, combination, agreement or arrangement in breach of sections 45(1)(a)(b) and (c) of the *Competition Act* as well as sections 21 and 22 of the *Criminal Code*.

38. The Defendant OMERS Infrastructure by virtue of its ownership of DoProcess at the relevant time and also by virtue of its conduct in directing and counselling DoProcess as well as Dye and Durham and in directing the completion of the Acquisition, thereby aided and abetted and counselled the anti-competitive agreement to give effect in Canada to the conspiracy, combination, agreement or arrangement in breach of sections 45(1)(a)(b) and (c) of the *Competition Act* as well as sections 21 and 22 of the *Criminal Code*.

39. The Defendants' conduct caused loss and damage to the Plaintiffs and other Class Members within the meaning of section 36(1) of the *Competition Act*.

The Defendants are jointly and severally liable to pay damages to the Plaintiffs and other Class Members, as well as the full cost of the investigation, pursuant to section 36 of the *Competition Act*.

DAMAGES

40. The damages to the Plaintiffs and other Class Members include the difference between the price actually paid for the licence and/or use of Conveyancer and/or Unity during the Class Period as a result of the anti-competitive agreements and the price that would have been paid in the absence of the agreements.

41. The damages are capable of being quantified on an aggregate basis and the amounts payable to the Class Members in respect to damages may be calculated on an aggregate basis pursuant to Rule 334.28 of the *Rules*.

42. The Plaintiffs and other Class Members plead and rely upon the *Federal Courts Act*, the *Competition Act*, and the *Criminal Code*, all as amended.

PLACE OF TRIAL

43. The Plaintiffs on behalf of the Class Members propose that this action be tried in Toronto, Ontario.

Date: 26 April 2022



Nicholas J. Cartel

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