



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-23-00705617-00CL

DATE: 22 October 2024

NO. ON LIST: 4

TITLE OF PROCEEDING: FIRST SOURCE FINANCIAL MANAGEMENT INC. v. 2807823 ONTARIO INC.

BEFORE: JUSTICE CONWAY

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
Thomas Gertner	Lawyer for the Receiver, TDB Restructuring Limited	Thomas.gertner@gowlingwlg.com
Jeffrey Larry	Lawyer for the Applicant	Jeff.larry@paliareroland.com

For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info
Ian Cantor	Lawyer for the Defendants, 8522146 Canada Inc., Elk Capital Ltd., Trevor Rabie and Matthew Elkind	Icantor@rarlitigation.com
Michael D. Magonet	Lawyer for the Defendants, Evoke Solutions Incorporated and Jon Jeffrey Howard	M@magonetlaw.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Jeffrey Berger	The Receiver	jberger@tdbadvisory.ca
Bryan Tannenbaum		btannenbaum@tdbadvisory.ca

ENDORSEMENT OF JUSTICE CONWAY:

- [1] **All defined terms used in this Endorsement shall, unless otherwise defined, have the meanings ascribed to them in the Factum of the Receiver dated October 18, 2024.**
- [2] The Receiver brings this motion seeking two orders: (i) an AVO approving the Transaction for the sale of the Property; and (ii) an Ancillary Relief and Discharge Order authorizing the Receiver to make the Proposed Interim Distribution of Proceeds, approving the First Report, approving the fees and disbursements of the Receiver and its counsel, approving the Statement of Receipts and Disbursements, sealing the Confidential Appendices to the First Report, and discharging the Receiver.
- [3] Messrs. Cantor and Magonet, counsel for the guarantors, attended today. First Source, the Applicant, has commenced litigation against the guarantors for the shortfall on any recovery from the sale of the Respondent's assets (the "**Guarantee Litigation**"). Counsel for the guarantors said that they were not seeking an adjournment of this motion or opposing the relief sought by the Receiver. However, they wanted me to include language in my endorsement that any relief granted today is without prejudice to their rights to argue in the Guarantee Litigation that the Receiver acted improvidently in selling the Property.
- [4] I refused to do so. As I told counsel in Court, now is the time for the court to assess whether the Receiver has acted reasonably and properly in marketing the Property and to decide whether the Receiver has met the *Soundair* principles. If I approve the Transaction and grant the AVO, any challenge in the Guarantee Litigation to the Receiver's conduct would, in my view, amount to a collateral attack on the APA.
- [5] I repeatedly asked Messrs. Cantor and Magonet whether they were seeking an adjournment of the Receiver's motion, in order to obtain more information and decide whether they want to oppose the Transaction. They told me clearly and repeatedly that they did not want to adjourn the motion (their reason is that interest costs are continuing to accrue). They also confirmed that they were not opposing the relief sought today. When I indicated that I would not be including their requested wording in my endorsement, they again said that they did not want an adjournment and were not opposing the motion. I therefore proceeded with the Receiver's motion.
- [6] With respect to the APA, I have reviewed the marketing process and am satisfied that the Receiver has satisfied the *Soundair* factors. The Receiver exposed the Property (vacant land) broadly to the market over a six-week period. Only four bids were received by the Bid Deadline. The Receiver negotiated an increase to the bid presented by the Purchaser and determined that the Transaction generated the highest and best recovery for creditors.
- [7] There was a Prospective Higher Bidder. However, as outlined in the Receiver's First Report and the Supplement to the First Report, the Receiver worked with that bidder but did not receive a deposit or confirmation that it had the financing to complete the transaction. As the Receiver states in the First Report, "the Receiver gave the Prospective Higher Bidder numerous opportunities to confirm its financing and submit a deposit over a

three-week time period. However, notwithstanding repeated assurances from the Prospective Higher Bider [*sic*] that it would provide this confirmation as well as the deposit, it failed to do so.” The Receiver states that there is “significant uncertainty and the transaction risk associated with the Prospective Higher Bidder.” The Receiver “has no confidence whatsoever that appropriate financing will be secured”.

- [8] The Receiver is of the view that the Transaction provides for the greatest recovery in the circumstances and no further marketing of the Property will generate a superior transaction. I accept the Receiver’s recommendation and grant the APA.
- [9] The relief in the Ancillary Relief and Discharge Order is appropriate. The activities, fees and disbursements are approved. The Proposed Interim Distribution of Proceeds is approved. The discharge of the Receiver on filing the discharge certificate is approved.
- [10] The order contains a sealing order for the Confidential Appendices. I am satisfied that the requested sealing order for the Confidential Appendices meets the test in *Sierra Club/Sherman Estates* and that disclosure of this information would pose a risk to the public interest in enabling stakeholders of a company in receivership to maximize the realization of assets. It is time limited up to the closing of the Transaction. It only covers information that could prejudice stakeholders if the Transaction fails to close and the Property has to be remarketed. **I direct counsel for the Receiver to file a hard copy of the Confidential Appendices with the Commercial List office in a sealed envelope with a copy of the Ancillary Relief and Discharge Order and this Endorsement.**
- [11] Counsel for the Receiver has revised the draft orders to delete the references to declaratory language. They are satisfactory to me now. Orders to go as signed by me and attached to this Endorsement. These orders are effective from today's date and are enforceable without the need for entry and filing.

A handwritten signature in blue ink, appearing to read "Conway J.", is located at the bottom left of the page.