Court File No. CV-20-00636417
CL File No.: _____

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

ECOHOME FINANCIAL INC.

Plaintiff

and

UTILECREDIT CORP. and JOHN NASSAR

Defendants

SUPPLEMENTARY FACTUM OF THE PLAINTIFF,
ECOHOME FINANCIAL INC.
(Motion re: Appointment of Receiver)
(Returnable June 5, 2020)

I. OVERVIEW

1. This supplementary factum responds to certain arguments made against the appointment of a receiver contained in the Affidavit of John Nassar sworn June 3, 2020 (the "**Nassar Affidavit**") and Utilecredit's factum that were filed last night and this morning, respectively. This supplementary factum also addresses events that have unfolded since May 27, 2020, the original return date of this motion.

2. At the hearing on May 27, 2020, the Court granted Utilecredit an adjournment on terms set by the Court in an endorsement of that date (the "**May 27 Decision**"), which included

requiring Utilecredit to "immediately provide all financial information to which the plaintiff is entitled."

3. After receiving the adjournment the defendants requested, Utilecredit refused to produce any of the financial information requested by EcoHome, notwithstanding the requirement to do so pursuant to the May 27 Decision and the terms of the Amended and Restated Consumer Lease Program Agreement dated as of January 6, 2016 (the "**Program Agreement**") and the General Security Agreement dated August 14, 2015 (the "**GSA**"). Instead, Utilecredit filed a Notice of Intention to Make a Proposal (the "**NOI**") to its creditors in an attempt to stay this motion to appoint a receiver.

4. At 4:50 p.m. June 3, 2020 – a full seven days after the initial hearing in this matter and two business days prior to the peremptory hearing date for the motion – Utilecredit filed the Nassar Affidavit. The Nassar Affidavit makes numerous assertions that are plainly inconsistent with the documentary record before the Court or contradicted by the correspondence between the parties, as set forth in the supplementary affidavit of Brent Houlden sworn June 4, 2020 (the "**Second Houlden Affidavit**"), which was filed in response to the numerous incorrect statements made by Nassar in his affidavit last evening.

5. The last minute attempted procedural tricks of Utilecredit do not displace the fundamental facts of the situation:

(a) EcoHome is a secured creditor of Utilecredit. Utilecredit granted EcoHome a security interest over all of its assets, property and undertakings pursuant to the GSA. The security interest granted under the GSA secures all of Utilecredit's

present and future obligations, indebtedness and liabilities to EcoHome, whether absolute or contingent. The GSA entitles EcoHome to appoint a receiver in the current circumstances;

(b) EcoHome is owed at least $1,589,765 as of March 31, 2020, plus interest and costs. The amount owing to EcoHome will continue to grow as Customer Contracts fall into default over their remaining term. EcoHome has provided Utilecredit with a highly-detailed, transaction-by-transaction calculation of the indebtedness based on data prepared by LeasePlus, an industry leading system to administer financing and leasing contracts. The Lease Reserve Reconciliation (as at December 31, 2019) was most recently provided to Utilecredit in February 2020. The Nassar Affidavit only musters three specified concerns with the calculation, two of which are demonstrably wrong and one of which (relating to NOSI fees) is disputed and highly immaterial. There is strong and compelling evidentiary support before this Court relating to the indebtedness owing by Utilecredit to EcoHome;

(c) Nassar has repeatedly acknowledged that EcoHome is insolvent, and Utilecredit is admitted to be an “insolvent person” for purposes of the BIA in light of its NOI filing. EcoHome is the only secured creditor of Utilecredit. Based on the claims summary prepared in connection with the NOI, EcoHome’s claim represents 99% of all claims against Utilecredit. EcoHome is effectively the only creditor to whom Utilecredit would be making a proposal;

(d) The BIA expressly provides that the NOI does not stay EcoHome's receivership motion or its right to fully enforce its security;

(e) EcoHome has completely lost faith in Utilecredit and Nassar as a result of months of stonewalling, obfuscation and refusal to provide financial information and false evidence put forward on this motion, and will not support any proposal put forward by Utilecredit. EcoHome has waited months for Nassar to put forward a credible proposal and he has not done so. Nassar does not need, and is not entitled to, more time; and

(f) the appointment of a receiver is necessary to enable EcoHome to realize on its collateral. This collateral includes the residual value of the Customer Contracts (which the Nassar Affidavit now says is an asset of Utilecredit with a minimum value of $2 million), any claims that Utilecredit (or a receiver of trustee thereof) may have in respect of improper transfers or transfers at undervalue, and the books and records of Utilecredit necessary to review and advance those claims. By Nassar's own evidence, Utilecredit originated (and was paid by EcoHome for) approximately $17 million worth of Customer Contracts. All of that value has seemingly been removed from Utilecredit. A receiver is best placed to determine what has occurred and whether EcoHome's collateral has been improperly dissipated.

6. EcoHome submits that the Court should not countenance the last minute maneuvering of Utilecredit that is intended to frustrate the rights of EcoHome to enforce on its bargained-for collateral. Nassar has had ample opportunity to credibly dispute the indebtedness or put forward

a viable proposal. He has been unable or unwilling to do so. Moreover, Utilecredit has breached the letter and spirit of the May 27 Decision and remains in breach of it. The appointment of a receiver over the assets, property and undertaking of Utilecredit is the just and appropriate remedy in the circumstances of this case.

II. FACTS

A. Utilecredit Has Not Provided The Required Financial Information to the Plaintiff

7. On May 27, 2020, this Court granted an adjournment of EcoHome's motion – on a peremptory basis – to June 5, 2020. The basis for the adjournment was set out in the Court's May 27 Decision, which said:

> The plaintiff seeks an order appointing a receiver over the defendant UtileCredit Corp. The defendant seeks an adjournment. It argues it was only given notice late Friday of a hearing on Wednesday and that counsel was retained only on Monday. It submits there are factual issues in dispute including the amount of the debt which may amount to zero.
>
> There are some challenges with this position. The defendant had admitted in emails to the debt owing but had explained he had no money, the corporation was insolvent and had not been operating for 2 years.
>
> I am nevertheless inclined to grant an adjournment until June 5, 2020. The defendant is entitled to a chance to put his full version of events before the court. I will, however, set the following terms for the adjournment:
>
> …
>
> 2. The defendants shall immediately provide all financial information to which the plaintiff is entitled. The plaintiff may send the defendants a list of such information to which the defendants are required to respond immediately.
>
> Endorsement of Koehnen J dated May 27, 2020, Ex. "A" to the Second Houlden Affidavit, Supplementary Motion Record ("**SMR**"), Tab 1(A), p. 17

8. The May 27 Decision was granted on the consent of Utilecredit. At the May 27, 2020 hearing, the Court indicated that Utilecredit and its counsel should work "around the clock" to provide requested financial information to EcoHome.

9. On May 27, 2020, in accordance with the Court's decision, EcoHome's counsel wrote to Utilecredit's counsel requesting, among other things, all year-end and quarterly financial statements of Utilecredit, quarterly bank statements for all bank accounts maintained by Utilecredit, and the annual corporate tax returns of Utilecredit.

> E-mail from B. Wiffen to P. Chand et al, May 27, 2020, Ex. "B" to the Second Houlden Affidavit, SMR, Tab 1(B), p. 20

10. On May 29, 2020 (two days later), Utilecredit's counsel wrote to EcoHome's counsel asserting the position that the Program Agreement did not require Utilecredit to provide any of the documents requested by EcoHome and that EcoHome was attempting to circumvent the discovery process and the normal course of litigation.

> Letter from M. Snider to J. Wadden et al., May 29, 2020, Ex. "C" to the Second Houlden Affidavit, SMR, Tab 1(C), p. 22

11. Later the same day, EcoHome's counsel wrote to Utilecredit's counsel indicating that (a) EcoHome did not agree with Utilecredit's interpretation of the Program Agreement or its assertion that Utilecredit does not have any obligation to provide the requested information under the Program Agreement; and (b) the parties did not need to debate the meaning of the Program Agreement, since pursuant to the GSA Utilecredit is required to, *inter alia*, (i) provide EcoHome with such information and financial data as EcoHome may request from time to time, and (ii) permit EcoHome or its representatives full and reasonable access to Utilecredit's premises,

business, financial and computer records and allow the duplication or extraction of pertinent information therefrom.

> Letter from J. Wadden to M. Snider to J. Wadden., May 29, 2020, Ex. “D” to the Second Houlden Affidavit, SMR, Tab 1(D), p. 26

12. Notwithstanding the clear wording and intent of the May 27 Decision and the obligations of Utilecredit under the Program Agreement and the GSA, Utilecredit never responded to the May 29, 2020 letter from EcoHome’s counsel. The delivery of partially-redacted annual financial statements as part of a responding motion record on June 3, 2020 does not satisfy Utilecredit’s “immediate” disclosure obligations under the May 27 Decision or the GSA, which requires Utilecredit to provide EcoHome with all information and financial data and the business, financial and computer records of Utilecredit.

B. Nassar Has Made Misrepresentations Regarding the Availability of Financial Information

13. EcoHome’s counsel sent a demand letter to Nassar on May 19, 2020 in which EcoHome’s counsel demanded that Nassar deliver copies of the latest quarterly and annual financial statements of Utilecredit.

> Letter from B Wiffen to J. Nassar, May 19, 2020, Ex. “I” to the Affidavit of Brent Houlden (the “**First Houlden Affidavit**”), Motion Record (“**MR**”), 2(I), p. 89

14. By reply email on May 19, 2020, Nassar stated “we won’t be providing financial statements, partly because your client is in breach of their reporting obligations to Utilecredit and partly because the statements are not available”. [emphasis added]

Email J. Nassar to B. Wiffen, May 19, 2020, Ex. “J” to the First Houlden Affidavit, MR, 2(J), p. 92

15. Now, the Nassar Affidavit attaches certain financial statements of Utilecredit, including Utilecredit’s December 31, 2019 financial statements. The December 31, 2019 financial statements include a “Notice to Reader” cover page that is dated March 27, 2020.

Utilecredit Financial Statements, Ex. “D” to the Nassar Affidavit, Responding Motion Record

16. Despite the fact that these financial statements were seemingly prepared in March 2020, Nassar falsely advised EcoHome nearly two months later that he would not provide the financial statements to EcoHome because they were “not available”. Importantly, Nassar did not instruct counsel to correct this misrepresentation when appearing before the Court at the original return of this motion.

C. Utilecredit Files a Notice of Intention to Make a Proposal

17. Instead of focussing on complying with the May 27 Decision and providing responding materials in a timely fashion, Utilecredit filed a notice of intention to make a proposal pursuant to subsection 50.4(1) of the BIA on June 1, 2020. The same day, counsel for Link & Associates, in its capacity as proposal trustee, wrote to the Court to advise of the NOI filing and to make certain submissions on the matters before the Court on this motion.

Letter from P. Masic to Koehnen J. dated June 1, 2020

18. The Nassar Affidavit repeats, in a number of places, the claim that Nassar repeatedly made to EcoHome that Utilecredit is a "dormant shell company", has no tangible assets and no employees, and is an "asset-less shell corporation". Despite that representation in his affidavit, Nassar then goes on to claim that Utilecredit in fact owns the residual value of the Customer Contracts and claims they have a value of at least $2 million at a conservative valuation. Again, in repeatedly claiming to EcoHome and this Court that Utilecredit in effect has no assets the Receiver can deal with, he then claims a grand conspiracy by EcoHome to take this $2 million asset "without negotiating a price". Again, Nassar exhibits disregard or recklessness towards the truth.

Nassar Affidavit, paras. 12, 13, 28 and 30, Responding Motion Record, Tab 1

19. Nassar again shows disregard or recklessness towards the truth when he tries now to resile from his repeated admissions that Utilecredit is insolvent. In his affidavit, he tries to correct and explain away his repeated admissions that Utilecredit is insolvent. In doing so, he is asking this Court to accept that as a businessman, he does not understand the the word

"insolvent", which is simply not credible. Even a cursory review of the redacted financial statements that were belatedly provided shows that Utilecredit is insolvent – in each of the last numbers of years its liabilities are greater than its assets, it has negative equity, and insufficient cash to pay for the liabilities. Also, the filing of the NOI can only be done by an "insolvent person" and involves an admission of liability – showing that Nassar does in fact believe that Utilecredit is insolvent.

Nassar Affidavit, paras. 12, 13, 28 and 30, Responding Motion Record, Tab 1

Utilecredit Financial Statements, Ex. "D" to the Nassar Affidavit, Responding Motion Record

III. ISSUE

20. The issue before the Court is the same as it was on May 27, 2020: This motion requires the Court to decide whether it should make an order pursuant to subsection 243(1) of the BIA and section 101 of the CJA appointing RSM as receiver and manager over the Property of Utilecredit.

21. In light of the filing of the NOI by Utilecredit, this Court must also decide whether it is appropriate to declare terminated the 30-day proposal period in respect of the NOI pursuant to subsection 50.4(11) of the BIA. EcoHome submits that, if the Court exercises its authority to terminate the proposal period and Utilecredit is automatically assigned into bankruptcy, RSM should be appointed as bankruptcy trustee (in addition to receiver) of Utilecredit.

IV. LAW & ARGUMENT

A. Utilecredit has provided no credible evidence to dispute the obligations owing

22. Utilecredit attempts to avoid the appointment of a receiver by suggesting that it does not owe a debt to EcoHome. At paragraph 17 of the Nassar Affidavit, Nassar states that "the Lease Reserve Reconciliation is a bald statement of amounts allegedly owing and is both deficient and unreliable". Nassar continues that "EcoHome has never provided a satisfactory accounting of the Cash Reserve Account to Utilecredit, and has provided no reporting whatsoever since spring 2017. The Lease Reserve Reconciliation provides no explanation or supporting documentation for any of the line items therein."

23. Nassar's statements are plainly incorrect and contracted by the documentary evidence.

24. On October 31, 2017, Christopher Alexander of EcoHome sent Nassar the September 31, 2017 Lease Reserve Reconciliation, which document demonstrated that, at that time, there was a deficiency in the Cash Reserve Account of almost $700,000. Nassar did not dispute that amount, and by his reply email of November 8, 2017, Nassar acknowledged that EcoHome should realize on its security:

> …We might be able to consider a repurchase of the book if this is something you would consider, otherwise I think you will have to realize on your security. <u>There is no way to cover the $700k</u> [emphasis added].

Email from C. Alexander to J. Nassar dated November 10, 2017, Ex. E to the Second Houlden Affidavit, Tab 1(E), p. 29

25. EcoHome most recently sent a Lease Reserve Reconciliation to Nassar in February 2020. On February 14 and 27, 2020, Peter Soon, EcoHome's Senior Vice President, Operations, emailed Nassar to demand repayment of the indebtedness. Soon attached to each of those emails an Excel spreadsheet setting forth the Lease Reserve Reconciliation as at December 31, 2019. Nassar's evidence simply ignores the existence of this document and falsely asserts that no such reconciliation has been provided.

> Email from C. Alexander to J. Nassar dated November 10, 2017, Ex. E to the Second Houlden Affidavit, Tab 1(E), p. 29

26. The Excel spreadsheet provided to Nassar on February 14 and 27, 2020 contains a summary page in substantially the form Nassar now describes as a "bald statement of amounts owing". However, Nassar ignores that the Lease Reserve Reconciliation provided to him more than 3.5 months ago contains links, for each line item on the summary page, to a separate spreadsheet tab that sets forth the calculation of the line item on a highly-detailed, transaction-by-transaction basis that, where applicable, lists the applicable date, contract number, customer ID, contract type, funding date, equipment type and applicable amount. This Excel spreadsheet provides the key details for each transaction or occurrence giving rise to an adjustment to the Cash Reserve Account. The reconciliation is a detailed, sophisticated accounting of changes to the Cash Reserve Account.

> E-mail from J. Nassar to P. Soon, Ex. "F" to the First Houlden Affidavit, MR, Tab 2(F), p. 78
>
> Second Houlden Affidavit, paras. 20-21, MR, Tab 1, p. 6-7
>
> Lease Reserve Reconciliation at December 31, 2019, Exhibit F to the Second Houlden Affidavit, MR, Tab 1(F), p. 31 (and provided electronically)

27. The Lease Reserve Reconciliation and supporting calculations substantiate the amount of the debt owing. The three issues with the Lease Reserve Reconciliation raised in the Nassar Affidavit are either clearly refuted based on a cursory review of the Lease Reserve Reconciliation or are highly immaterial. The financial data in the Lease Reserve Reconciliation relating to individual leases is calculated by LeasePlus, an industry leading system used to administer finance and leasing contracts. LeasePlus has been relied upon by Ernst & Young LLP and KPMG LLP in their financial statement audits of EcoHome.

Second Houlden Affidavit, paras. 21-22, MR, Tab 1, p. 7-8

28. This is not the first time EcoHome has sought and received a Court-appointed receiver and manager in connection with a dealer. Last year, this Court appointed a receiver and manager over all of the assets, undertakings and properties of another one of EcoHome's dealers in connection with a deficiency in that dealer's cash reserve account with EcoHome.

Order of Conway J in *EcoHome Financial Inc. v. Eco Energy Home Services Inc.* (CV-19-614122-00CL) April 3, 2019

29. There is a substantial deficiency in the Cash Reserve Account. The amount required to bring the Cash Reserve Account up to the Required Reserve Amount under the Program Agreement is a debt owing to Utilecredit. This amount is a debt owing by Utilecredit to EcoHome, a debt which is secured.

30. Nassar's bald assertions that there is no debt owing flatly contradict his earlier emails and the readily apparent deficiency in the Cash Reserve Account. As the Court noted in granting Utilecredit's requested adjournment on May 27, 2020, the challenge with the Defendant's new

position is obvious: “The defendant had admitted in emails to the debt owing but had explained he had no money, the corporation was insolvent and had not been operating for 2 years.” Nassar’s and Utilecredit’s attempts to now belatedly deny the existence of a secured debt should be rejected

> Endorsement of Koehnen J dated May 27, 2020, Ex. “A” to the Second Houlden Affidavit, SMR, Tab 1(A), p. 17

31. In addition, the obligations owing by Utilecredit to EcoHome will continue to grow as a result of, among other things, (a) amounts charged against the Cash Reserve Account for any Consumer Contracts that become Uncollectible Customer Contracts during the remaining term of their 10-year life (which defaults, based on historical experience with the Customer Contracts purchased from Utilecredit, will be substantial), and (b) costs incurred by EcoHome over the remaining life of the Customer Contracts to administer the Customer Contracts and service the Equipment due to Utilecredit’s ongoing failure to perform such functions as required pursuant to Section 6.02 of the Program Agreement. In addition, EcoHome has incurred significant legal costs in pursuing the appointment of a receiver and responding to the NOI filing and other defensive moves and delay tactics by Utilecredit. These amounts form part of the indebtedness owing by Utilecredit to EcoHome.

B. A stay under section 69 of the BIA is inoperative as against EcoHome

32. As part of Utilecredit’s ongoing efforts to build an obstacle course to frustrate EcoHome’s right to realize on its security by the appointment of a receiver, Nassar caused Utilecredit to file an NOI and then have the proposal trustee’s counsel write to the Court – without notice to EcoHome – to incorrectly claim that the “underlying action” and the

receivership motion are stayed. The proposal trustee's counsel did not even advise the Court of the clear provisions and case law – discussed below – that clearly provide that the enforcement efforts of a secured creditor are not stayed by the NOI in these circumstances. By virtue of the express provisions of the BIA, the stay of proceedings in favour of Utilecredit as a result of the filing of the NOI does not apply to EcoHome. Furthermore, EcoHome was troubled when the proposal trustee's counsel mischaracterized EcoHome's claim as "contingent" – an incorrect characterization parroted in Utilecredit's factum.

33. Section 69 of the BIA provides for a stay of proceedings in favour of a debtor company that has filed a notice of intention to make a proposal. However, the stay of proceedings is expressly subject to section 69(2) of the BIA. Subsection 69(2)(b) of the BIA says:

> The stays provided by subsection (1) do not apply…to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security against the insolvent person more than ten days before the notice of intention under section 50.4 was filed, from enforcing that security, unless the secured creditor consents to the stay
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> *Bankruptcy and Insolvency Act*, s. 69(2)(b), R.S.C. 1985, c. B-3

34. The sequence of events in this case and subsection 69(2)(b) operate to exempt EcoHome from the stay. EcoHome served its Notice of Intention to Enforce a Security pursuant to subsection 244(1) of the BIA on March 3, 2020 (the "**Enforcement Notice**"). Utilecredit did not file its NOI until June 1, 2020 – 90 days after the EcoHome's Enforcement Notice.

35. In *John Deere Credit Inc. v. Doyle Salewski Lemieux Inc.*, the Ontario Court of Appeal discussed the interaction between the notices under section 244 of the BIA and the stay of

proceedings under section 69 of the BIA upon the filing of a notice of intention to make a proposal:

> Section 244 requires a secured creditor to send the prescribed notice and then wait ten days before enforcing the security.
>
> Section 69 entitles the insolvent person to file a proposal and thereby prevent a secured creditor from enforcing the security
>
> While these are separate legislative provisions, in my view they cover the same time period. Until a secured creditor, having sent the prescribed notice, has waited the time necessary before being able to enforce the security, the insolvent person can file a proposal staying that creditor's right to proceed to enforce the security.
>
> Hence, … the effect of sections 244 and 69 taken together is that a secured creditor must send a notice of intention to enforce his security and then wait for the expiry of ten days. Only thereafter can the security interest be enforced without the consent of the insolvent person. **The [debtor] has the same ten days following the day on which the notice was sent to file a notice of intention to make a proposal and gain the protection of the stay provisions. In effect, the two sections are designed so that the insolvent person has these ten days to determine whether to give up the security provided or to continue with the proposal proceedings.** [emphasis added]
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> John Deere Credit Inc. v. Doyle Salewski Lemieux Inc, 1997 CanLII 830 (ON CA)

36. Utilecredit's opportunity "to file a notice of intention to make a proposal and gain the protection of the stay provisions" as against EcoHome expired on March 13, 2020. Utilecredit chose not to file a notice of intention to make a proposal during the statutory 10-day period in which doing so would have operated to stay the rights of EcoHome. As a result, EcoHome's motion for the appointment of a receiver is not subject to the stay of proceedings.

37. Moreover, EcoHome's claim is not a contingent claim. A contingent claim is one that is dependent upon the occurrence of a future event – it is the future event that crystallizes the claim.

In this case, EcoHome's secured claims is comprised of, among other things, amounts owing and due now. It is not contingent on some future event. A claim is not a contingent claim because it will be the subject of a Court determination.

C. The Court Should Terminate the NOI Proposal Period

38. Subsection 50.4(11) of the BIA provides that where a debtor files a notice of intention to make a proposal, a creditor can apply to the court to terminate the initial 30-day stay on one or more of four disjunctive grounds:

> (a) the insolvent person has not acted, or is not acting, in good faith and with due diligence;
>
> (b) the insolvent person will not likely be able to make a viable proposal before the expiration of the 30-day period;
>
> (c) the insolvent person will not likely to be able to make a proposal, before the expiration of the 30-day period that will be accepted by the creditors; or
>
> (d) the creditors as a whole would be materially prejudiced if the application to terminate was rejected by the court.
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> Bankruptcy and Insolvency Act, *s. 50.4(11), R.S.C. 1985, c. B-3*
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> *NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc.*, 2015 ONSC 5139 at para 25 [*NS United*]

39. In this case, the NOI proposal period should be terminated because (a) Utilecredit has not acted and is not acting in good faith or with due diligence, and (b) Utilecredit will not likely be able to make a proposal before the end of the proposal period that is acceptable to Utilecredit, whose claim represents 99% of all claims against Utilecredit.

40. In *NS United*, this Court said expressly that the "BIA does not guarantee an insolvent person a stay without review":

> It is clear from the very existence of s. 50.4(11), as well as judicial authority, that while an insolvent debtor is entitled to an automatic stay simply by filing a notice of intention to make a proposal, the BIA does not guarantee an insolvent person a stay without review. There is no absolute immunity from creditors. Section 50.4(11) of the BIA empowers the court to terminate the 30-day stay where the statutory conditions for doing so are met.
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> *NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc.*, 2015 ONSC 5139 at para 27

41. The factual circumstances in *NS United* also bear a striking resemblance to the facts now before this Court. In *NS United*, the Court found that:

(a) there was a "paucity of evidence about what a proposal might look like";

(b) "the debtor has utterly failed to provide even a hint of its plan for a proposal"; and

(c) the debtor's management admitted that the company was being "wound down" before the filing of its NOI and that there was no plan to "rehabilitate" the debtor company.

> *NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc.*, 2015 ONSC 5139 at para 28

42. The Court concluded that on the basis of subsections 50.4(11)(b) and (c) to terminate the 30-day stay:

> Here, the debtor has essentially nothing to work with, which might explain why it has been so reluctant to come forward with anything concrete. [The debtor] has no active business, no revenue, no cash flow and effectively no assets. The inference to be drawn from the complete absence of any hint of a concrete proposal is, in these circumstances, that there is no basis for a viable plan and certainly no basis for a conclusion, on a balance of probabilities, that there is

> likely to be any proposal that would be acceptable to the veto-empowered creditor NS United.
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> *NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc.*, 2015 ONSC 5139 at para 35

43. Nassar's evidence and admissions must necessarily lead to the same conclusion as this Court reached in *NS United*. Nassar has given evidence that:

(a) Utilecredit has "remained a dormant shell company" since 2017;

(b) Utilecredit has no tangible assets;

(c) Utilecredit has no employees;

(d) Utilecredit is an "asset-less shell corporation"; and

(e) Utilecredit "has not [*sic*] assets with which to defend itself from a lawsuit".

Nassar Affidavit, paras. 12, 13, 28 and 30, Responding Motion Record, Tab 1

44. Based on Nassar's own evidence, Utilecredit has nothing to work with, which suggests it will not be able to put forward any sort of viable plan. Nassar says that he intends to personally fund a proposal to the creditors, but still provides no indication of what that proposal may contain and no reason to suggest why EcoHome – Utilecredit's only secured, "veto-empowered" creditor – would likely accept it.

45. EcoHome will not support any proposal put forward by Utilecredit because it has completely lost confidence in Utilecredit and Nassar as a result of months of stonewalling, a refusal to provide financial information, and the last-minute desperation moves by Utilecredit that are plainly calculated to frustrate and delay the exercise of EcoHome's rights rather than

advance a consensual resolution to this matter. In short, any proposal from Utilecredit is "doomed to fail".

Second Houlden Affidavit, para. 33, MR, Tab 1, p. 12

46. In addition to subsections 50.4(11)(b) and (c) of the BIA, Utilecredit's proposal should also be terminated because Utilecredit has not acted and is not acting in good faith or with due diligence in accordance with subsection 50.1(11)(a) of the BIA. The NOI was filed 90 days after EcoHome served its Enforcement Notice, and seemingly only in an attempt to thwart its sole secured creditor and sole arm's-length creditor from enforcing upon its security.

47. Nassar indicates he intends to fund a proposal to creditors. EcoHome is effectively the only creditor. Nassar does not need to resort to the BIA proposal provisions to make a settlement offer to EcoHome that could have resolved all matters in issue. Nassar has had months to make a viable proposal to EcoHome and has not done so. He also has not made an offer in the past week during the adjournment. Nassar could still do so in the context of the receivership. In the interim, EcoHome should not be required to incur the expense of monitoring and responding to the NOI proceedings, or sustain the delays in a proposal that can last up to 6 months (something Utilecredit fails to refer to in its materials) where the proceedings are wholly unnecessary and were initiated for an ulterior purpose.

48. It is also clear that Nassar and Utilecredit are not acting in good faith when their response to this Court's May 27 Decision is considered – rather than complying with the letter and spirit of that Order, they took an overtly strained (and incorrect) interpretation of the requirement for them to produce financial information and refused to produce documents, and only produced

high level and redacted financial statements on the eve of the hearing. That conduct is not conduct of a good-faith debtor.

49. In *Janodee Investments Ltd. v. Pellegrini*, Justice Lax lifted the stay of proceedings in respect of a debtor's proposal proceedings on the basis that the debtor was not acting in good faith and with due diligence:

> The last minute nature of the filing of the Notice of Intention is also relevant…This is an abuse of the bankruptcy process and the court should not lend its assistance to it. It is inequitable to continue the stay in circumstances where the creditor has proceeded diligently and in conformity with the court process, while the debtor's conduct is an affront to the process.
>
> The conduct of [the debtors] is more consistent with a desire to delay and to frustrate the rights of their creditors than with a desire to make serious efforts to resolve their financial difficulties. This does not advance the goals and policies of the BIA. The proposal sections of the BIA are intended to give a debtor some breathing room. They are not intended to create an obstacle course for creditors.
>
> *Janodee Investments Ltd. v. Pellegrini*, 2001 CanLII 28455 at paras 34-38 (ONSC)

50. The circumstances in the present case are similar. The Court must not allow Utilecredit and Nassar to continue to make a last ditch NOI filing with no prospects of success to delay and obstruct EcoHome's ability to exercise the enforcement rights it bargained for.

D. The Appointment of a Receiver is Just and Convenient

51. EcoHome does not have any visibility into the financial condition of Utilecredit given Nassar's repeated refusal to provide information to which EcoHome is contractually entitled. This is particularly problematic given that, as Nassar alleges, Utilecredit was set up as a special purpose entity for the purpose of providing EcoHome security.

52. It will be the role of the receiver to undertake a review of Utilecredit and its assets and past dealings and transactions to determine the extent of Utilecredit's assets and EcoHome's collateral. At a minimum, the collateral available to EcoHome includes the residual value of the Customer Contracts (which the Nassar Affidavit says is an asset of Utilecredit with a minimum value of $2 million), any claims that Utilecredit (or a receiver of trustee thereof) may have in respect of improper transfers or transfers at undervalue, and the books and records of Utilecredit necessary to review and advance those claims.

53. All of the foregoing assets and potential claims form part of the collateral granted by Utilecredit to EcoHome pursuant to the GSA. It is not open to Utilecredit to now argue that EcoHome is not entitled to the appointment of a receiver because Utilecredit has dissipated all of EcoHome's collateral.

54. By Nassar's own evidence, Utilecredit was paid by EcoHome approximately $17 million for Customer Contracts. All of that value has seemingly been removed from Utilecredit. A receiver is best placed to determine what has occurred and whether EcoHome's collateral has been improperly dissipated.

55. Nassar asserts that Utilecredit's only remaining asset is its books and records and that EcoHome is seeking the appointment of a receiver to obtain access to the books and records for an improper purpose. Even if Utilecredit's assertion is taken at face value – despite being contradicted by Nassar's own evidence regarding the substantial residual value of the Customer Contracts – there is nothing improper with a secured creditor taking enforcement action to obtain books and records that form part of its collateral.

56. In *Westernbank Puerto Rico v. Inyx Canada Inc.*, this Court in granting a receivership order rejected an argument by the debtor company that the creditor was acting improperly in seeking to enforce its security interest in the debtor's books and records:

> It is argued on behalf of the Debtor that even if it appears that the creditor is otherwise entitled to have a receiver appointed, this creditor is disentitled by reason of its motive, which is to examine the Debtor's records for the purpose of conducting a searching review of the business affairs not only of the Debtor but also of other members of the Inyx group of companies, and in particular, in relation to the allegation of fraud in respect of which there is pending litigation in another jurisdiction. It is argued that apart from discovery rights in that litigation, the creditor would not have right of access to relevant documents in the Debtor's hands and that the court ought not to allow the creditor to use its remedies qua creditor of the Debtor to give a discovery advantage to the creditor in the litigation. I do not accept this argument. The fact that there is a possibility that the creditor may uncover evidence of fraud in exercising its rights under the GSA is not grounds to deny the creditor its remedy.
>
> It is normal and proper that the creditor seeks repayment and seeks to ascertain where the Debtor's assets are and, if assets have been disposed of, their location, including assets in the nature of corporate opportunities which might have value. This is not an improper motive whether or not there has been evidence of fraud. Where there is some evidence of diversion of funds and of dishonest conduct as there is here, it is *a fortiori* not improper for the creditor to try to follow the assets by examining the records relative to those issues and to pursue such remedies as are available to it to recover payment.
>
> *Westernbank Puerto Rico v. Inyx Canada Inc.*, 2007 CanLII 36084 at paras. 30 and 31

57. The proposal process is a "debtor-in-possession" regime that would enable Nassar to remain in control of Utilecredit for at least another 30 days (and up to six months) despite the fact that EcoHome has completely lost confidence in Nassar as a result of his obfuscation and lack of forthrightness. The continuation of the proposal process would force EcoHome to suffer further delay and costs in circumstances where it is the only party with an economic interest in

the debtor's estate and is strenuously opposed to that process. The continuation of the NOI proceedings is a transparent abuse of process that should not be countenanced by this Court.

58. Lastly, Utilecredit repeatedly suggests that there is "another process" that is "just as good" as a receivership and therefore the Court should not grant a receivership. That is not the appropriate paradigm or analysis – a proposal process is not aimed at protecting a debtor's assets (including claims) for the benefit of the secured creditors. It is fundamentally a different process and not functionally equivalent to a receivership. The BIA recognizes this by allowing a secured creditor to continue its enforcement efforts unless a proposal is filed during the 10-day notice period.

V. CONCLUSION AND ORDER REQUESTED

59. Despite Utilecredit's attempts to muddy the waters, the facts of this case are clear. EcoHome is a secured creditor of Utilecredit and is currently owed more than $1.5 million. Utilecredit is insolvent and has no ability to repay the indebtedness. EcoHome has security over all assets and property of the Debtor pursuant to the GSA and the contractual right to appoint a receiver. EcoHome delivered its BIA Enforcement Notice more than 90 days ago and has given Utilecredit ample time to develop a consensual proposal acceptable to EcoHome. Utilecredit has been unable or unwilling to do so and has instead resorted to last minute procedural tricks in an attempt to frustrate EcoHome's enforcement rights.

60. In the circumstances of this case, the appointment of a receiver over the assets and property of Utilecredit is just, convenient and appropriate. The Applicant requests that this Court issue an Order substantially in the form attached at Tab 3 to the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

June 4, 2020

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Court File No. CV-20-00636417

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

SUPPLEMENTARY FACTUM
(Motion re: Appointment of Receiver)
(Returnable June 5, 2020)

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