

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

BETWEEN:

FIRST SOURCE FINANCIAL MANAGEMENT INC.

Applicant

- and -

2507448 ONTARIO INC.

Respondent

**APPLICATION UNDER SECTION 243 (1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C.
1985, C.B-3, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C.43**

MOTION RECORD OF THE RESPONDENT

March 5, 2020

Corestone Law
117 Peter St, Suite 310
Toronto, ON, M5V 0M3

Maja Milosevic, LSO#: 67859T
Tel: (416) 591-2222
Fax: (416) 591-2221

Lawyers for the Respondent

INDEX

TAB 1

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

BETWEEN:

FIRST SOURCE FINANCIAL MANAGEMENT INC.

Applicant

- and -

2507448 ONTARIO INC.

Respondent

APPLICATION UNDER SECTION 243 (1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C.B-3, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C.43

AFFIDAVIT OF DEL TERRELONGE

I, **Del Terrelonge**, of the City of Toronto, in the Province of Ontario, **AFFIRM AND SAY:**

1. I am the director of the Respondent corporation in this matter and as such, have knowledge of the information hereinafter deposed to, or where the said information is based upon information provided by others, the source of the said information is set out and I verily believe the said facts to be true.
2. In addition to being a director of the Respondent, I have also provided personal guarantees for the three mortgages registered on the property subject to this receivership, 581 Wellington St., Toronto, Ontario ("Property"). This fact is not in dispute.

Disputed Charges

3. In December 2019, prior to the Interim Distribution motion on December 13, 2019, I instructed my counsel to outline certain charges included in the Applicant's mortgage payout statement which I objected to as unjustifiable charges. At the time, the extended closing date for the sale of the Property was scheduled to take place on December 9, 2019, and the intent was for the Applicant to receive a payout of the amounts not being disputed by any parties ("Interim Distribution"), and to set aside those amounts which were being challenged for determination on a motion. Since then, the purchaser requested two additional extensions of the closing and the transaction did not close until the end of January 2020.

4. The Disputed Charges were as follows:

- (a) Management Costs, \$15,000/month - Item 19 = \$201,000.00;
- (b) Administrative Fee, \$350/month - Item 6n) = \$11,150.00;
- (c) Forbearance payment = \$50,000.00; and
- (d) Administrative fees for insurance notice = \$14,000.00.
- (e) Subtotal = \$276,150.00.
- (f) Please see attached **Exhibit "A"** for correspondence from my counsel to the Receiver and Applicant, setting out the Disputed Charges.

5. My counsel also set out the reasoning for the Disputed Charges, in order to facilitate resolution of the items. For example, the Applicant had in its possession a copy of the insurance policy for which the insurance notice charges were levied, and therefore, should not have included these charges. Further, I instructed my counsel to request that the Applicant provide a breakdown of its internal costs to justify the \$15,000.00/month Management Costs, but the Applicant refused and/or neglected to provide the requested documents, which represents the

bulk of the amount in dispute. As such, we were not able to come to a resolution ahead of this motion.

6. At this time, I no longer dispute the \$50,000.00 forbearance payment made and do not oppose this amount being released to the Applicant. While I had a verbal agreement with the principals of the Applicant that they would apply this payment to their outstanding balance, to reduce their overall amount owing by the \$50,000.00, I have not been able to locate a written document setting out the amendment to the agreement. However, there is a legal fee charge from Schneider Ruggiero in the amount of \$6,182.50 that is included in the Applicant's outstanding balance found at **Appendix "Q"** of the Receiver's Motion Record dated February 26, 2020 (hereinafter referred to as the "March 10 Motion Record"). To my understanding, Schneider Ruggiero Spencer Milburn LLP was retained by the Applicant to facilitate the transfer of the Applicant's mortgage, related to the forbearance agreement and the \$50,000 payment. While I initially agreed to pay the \$50,000.00 fee, there was no discussion about payment of legal costs at any time, nor was there discussion of payment of any amount over and above the \$50,000. As such, while I no longer dispute release of the \$50,000.00, this amount should be reduced by \$6,182.50.

7. As a result of the forgoing, the updated amount now representing the Disputed Charges is \$232,332.50 ($\$276,150.00 - (\$50,000.00 - \$6,182.50)$).

Correction of Outstanding Balance

8. In addition to the Disputed Charges outlined above, there are amounts being claimed by the Applicant as outstanding which require clarification and correction for this Court. In particular, there are charges included in the Applicant's Account Statement as at March 10, 2020, as found at **Appendix "Q"** of the March 10 Motion Record, which have already been accounted for and paid out, and therefore, the final figure of \$717,115.89 is not an accurate reflection of the Applicant's actual remaining balance.

9. For one, the Receiver's Certificate, and corresponding interest and fees, were paid out as part of the Interim Distribution to the Applicant granted on December 13, 2019. Please see

paragraph 40 of the Fifth Report of the Receiver (hereinafter referred to as the "Fifth Report") (page 35 of the March 10 Motion Record), as well as **Appendix "P"** of the March 10 Motion Record, which lists the payment of \$53,947.00 as a disbursement which has already been made. The Applicant, however, has included the Receiver's Certificate in its Account Statement as at March 10, 2020, **Appendix Q**, broken down as follows:

- (a) \$50,000 for the Certificate;
- (b) \$3,427.40 for the interest;
- (c) \$1,000.00 for the fee; and
- (d) \$107.04 as late interest charge.
- (e) Subtotal = \$54,534.44.

10. As \$53,947.00 has already been repaid, the Applicant should not include the items as outstanding in **Appendix Q**. Moreover, it is unclear why there is a late interest charge of \$107.04, what period it is being calculated for, and why it was not included in the disbursements under **Appendix P**. As the Applicant has been repaid the Certificate, the full amount of \$54,534.44 should be subtracted from the Applicant's remaining balance of \$717,115.89.

11. In addition, the mortgage terms entered into with the Applicant call for a monthly compounding of the interest rate, however, the Applicant has charged a daily compounded interest rate, as set out in the Applicant's payout statement, dated December 12, 2019, found at **Appendix "M"** of the March 10 Motion Record (page 165 of the March 10 Motion Record). Applying a daily interest charge results in a different interest charge calculation as compared to compounding monthly. Please see attached as **Exhibit "B"** a chart outlining the monthly compounded interest charges, and the updated Outstanding Balance of the Applicant, using the same chart as set out in **Appendix "Q"**, with the corrected outstanding interest updated.

12. It is my understanding that the third mortgagees are challenging the Applicant's entitlement to the increased interest rate of 18%, but that they do not dispute that the Applicant is owed 9% interest up until closing. As such, the Applicant has received its interest charges up until January 31, 2020, at the 9% interest rate, and that the remaining 9%, compounded monthly and starting in May 2019, is the subject of the dispute between the Applicant and the third mortgagees. While I do not take a position on the third mortgagees' position, the amount being claimed by the Applicant is nonetheless inaccurate. If the above monthly compounding formula is used, the correct amount of outstanding interest owing to the Applicant is \$253,772.43, and not the \$333,045.85 that is being claimed, a difference of \$79,273.42. Also, included within this \$253,772.43 is the \$35,256.00 representing the remaining 9% interest, compounded and accumulating since December 19, 2019, as per the Receiver's calculations set out in paragraph 36 of the Fifth Report (page 34 of the March 10 Motion Record).

13. As such, the total amount of the Applicant's remaining balance is not \$717,115.89, but must be reduced by the following amounts, to be accurate:

- (a) Receiver's Certificate, fees and interest = \$54,427.40;
- (b) Monthly compounded interest difference = \$79,273.42;
- (c) New updated total = $\$717,115.89 - \$133,700.82 = \$583,415.07$.

14. This \$583,415.07 is the actual starting point to consider for what the Applicant's remaining balance is as of the date of this motion, before taking into consideration the Disputed Charges set out above.

Conclusion

15. In light of the above figures, set out below is the amount actually left owing to the Applicant:

Amount Outstanding

Starting Balance =
\$717,115.89

Subtotal = \$583,415.07

Deductions

Receiver's Certificate =
\$54,427.40

Compounded interest diff. =
\$79,273.42

Management Costs =
\$201,000.00

Administrative Fee =
\$11,150.00

Admin fees for insurance notice =
\$14,000.00

Schneider Ruggiero legal fees =
\$6,182.50

**Correct total – Applicant's
outstanding balance**

\$351,082.57

16. To my understanding, there is \$1,520,307.00 remaining to be distributed. After payment to the Applicant of its entitlement of \$351,082.57, there should therefore be \$1,169,224.43 left over for distribution to the other mortgagees and payment of the other outstanding charges and fees which are not being disputed.

17. I verily believe that the above disputed charges are unjustifiable and should not be granted to the Applicant, and instead, the Applicant's entitlement should be reassessed and reduced by this amount and correspondingly distributed to the next mortgagees in priority.

18. Furthermore, I verily believe that the Applicant's calculation of its outstanding balance is inaccurate and the correct starting point is \$583,415.07, as opposed to the claimed amount of \$717,115.89.

19. Contrary to the position of the Receiver as set out in paragraph 27 of the Fifth Report, under Tab 2 of the March 10 Motion Record, there is a practical benefit to proceeding with the adjudication of the issues concerning the disputed amounts. It was always the understanding among the parties who actively participated in the receivership process, that the final accounting of the Applicant's entitlement would be dealt with after the closing took place and the Receiver was in receipt of funds. This motion was specifically booked to resolve the disputed amounts and now is the time to resolve the issues. Plus, the figures outlined above amount to several hundreds of thousands of dollars that are being challenged, not an insignificant or trifling amount.

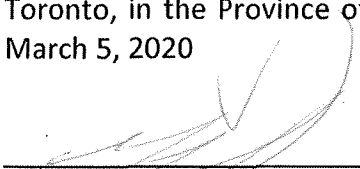
20. Furthermore, as a guarantor of the mortgagees registered on the Property, I personally have an interest in seeing that the funds are distributed properly according to each parties' rightful entitlement. I would suffer prejudice if not given the opportunity to make submissions on the disputed amounts, whereas the Applicant will not suffer any prejudice as this motion has been in the works for nearly three months and the amounts in dispute, including the reasoning for the dispute, were known to the Applicant since December 2019. Plus, contrary to the Receiver's assertion at paragraph 27(c) of the Fifth Report, the second mortgagee would be prejudiced if the disputed amounts are *not* analyzed and assessed, as the analysis may ultimately determine that amounts being claimed by the Applicant are not justifiable, and therefore, should go the second mortgagee. The only party that benefits from this Court not engaging in the analysis is the Applicant.

21. Finally, it is in the interests of justice to have the proper amounts assessed and to have an Order issued by this Court which reflects the true value of the parties' entitlements. Any lack of standing or financial interest I may have, which I deny, does not extinguish this Court's right to be presented with accurate financial information, nor does it shield the Applicant from scrutiny of its claimed entitlement and obligation to justify to this Court the charges being

levied. There are two other mortgagees whose rights are impacted by the decision of this Court on this motion and their interests must be considered when making a determination as to entitlement.

22. I make this affidavit in support of the relief sought for the within application and for no other or improper purpose.

AFFIRMED BEFORE ME at the City of
Toronto, in the Province of Ontario on
March 5, 2020



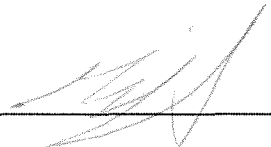
Commissioner for Taking Affidavits
Maja Milosevic, LSO#: 67859T



Del Terrelonge

TAB A

This is Exhibit "A" referred to in the
Affidavit of Del Terrelonge, affirmed before me
this 5th day of March 2020

A handwritten signature in dark ink, appearing to be "M. J. ...", is written over a horizontal line.

A COMMISSIONER FOR TAKING AFFIDAVITS

From: Maja Milosevic
Sent: December 9, 2019 18:18
To: Jeff.Larry@paliareroland.com
Cc: Stewart Thom
Subject: 581 Wellington St. -- Distribution motion

Counsel,

We have now had a chance to review the First Source Mortgage payout statement (Tab L to the motion record) for the amounts in dispute. As you will see, there is not many items in dispute.

Management Costs, \$15,000/month - Item 19

This is item number 19 under the Tab M Mortgage, Schedule A, and is the bulk of the amounts being disputed by my client. From my calculation, the Management Costs amount to \$201,000 (\$195,000 for the period from November 2018 - November 2019, and \$6,000 for Dec. 1 - 12, 2019).

For the basis of the dispute, please see the attached cases, 1141339 Ontario Ltd. v. Surgeoner and Igloo Refrigeration Co. v. Industrial Acceptance Corp., which hold that a mortgagee is not allowed compensation for his own care and trouble in the management and administration of his security, and specifically, that when a mortgagee takes possession of a property, they are simply acting as a "reasonable, prudent" owner, and cannot charge compensation to the mortgage account.

My client does acknowledge, as held in the same cases, that First Source may be entitled to its out-of-pocket disbursements and for payments to agents like the receiver, the property manager, and realtor, but to my understanding those are already included in the payout statement / motion record separately and accounted for anyway.

If there is some reason this situation is distinguishable from the attached cases, or if First Source can show what internal costs it has incurred to manage the mortgage, let me know and I will discuss it with my client.

Administrative Fee, \$350/month - Item 6n)

There is a charge of \$11,500.00 for item "Sched A 6n) Each 3 phone calls/emails due to issues of the loan". From my reading of the this term in the mortgage, there should only be a charge of \$350 for the one month, and so, a reduction of \$11,150.00 from the payout statement.

This may just be a clerical error, or the number of 6n) instances and time frame was just not properly recorded in the payout. Please advise.

Other Amounts - The forbearance payment

My client advises that he spoke with David Mandel sometime in July 2019 about the forbearance payment of \$50,000 made at the end of June / beginning of July, and that David told him that First Source would agree to apply the \$50,000 payment towards the mortgage payout, despite the earlier agreement that it was on top of the principal.

I am having my client review his records to see if it was reduced to writing, and if so, my client would also seek to have this amount reduced. I hope to have this to you by tomorrow at the latest/confirmation of our position.

To sum up, then, out of the \$4,609,990.68 set out in the First Source payout statement, by our calculations, this should be reduced by \$212,150.00 for the Management Costs and Administrative Fee, depending on First Source's response. This would bring the payout amount down to \$4,397,840.68. There may also be a further reduction of \$50,000 being claimed on top of that, to bring it down further to \$4,347,840.68.

The rest of the items listed in the payout statement are not being disputed by my client for this Friday's distribution motion.

Thank you.

Maja Milosevic, B.B.M., J.D.

Counsel

[Corestone Logo]

Office: 416-591-2222
Cell: 647-699-0762
Fax: 1-855-677-2201
Email: maja@corestone.ca<<mailto:maja@corestone.ca>>
Address: 117 Peter St., Suite 310
Toronto, ON M5V 0M3
Website: www.corestone.ca<<http://www.corestone.ca>>

The legal partner of choice for:

[signature2]

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5 attachments



CORESTONE LAW
COMMERCIAL, FINANCIAL & INSURANCE LAW

Outlook-Corestone .png
37K



PROFESSIONAL
SOCIETY
OF PROFESSIONAL
ENGINEERS

Outlook-signature2.png
11K



Tab L_First Source Statement.pdf
124K



1141339 Ontario Ltd v Surgeoner.doc
168K



Igloo Refrigeration Co v Industrial Acceptance Corp.doc
41K

Stewart Thom

Tel: 416-777-5197

Fax: 1-877-689-3872

Torkin Manes LLP

Barristers & Solicitors

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Thank you.

From: Maja Milosevic [mailto:maja@corestone.ca]
Sent: December 12, 2019 3:04 PM
To: Stewart Thom; Joseph Richard Forget
Cc: Jeff.Larry@paliareroland.com
Subject: Re: First Source -- First payout statement

This email was sent by an external sender.

Hello all,

Yes, thank you Stewart.

I have discussed the situation with my client and he is in agreement with the Receiver's approach for tomorrow's motion -- to agree to the release of those amounts NOT in dispute and to have the disputed amounts resolved at a later date in January, either by motion or hopefully with the parties' cooperation.

To that end, and for the sake of clarity, my client's position is as follows:

Amounts to be released upon receipt of closing funds

- Principal of \$3.5m;
- 1st year's interest charges at the 9% rate; and
- Those administrative fees NOT identified as in dispute.

I believe all the parties are the on the same page about the above.

In addition, my client also takes the position that the deferred amounts and January motion should not prevent the payout of the 2nd mortgagee (as much as is possible), and third mortgagees (if any), according to their priority. As far as we are aware, the property sold for \$5.8m, so there should still be enough funds left over to pay some of these other amounts.

Amounts to be deferred & the merits resolved in January

- Management Costs identified in my Monday email;
- The \$11,500 Admin Fee identified in my Monday email;
- The \$50,000 payment identified in my Monday email, that my client advises David told him would be applied to pay down the principal (and if successful, re-calculation of the interest charges from the time of the payments, this past summer 2019, when the disputed 18% rate applied); and
- All the Admin Fees charged for the request for insurance notice (this was just now identified to me by my client. He states that First Source was aware there was insurance on the property, and that it in fact

had a copy of the policy at all times).

In addition, given the third mortgagees' position, I assume that the 18% interest charges are also to be deferred. These are then all the amounts being deferred to January.

Thanks.

Maja Milosevic, B.B.M., J.D.
Counsel



CORESTONE LAW
CONSTRUCTION & PROPERTY LAW

Office: 416-591-2222
Cell: 647-699-0762
Fax: 1-855-677-2201
Email: maja@corestone.ca
Address: 117 Peter St., Suite 310
Toronto, ON M5V 0M3
Website: www.corestone.ca

The legal partner of choice for:



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From: Stewart Thom <sthom@torkinmanes.com>
Sent: December 12, 2019 12:35
To: Maja Milosevic <maja@corestone.ca>; Joseph Richard Forget <jrforget@live.ca>
Cc: Jeff.Larry@paliareroland.com <Jeff.Larry@paliareroland.com>
Subject: RE: First Source -- First payout statement

We are going to schedule a date in January to argue the question of the disputed amounts (including those your client has identified) – i.e. argument on those issues will be deferred to January. Does that clarify?

Stewart Thom

Tel: 416-777-5197

Fax: 1-877-689-3872

Torkin Manes LLP

Barristers & Solicitors

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From: Joseph Richard Forget <jrforget@live.ca>
Sent: December 12, 2019 12:22
To: Stewart Thom <sthom@torkinmanes.com>
Cc: jeff.larry@paliareroland.com <jeff.larry@paliareroland.com>; Maja Milosevic <maja@corestone.ca>
Subject: Re: First Source -- First payout statement

Any payments have to be based on the First payout not the mortgage agreement

Sent from my iPhone

On Dec 12, 2019, at 12:19 PM, Stewart Thom <sthom@torkinmanes.com> wrote:

Richard,

I was wondering if you could be a bit clearer on your position and the legal basis for it so that we can understand where you are coming from and determine an appropriate amount to distribute, on an interim basis, to First Source. As discussed, for tomorrow's purposes the intention is (ideally) not to argue the propriety of any disputed charges on the merits but to facilitate a payout in an amount which should be non-controversial, in order to prevent the ongoing accumulation of interest in respect of amounts which are not, or should not be, in dispute.

From the below, I am having a hard time fully understanding your client's position. It may be easier to approach it this way: the Receiver is of the view that at a minimum, and in the interests of reducing the accumulation of further interest, the principal amount of the loan and the interest on the principal accrued to date should be paid out. The terms of the mortgage indicate that the interest rate on the principal advance is equal to 9% per annum for the first 12 months of the loan and then 18% per annum afterwards. That total is the amount which we anticipated, at a minimum, would not be in dispute.

I am attaching a copy of the mortgage and the charge terms, as I don't know if you have these already. It appears that you are operating on the assumption that the interest on the loan is 9% which, on the receiver's review of the charge, would only be the rate for the first 12 months of the loan.

Presently, I believe that it may make sense to defer argument on all additional charges listed in the mortgage, as some of these have also been identified by Ms. Milosevic as a concern to her client. For the record, Ms. Milosevic's client has not raised an objection to the payment of interest on the principal in accordance with the mortgage terms and as set out above.

Please confirm your client's position with respect to the above. If you are indeed objecting to payment of interest on the principal advance at a rate of 18% after the first 12 months of the loan, if you could explain to me the basis for that objection it would be helpful in determining how to proceed.

Stewart Thom

Tel: 416-777-5197

Fax: 1-877-689-3872

Torkin Manes LLP

Barristers & Solicitors

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From: Joseph Richard Forget [mailto:jrforget@live.ca]
Sent: December 11, 2019 3:08 PM
To: jeff.larry@paliarerland.com; maja@corestone.ca; Stewart Thom
Subject: Fw: First Source -- First payout statement

This email was sent by an external sender.

here is the first payout statement. It is our position that this figure minus the \$350.00 charge plus a pier diem rate at 9% is the applicable figure that the third mortgage investors ought to bear and that is payable to first source.

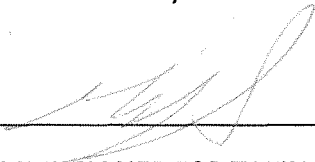
From: Maja Milosevic <maja@corestone.ca>
Sent: December 11, 2019 3:03 PM
To: Joseph Richard Forget <jrforget@live.ca>
Subject: First Source -- First payout statement

Please see attached.

Sent from mobile device. Please excuse any errors or omissions.
<AT4834357.PDF>
<AT4834357_Instrument_Statement_61.PDF>

TAB B

This is Exhibit "B" referred to in the
Affidavit of Del Terrelonge, affirmed before me
this 5th day of March 2020



A COMMISSIONER FOR TAKING AFFIDAVITS

DOUBLE INTEREST 2018/19

\$	-			Sept
\$	-			Oct
\$	-			Nov
\$	-			Dec
\$	-			Jan
\$	-			Feb
\$	-			Mar
\$	-	\$	3,743,462.94	Apr
\$	28,075.97	\$	3,771,538.91	May
\$	28,286.54	\$	3,799,825.45	Jun
\$	28,498.69	\$	3,828,324.14	July
\$	28,712.43	\$	3,857,036.58	Aug
\$	\$28,927.77	\$	3,885,964.35	Sept
\$	29,144.73	\$	3,915,109.08	Oct
\$	29,363.32	\$	3,944,472.40	Nov
\$	17,506.97	\$	3,961,979.37	Dec
\$	35,256.00	\$	3,997,235.37	Jan
		\$	253,772.43	

The above was calculated using the Microsoft Excel Mortgage Calculator program.
 The calculations are based on a rate of 0.75% per month (9% / 12 months = 0.75%)

Wellington Balance Outstanding as at March 10, 2020

First Source

From September 2018 to Jan 2020

Description

Sched A 2k) Notice of Default	\$	350.00
Sched A 15) Management Fee - Default 15K/mth Nov '18 to Jan '20	\$	225,000.00
NSF Payment Charge Jun 27/19	\$	350.00
Legal Fee Schneider Ruggiero	\$	6,182.50
Sched A 2k) Request for 4th Discharge Statement	\$	350.00
Sched A 2k) Mortgage Statement June 18/18 (2x)	\$	700.00
Sched A 2d) Failure to provide insurance renewal after requested	\$	350.00
Sched A 2k) Request for 5th Discharge Statement	\$	350.00
ProInCon Inv #17563 - Reimburse FS	\$	169.50
Sched A 2k) Request for 3rd Discharge Statement	\$	350.00
Legal Fees Palaire Roland	\$	61,433.60
Sched A 2d) Failure to provide insurance April, Oct 2018, Jan 2019	\$	1,050.00
Sched A 15) Default Management \$350/hr (reduced to 40 hrs)	\$	14,000.00
Sched A 2n) Each 3 phone calls / emails due to issues	\$	11,550.00
Sched A 2k) Request for 1st and 2nd Discharge Statement	\$	700.00
Sched A 2d) Failure to proof of property taxes after requested	\$	350.00
Unpaid Late Charges	\$	6,300.00
Interest Outstanding	\$	253,772.43
Receiver Certificate	\$	-
Receiver Certificate Fee	\$	-
Interest Charge on Receiver Certificate of \$50,000 @9% Jun 7 2019	\$	-
Late Interest on Receiver Certificate	\$	107.04
TOTAL	\$	583,415.07

FIRST SOURCE FINANCIAL MANAGEMENT INC.
Applicant

and

2507448 ONTARIO INC.
Respondent

Court File No.: CV-19-00613044CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at TORONTO

AFFIDAVIT OF DEL TERRELONGE

Corestone Law
117 Peter St, Suite 310
Toronto, ON, M5V 0M3

Maja Milosevic LSO#: 67859T
Tel: (416) 591-2222
Fax: (416) 591-2221

Lawyers for the Respondent

FIRST SOURCE FINANCIAL MANAGEMENT INC.
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and

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Court File No.: CV-19-00613044CL

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117 Peter St, Suite 310
Toronto, ON, M5V 0M3

Maja Milosevic LSO#: 67859T

Tel: (416) 591-2222

Fax: (416) 591-2221

Lawyers for the Respondent