

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

**IN THE MATTER OF Section 101 of the *Courts of Justice Act*, R.S.O. 1990 c.C.43,  
as amended, and in the matter of Section 243(1) of the *Bankruptcy and Insolvency Act*,  
R.S.C. 1985, c. B-3, as amended**

**BETWEEN:**

**2478888 ONTARIO INC.**

Applicant

- and -

**3070 ELLESMERE DEVELOPMENTS INC.**

Respondent

**FIRST REPORT OF THE RECEIVER**  
**January 20, 2020**

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## INTRODUCTION

1. Pursuant to an order of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) dated September 13, 2019 (the “**Receivership Order**”), RSM Canada Limited (“**RSM**”) was appointed receiver (the “**Receiver**”) of all property, assets and undertakings (collectively, the “**Property**”) of 3070 Ellesmere Developments Inc. (the “**Borrower**”). A copy of the Receivership Order is attached hereto as Schedule “**1**”.
2. The purpose of this report (the “**First Report**”) is to:
  - (a) provide the Court and all stakeholders with information about activities undertaken and developments that have occurred since the issuance of the Receivership Order, including the appeal of the Receivership Order filed by the Borrower and the disposition of that appeal;
  - (b) inform the Court of the status of a proposal filed by the Borrower on September 27, 2019 (the “**Proposal Proceeding**”) pursuant to Part III, Division I of the *Bankruptcy and Insolvency Act* (“**BIA**”);
  - (c) report to the Court on the Receiver’s intended next steps and process to sell the Real Property;
  - (d) provide the Court with copies of communications received from the Borrower’s counsel, including an offer purportedly accepted by the Borrower as vendor for the sale of the Real Property, and the responses delivered on behalf of the Receiver; and
  - (e) seek an Order from the Court that:
    - (i) in furtherance of and in addition to the powers granted to the Receiver pursuant to the Receivership Order, authorizes the Receiver to make an assignment in bankruptcy on behalf of the Borrower with RSM being named as trustee in bankruptcy;



- (ii) prohibits the Borrower and its principal, Mr. Liu, and anyone acting on its, his or their behalf, from: (a) holding themselves out as having any capacity whatsoever to deal with the Property, including the Real Property, (b) negotiating, as vendor, any terms for a sale of the Real Property, (c) engaging, as vendor, with any third parties with respect to a sale of the Real Property, (d) taking any steps to delay or hinder the Receiver's sole and exclusive power to sell the Real Property pursuant to the Receivership Order; or (e) taking any steps whatsoever with respect to any Property of the Borrower, including but not limited to the commencement or continuation of litigation; and
- (iii) approving this First Report and the activities of the Receiver set out herein.

#### **TERMS OF REFERENCE**

3. In preparing this First Report and making the comments herein, the Receiver has relied upon information from third-party sources (collectively, the "**Information**"). Certain of the information contained in this First Report may refer to, or is based on, the Information. As the Information has been provided by other parties, or obtained from documents filed with the Court in this matter, the Receiver has relied on the Information and, to the extent possible, reviewed the Information for reasonableness. However, the Receiver has not audited or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would wholly or partially comply with Canadian Auditing Standards pursuant to the Chartered Professional Accountants of Canada Handbook and, accordingly, the Receiver expresses no opinion or other form of assurance in respect of the Information.
4. Unless otherwise stated, all monetary amounts contained in the First Report are expressed in Canadian dollars.
5. Capitalized terms used in the First Report and not defined herein are as defined in: (i) the Receivership Order or, if not defined therein, (ii) the Goldberg Affidavit.

## **ACTIVITIES OF THE RECEIVER**

6. The Receivership Order, among other things, authorizes and grants the Receiver the exclusive ability to market and sell the Real Property. Since the issuance of the Receivership Order, the Receiver has taken certain steps and conducted the following activities:
- (a) took possession of the Real Property;
  - (b) registered a copy of the Receivership Order against title to the Real Property;
  - (c) arranged for insurance coverage in respect of the Real Property;
  - (d) established a website for these Receivership proceedings:  
  
<[rsmcanada.com/3070-ellesmere-developments-inc](http://rsmcanada.com/3070-ellesmere-developments-inc)>;
  - (e) arranged for certain repairs and maintenance to be completed at the Real Property pursuant to demands from the City of Toronto;
  - (f) consulted with the secured creditors and other stakeholders as to the appropriate method of marketing for the Real Property;
  - (g) requested proposals from commercial real estate brokers regarding the sale of the Real Property;
  - (h) issued the notices required pursuant to Sections 245 and 246 of the BIA to known creditors of the Borrower; and
  - (i) prepared this First Report.

## **BORROWER'S APPEAL OF RECEIVERSHIP ORDER**

7. The Receivership Order was granted by Justice Hainey on September 13, 2019 on application of the Lender which holds a first mortgage over the Real Property, with the support of other mortgagees and creditors. Details as to the events leading to the Receivership Order being granted were set out in the Affidavit of Henry Goldberg of the

Lender sworn September 11, 2019 (the “**Goldberg Affidavit**”), a copy of which is attached (without Exhibits) as Schedule “**2**” to this Report.

8. The Receivership Order was signed and granted on September 13, 2019 on consent of the Borrower, and was held in abeyance by the Lender’s counsel, Thornton Grout Finnigan LLP (“**TGF**”), for a 2 week period. This was to allow the Borrower a final opportunity to repay all amounts owing to the Lender in full, which at that time was \$13,616,330.52 based on a mortgage payout statement delivered to the Borrower’s counsel on September 18, 2019. On September 27, 2019, as payment had not been made by the Borrower by that date, the Receivership Order was issued and entered by the Court.
9. Also on September 27, 2019, the Borrower filed a proposal to its creditors, pursuant to the provisions of the BIA, with the Official Receiver in the Proposal Proceeding (the “**Proposal**”). The Receiver only became aware of this fact on October 9, 2019 as a result of the Receiver following up with the Borrower and the Proposal Trustee, Crowe Soberman Inc., for responses to information and documentation requests that were made in accordance with the Receivership Order. The Proposal Proceeding is addressed in more detail below.
10. On October 10, 2019, the Receiver sent a request for information to Mr. Thomas Liu, the principal of the Borrower (“**Mr. Liu**”), to request, *inter alia*:
  - (a) copies of all bank statements for the period October 1, 2018 through September 30, 2019;
  - (b) a digital copy of the Company’s accounting records (i.e. Quickbooks file);
  - (c) copies of any contracts entered into by the Borrower, including sales agreements, leases, service agreements, contractor agreements, etc.;
  - (d) payroll records, if applicable;
  - (e) legal files; and

- (f) information relating to any Property of the Borrower (i.e. environmental reports, blueprints and architectural drawings, vehicle registrations, etc.).
11. In an email dated October 14, 2019, Mr. Liu responded to the Receiver and agreed to meet with the Receiver on Wednesday, October 16, 2019 to provide and review the requested information.
  12. On October 15, 2019 the Borrower, through its new counsel, Blaney McMurtry LLP, served a Notice of Appeal regarding the Receivership Order (the “**Notice of Appeal**”), pursuant to which the Borrower sought to appeal the Receivership Order. Attached as Schedule “**3**” to this Report is a copy of the Notice of Appeal.
  13. In view of the Notice of Appeal, the meeting scheduled for October 16, 2019 between Mr. Liu and the Receiver was cancelled. As of the date of this First Report, Mr. Liu has not provided any of the requested information to the Receiver.
  14. The Lender brought a Motion to Quash the Appeal of the Borrower (the “**Motion to Quash**”) to the Court of Appeal for Ontario (the “**Court of Appeal**”). Attached as Schedule “**4**” to this Report is a copy of the Notice of Motion filed by the Lender for the Motion to Quash. No responding materials to the Motion to Quash were filed at any time by counsel on behalf of the Borrower.
  15. The Motion to Quash was scheduled to be heard January 7, 2020, being the first available date provided by the Court of Appeal. The Borrower’s counsel sought an adjournment of the date set by the Court of Appeal for the Motion to Quash, as discussed below. The Borrower’s counsel then advised TGF by email on January 2, 2020 that it expected to receive instructions that it would not be opposing the Motion to Quash, and ultimately confirmed that position on January 6, 2020.
  16. On January 7, 2020, the Court of Appeal for Ontario issued an Order quashing the appeal brought by the Borrower. Attached as Schedule “**5**” to this Report is a copy of the Court of Appeal’s Order and Endorsement dated January 7, 2020.

## **PRIOR ORDER AFFECTING THE REAL PROPERTY**

17. An Order had previously been issued by Justice Hainey in a separate proceeding in Court File No. CV-18-592726-00CL on February 26, 2019, on motion brought by one of the Borrower's shareholders (now a judgment creditor), prohibiting and restraining the Borrower from taking any steps in respect of the Real Property, including any sale thereof (the "**Prohibition Order**"). Paragraph 5 of the Prohibition Order provides as follows:

5. THIS COURT ORDERS that the Defendants, including 3070 Ellesmere Developments Inc., are enjoined from taking any steps to sell or otherwise encumber the property known municipally as 3070 Ellesmere Road in Scarborough, Ontario (the "Property") ... and the Land Registrar ... shall be authorized to register this Order against title to the Property on Application by the Plaintiff.

A copy of the Prohibition Order is attached hereto as Schedule "6".

18. The Receiver understands that the Prohibition Order was never appealed by the Borrower or set aside by any further Order of the Court.

## **BIA PROPOSAL PROCEEDINGS**

19. The Borrower filed a Notice of Intention to Make a Proposal ("**NOI**") on August 20, 2019, commencing the Proposal Proceeding. The underlying premise of the Proposal Proceeding was to effect a sale of the Real Property by the Borrower and its advisors.
20. The Borrower brought a motion within the Proposal Proceedings returnable September 13, 2019 seeking, *inter alia*, an Order permitting it to deal with the Real Property by way of a debtor-run sales process. The Borrower's motion was denied, and the Lender's application for the Receivership Order was granted on September 13, 2019.
21. On the same day on which the Receivership Order became effective, and two weeks after the Receivership Order was granted by the Court, the Borrower filed the Proposal in, what appears to the Receiver to be, an attempt by the Borrower to be able to continue to deal with the Real Property. A copy of the Proposal is attached hereto as Schedule "7".

22. The Receivership Order had the effect of staying all further dealings by the Borrower with its Property, including the Real Property, and declared that the Receiver was the sole party with authority to deal with all Property to the exclusion of all others.
23. Upon the filing of the Proposal, certain statutory steps under the BIA automatically occurred, including the scheduling of a general meeting of creditors (the “**Creditors’ Meeting**”). The Creditors’ Meeting was scheduled for October 18, 2019.
24. Counsel for all parties and the Receiver attended a Chambers attendance before Justice Hainey to obtain an endorsement adjourning the Creditors’ Meeting. On October 18, 2019, the Creditors’ Meeting in the Proposal Proceedings was adjourned *sine die*.
25. To the Receiver’s knowledge, since the adjournment of the Creditors’ Meeting, no steps have been taken in the Proposal Proceedings pending the outcome of the Appeal. As the Appeal has now been quashed and the Receivership Order is a final order of the Court, the Receiver continues to be the only party with the authority to deal with the Property, including the Real Property.
26. On January 16, 2020, counsel to the Receiver corresponded with the Borrower’s counsel outlining the intended motion being brought by the Receiver for the expansion of the Receiver’s powers to authorize the Receiver to file an assignment in bankruptcy of the Borrower, and requesting that the Borrower file an assignment in bankruptcy itself to bring the Proposal Proceedings to an end. The Borrower’s counsel responded to advise that Mr. Liu would not consent to doing so, but had no instructions as to whether any such step by the Receiver to effect an assignment in bankruptcy would be opposed. A copy of the email exchange between the Receiver’s counsel TGF and the Borrower’s counsel on the issue of bankruptcy is attached to this Report as Schedule “8”.

## **BORROWER’S ATTEMPTS TO DEAL WITH THE REAL PROPERTY**

27. The Receiver understands that prior to these receivership proceedings the Borrower had made several attempts to market and sell the Real Property, both privately and through a broker. The Receiver further understands that a number of offers may have been received

by the Borrower, but none of the offers were accepted or, if accepted by the Borrower, no transaction was concluded.

28. The Borrower and its sole officer and director, Mr. Liu, continue subsequent to the commencement of these receivership proceedings, to attempt to deal with the Real Property directly, notwithstanding the Prohibition Order and the Receivership Order. The Receiver is concerned that these repeated attempts are likely to: (i) create confusion in the market with respect to who is authorized to deal with prospective purchasers or sell the Real Property, (ii) create or perpetuate confusion with creditors and stakeholders as to what is actually occurring with the Real Property, and with the parallel Proposal Proceedings and the receivership, and (iii) ultimately have a negative impact on the ability of the Receiver to maximize realizations for the benefit of creditors.
29. The Borrower has made allegations against the Receiver and its counsel in carrying out the provisions of the Receivership Order.
30. On January 9, 2020, the Receiver received correspondence from counsel to the Borrower, Blaney McMurtry LLP, confirming that the Borrower was still trying to deal with the Real Property by purporting to negotiate and accept an agreement of purchase and sale with respect to the Real Property, a copy of which was provided to the Receiver's counsel as part of that correspondence. In addition to the lack of authority and lack of capacity of the Borrower to purport to sell the Real Property pursuant to the offer provided by the Borrower's counsel to the Receiver's counsel, the offer is not acceptable to the Receiver for a number of other reasons. That includes the conditions contained in the offer and the Receiver's concern based on listing proposals it has received, that the offer is not reflective of the potential market value of the Real Property following a robust, arms-length sale process conducted by a court officer.
31. TGF responded on behalf of the Receiver to advise that the proposed offer was not valid as the Borrower has no capacity with which to accept any offer for the Real Property, and that the Receiver would be continuing with its sales process in accordance with the Receivership Order. In response, the Borrower's counsel suggested that "sanctions" against the Receiver and/or its counsel, TGF, may be appropriate. Attached as Schedule

“9” are redacted copies of the recent exchange of correspondence with the Borrower’s counsel and TGF regarding the attempts by Mr. Liu to deal with the Real Property. Unredacted copies of such correspondence (which were redacted only as to reference to the offer price) are attached to this Report as Confidential Schedule “1”.

32. The Receiver notes that responding to matters raised by the Borrower such as these will only serve to further increase the costs of the receivership, to the ultimate detriment of the Borrower’s creditors.

### **LISTING THE REAL PROPERTY FOR SALE**

33. The Receivership Order authorizes the Receiver to market the Real Property for sale, including advertising and soliciting offers in respect of the Real Property.
34. Upon the Borrower’s appeal of the Receivership Order being quashed, the Receiver invited four realtors to each submit listing proposals for the marketing and sale of the Real Property.
35. The Receiver is presently reviewing the proposals submitted, including having discussions/correspondence with some or all of the realtors, in connection with the proposals. The Receiver intends on shortly entering into a listing agreement for the sale of the Real Property.
36. The Receiver will provide information on the Receiver’s marketing efforts at the time that the Receiver seeks the approval of the Court of an agreement of purchase and sale entered into by the Receiver.

### **LITIGATION INVOLVING THE BORROWER**

37. On January 17, 2020, the Receiver, through its counsel, became aware that Blaney McMurtry LLP had commenced an action on December 19, 2019 on behalf of a group of Plaintiffs, including the Borrower, notwithstanding the Receivership Order. A copy of the Statement of Claim filed in court file CV-19-00632309-0000 is attached to this Report as Schedule “10”.



38. The Borrower is also the defendant in several litigation claims:
- (a) 2518358 Ontario Inc. v. 3070 Ellesmere Developments Inc. bearing court file no. CV-18-00598800-0000 (the “**Rise Action**”);
  - (b) Xiuhong Du, Yunduan Chen and Guohua Xu v. Lemine Investment Group Inc., 3070 Ellesmere Developments Inc., Jin Zhi Chen and Tong Liu a.k.a. Thomas Liu bearing court file no. CV-18-00607231-0000 (the “**Du Action**”); and
  - (c) Jianji Ma and Cunyi Hu v. Lemine Investment Group Inc., Lemine Real Estate Consulting Inc., 3070 Ellesmere Developments Inc., Academy Management Inc., Tong Liu, also known as Thomas Liu, Yixuan Wang, also known as Yi Xuan Wang or Jessica Wang, Elliott Law Professional Corporation and Nancy Myles Elliott bearing court file no. CV-19-00616535-0000 (the “**Ma Action**”).
39. In the Rise Action the plaintiff is asserting a 50% interest in the Real Property pursuant to a joint venture agreement it entered into with the Borrower in addition to payment of \$3,950,000 it claims is owing. The Borrower filed a statement of defence in the Rise Action; the Rise Action was stayed as against the Borrower when it filed the NOI, and continues to be stayed against the Borrower by virtue of the Receivership Order.
40. In the Du Action, the plaintiffs seek, among other things, the return of \$1,873,523.13 and damages in the amount of \$3,000,000, which claim arises out of a series of agreements they entered into with one of the defendants for the purchase of condominium units that were meant to be constructed on the Real Property. The plaintiffs in the Du Action allege that they were told the purchase of such units would make them eligible for a permanent residency program, which the plaintiffs allege did not in fact exist. The Borrower filed a statement of defence in the Du Action; the Du Action was stayed as against the Borrower when it filed the NOI, and continues to be stayed against the Borrower by virtue of the Receivership Order.
41. The allegations raised in the Ma Action are substantially the same as those raised in the Du Action, though the quantum and nature of the relief differs slightly. The Borrower filed a statement of defence in the Du Action, following which the plaintiffs issued a reply to such

statement of defence. The Ma Action was stayed as against the Borrower when it filed the NOI, and continues to be stayed against the Borrower by virtue of the Receivership Order.

42. With the Borrower's appeal of the Receivership Order having been quashed, the Receiver and its counsel will review the above-noted litigation claims to consider the appropriate steps to be taken within the receivership. The Receiver will also determine whether any retainers were paid to any law firms by the Borrower in respect of such claims, or otherwise.

### **IMPACT OF APPEAL ON POTENTIAL RECOVERIES TO CREDITORS**

43. The filing of the Notice of Appeal to the Receivership Order caused the Receiver to pause its efforts with respect to the immediate listing and sale of the Real Property. Prior to learning of the Notice of Appeal on October 15, 2019, the Receiver had taken certain steps in connection with securing the Real Property, cleaning up the site, and having borrowings advanced to the Receiver to fund the receivership administration pursuant to a Receiver's Certificate.
44. The Receiver had intended to commence a sale process immediately following its appointment by the Court, leading to the intended completion of a sale transaction by the end of 2019. The timing of that intended process has been delayed by approximately three months as a result of the Appeal.
45. Carrying costs for the Real Property have continued to be incurred as a result of the delay arising from the Appeal. That amount is in addition to legal fees incurred by the Lender as respondent in the Appeal, which will be added to the indebtedness secured by its mortgage over the Real Property. All of these costs will impact the ultimate recovery for creditors (based on the priority waterfall) on a sale of the Real Property. In a letter filed by TGF with the Court of Appeal in response to the Borrower's request for an adjournment of the January 7, 2020 date for the Motion to Quash the Appeal of the Receivership Order, reference was made to the carrying costs of the Real Property. A copy of TGF's letter to the Court of Appeal on that issue which lists some of those costs is attached hereto as Schedule "11".

## **RELIEF REQUESTED BY THE RECEIVER**

46. The Proposal filed by the Borrower on September 27, 2019 is not viable, as it is based on the Borrower being permitted to sell the Real Property itself in order to make a proposal to creditors. That relief was sought by the Borrower in its motion returnable within the Proposal Proceeding on September 13, 2019 and was rejected by Justice Hainey in favour of the request by the various creditors and mortgagees, including the Lender, for the Receivership Order to be granted. Further, the secured creditors holding mortgages over the Real Property do not support the Proposal or any sale of the Real Property by the Borrower, and as a result the Proposal is not viable. As the Borrower/Mr. Liu continue their efforts to sell the Real Property notwithstanding the Prohibition Order and the Receivership Order, any continuation of the Proposal Proceedings may create a false impression with third parties that the Borrower has the authority to deal with the Real Property.
47. The Receiver is therefore seeking an Order expanding its powers from that set out in the Receivership Order, in order to authorize it to file an assignment in bankruptcy on behalf of the Borrower. This will result in an automatic vesting of all the Property, including the Real Property, in the Trustee, and terminate the rights of the Borrower. The Receiver believes that this step is appropriate in view of the Borrower's continuing attempts to deal with the Real Property, and the unnecessary separate proceedings that continue to exist.
48. A bankruptcy will also allow examinations under section 163 of the BIA to be undertaken, if that is determined to be useful in obtaining all necessary information to maximize the available realizations for the benefit of the creditors. Creditors of the Borrower will then have only one court officer to make all inquiries to, and all communications will be from one source. In an assignment in bankruptcy being filed by the Receiver, RSM would be named as trustee in bankruptcy of the Borrower. Paragraph 28 of the Receivership Order provides that nothing contained therein prevents the Receiver from acting as Trustee in Bankruptcy of the Borrower.
49. Although the Receiver is of the view that a bankruptcy should prevent any further confusion or attempts by the Borrower to interfere with or compete with the Receiver's

mandate, including to market and sell the Real Property for the benefit of all of the Borrower's creditors, the Receiver is also requesting that the Court specifically preclude the Borrower and its principal, Mr. Liu, and anyone acting on its, his or their behalf, from holding themselves out as having any capacity whatsoever to deal with the Real Property, to negotiate any terms for a sale of the Real Property as vendor, to engage as vendor with any third parties with respect to a sale of the Real Property, or to take any steps to delay, hinder or interfere with the Receiver's role pursuant to the Receivership Order. This additional relief will allow the Receiver to complete its mandate unimpeded.

50. In addition, the Receiver requires the Borrower and its principal Mr. Liu to comply with the information requests that have previously been made, which to date have not been complied with, as set out in paragraph 10 herein.
51. In accordance with the Receivership Order, TGF acts as counsel to the Receiver and was counsel to the Lender in the application for the appointment of the Receiver by the Court. The Receiver will utilize independent counsel in the event of a conflict arising at any time between the Lender and the Receiver and/or the Trustee in Bankruptcy.
52. The Receiver will provide further updates to the Court and all stakeholders in its next report.

## **CONCLUSIONS AND RECOMMENDATIONS**

53. Based on the foregoing, the Receiver respectfully requests that the Court make an Order:
  - (a) expanding the powers of the Receiver pursuant to the Receivership Order to specifically authorize the Receiver to file an assignment in bankruptcy on behalf of the Borrower in which RSM will be named as Trustee in Bankruptcy;
  - (b) prohibiting the Borrower and its principal, Mr. Liu, and anyone acting on its, his or their behalf from: (i) holding themselves out as having any capacity whatsoever to deal with the Real Property, (ii) negotiating, as vendor, any terms for a sale of the Real Property, (iii) engaging, as vendor, with any third parties with respect to a sale of the Real Property, (iv) taking any steps to delay or hinder the Receiver's sole

and exclusive power to sell the Real Property pursuant to the Receivership Order, or (v) taking any steps whatsoever with respect to any Property of the Borrower, including but not limited to the commencement or continuation of litigation; and

- (c) approving this First Report and the activities of the Receiver set out herein.

All of which is respectfully submitted to this Court as of this 20<sup>th</sup> day of January, 2020.

**RSM Canada Limited**, in its capacity as Court-appointed Receiver of  
3070 Ellesmere Developments Inc., and not in its personal or corporate capacity

Per:



Bryan A. Tannenbaum, FCPA, FCA, FCIRP, LIT  
President

# **SCHEDULE “1”**



Court File No. CV-19-00627187-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE MR.

)

FRIDAY, THE 13<sup>th</sup>

JUSTICE HAINEY

)

DAY OF SEPTEMBER, 2019

)

**2478888 ONTARIO INC.**

Applicant

- and -

**3070 ELLESMERE DEVELOPMENTS INC.**

Respondent

## **ORDER**

**(appointing Receiver)**

THIS APPLICATION brought by 2478888 Ontario Inc. for an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”) and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the “**CJA**”) appointing RSM Canada Limited as receiver (in such capacities, the “**Receiver**”) without security, of all of the Property (as defined herein) of 3070 Ellesmere Developments Inc. (the “**Borrower**”), was heard this day at 330 University Avenue, Toronto, Ontario.

ON HEARING the submissions of counsel for the Applicant, the Respondent, the intended Receiver and such other parties present, and on reading the consent of RSM Canada Limited to act as the Receiver,

## **SERVICE**

1. **THIS COURT ORDERS** that the time for service of the Notice of Application is hereby abridged and validated so that this matter is properly returnable today and hereby dispenses with further service thereof.

## **APPOINTMENT**

2. **THIS COURT ORDERS** that pursuant to section 243(1) of the BIA and section 101 of the CJA, RSM Canada Limited is hereby appointed Receiver, without security, of all of the property, assets and undertaking of 3070 Ellesmere Developments Inc., including but not limited to the real property municipally known as 3070 Ellesmere Road, Scarborough, Ontario, M1E 4C3, and more specifically described as PIN06186-0033 (LT) – Legal Description: PCL J-1 SECT M1227 BLK J PLAN 66M1227, CITY OF TORONTO, including all proceeds thereof (the “**Property**”).

## **RECEIVER’S POWERS**

3. **THIS COURT ORDERS** that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

- (a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;
- (b) to receive, preserve, and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of any Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;



- (c) to enter into any agreements, cease to carry on all or any part of the business, or cease to perform any contracts of the Borrower in relation to the Property;
- (d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;
- (e) to pay such protective disbursements as may be deemed necessary to preserve and protect the Property pending any disposition of same, or to prepare the Property for sale;
- (f) to receive and collect all monies and accounts now owed or hereafter owing to the Borrower arising from or in relation to the Property and to exercise all remedies of the Borrower in collecting such monies, including, without limitation, to enforce any security held by the Borrower;
- (g) to settle, extend or compromise any indebtedness owing to the Borrower arising from or in relation to the Property;
- (h) to execute, assign, issue and endorse documents of whatever nature in respect of the Property, whether in the Receiver's name or in the name and on behalf of the Borrower, for any purpose pursuant to this Order;
- (i) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

- (j) to market the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
- (k) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,
  - (i) without the approval of this Court in respect of any transaction not exceeding \$100,000, provided that the aggregate consideration for all such transactions does not exceed \$300,000; and
  - (ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, or section 31 of the Ontario *Mortgages Act*, as the case may be, shall not be required, and in each case the Ontario *Bulk Sales Act* shall not apply;
- (l) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens, encumbrances or other instruments affecting such Property, other than such permitted encumbrances as may be acceptable to the purchaser or rights that run with the land;
- (m) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;
- (n) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;

- (o) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Borrower;
- (p) to exercise any shareholder, partnership, joint venture, co-ownership or other rights which the Borrower may have arising from or in relation to the Property; and
- (q) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations;

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Borrower, and without interference from any other Person.

#### **DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER**

4. **THIS COURT ORDERS** that (i) the Borrower, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being “**Persons**” and each being a “**Person**”) shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

5. **THIS COURT ORDERS** that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the Property, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the “**Records**”) in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer,

software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

6. **THIS COURT ORDERS** that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

#### **NO PROCEEDINGS AGAINST THE RECEIVER**

7. **THIS COURT ORDERS** that no proceeding or enforcement process in any court or tribunal (each, a “**Proceeding**”), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

#### **NO PROCEEDINGS AGAINST THE PROPERTY**

8. **THIS COURT ORDERS** that no Proceeding against or in respect of the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Property are hereby stayed and suspended pending further Order of this Court.

### **NO EXERCISE OF RIGHTS OR REMEDIES**

9. **THIS COURT ORDERS** that all rights and remedies against the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any “eligible financial contract” as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver to carry on any business in respect of the Property which the Borrower is not lawfully entitled to carry on, (ii) exempt the Receiver from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

### **NO INTERFERENCE WITH THE RECEIVER**

10. **THIS COURT ORDERS** that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Borrower with respect to the Property, without written consent of the Receiver or leave of this Court.

### **CONTINUATION OF SERVICES**

11. **THIS COURT ORDERS** that all Persons having oral or written agreements with the Borrower or statutory or regulatory mandates for the supply of goods and/or services with respect to the Property, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Borrower are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Borrower or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

## **RECEIVER TO HOLD FUNDS**

12. **THIS COURT ORDERS** that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any part of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, and the proceeds of any borrowing advances made to the Receiver by the Applicant, shall be deposited into one or more new accounts to be opened by the Receiver (the “**Post Receivership Accounts**”). The monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein and after payment of all amounts owing to the Applicant, shall be held by the Receiver to be paid in accordance with the terms of any further Order of this Court.

## **EMPLOYEES**

13. **THIS COURT ORDERS** that all employees of the Borrower shall remain the employees of the Borrower and the Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

## **PIPEDA**

14. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a “**Sale**”). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all

material respects identical to the prior use of such information by the Borrower, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

#### **LIMITATION ON ENVIRONMENTAL LIABILITIES**

15. **THIS COURT ORDERS** that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

#### **LIMITATION ON THE RECEIVER'S LIABILITY**

16. **THIS COURT ORDERS** that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

#### **RECEIVER'S ACCOUNTS**

17. **THIS COURT ORDERS** that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless

otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the “**Receiver's Charge**”) on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings. The Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, save and except for the Charge/Mortgage of Land registered on title to the Property in favour of the Applicant, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA. For greater certainty, the Receiver’s Charge shall be subordinate in priority to the existing Charge in favour of the Applicant.

18. **THIS COURT ORDERS** that the Receiver and its counsel shall pass their accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

19. **THIS COURT ORDERS** that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands including from the borrowing advances made available by the Applicant, against its fees and disbursements, including legal fees and disbursements incurred at the standard rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

#### **FUNDING OF THE RECEIVERSHIP**

20. **THIS COURT ORDERS** that the Receiver be at liberty and it is hereby empowered to borrow from the Applicant such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed \$500,000 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the “**Receiver's Borrowings Charge**”) as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of



any Person, but subordinate in priority to: (i) the existing Charge in favour of the Applicant; (ii) the Receiver's Charge; and (iii) the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA. Advances by the Applicant to the Receiver hereunder shall be, and are hereby deemed to be priority advances made by the Applicant under the existing Charge granted by the Borrower in favour of the Applicant, and shall form part of the indebtedness secured by the existing Charge in favour of the Applicant, but for greater certainty, in all cases in priority to every other Person having, or claiming, any interest in the Property.

21. **THIS COURT ORDERS** that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

22. **THIS COURT ORDERS** that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "**Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.

23. **THIS COURT ORDERS** that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

#### **SERVICE AND NOTICE**

24. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/>) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the *Rules of Civil Procedure*. Subject to Rule 3.01(d) of the *Rules of Civil Procedure* and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL: <http://www.rsmcanada.com/3070-ellesmere-developments-inc.>

25. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Receiver is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Borrower's creditors or other interested parties at their respective addresses as last shown on the records of the Borrower and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

#### **RETENTION OF LAWYERS**

26. **THIS COURT ORDERS** that the Receiver may retain solicitors to represent and advise the Receiver in connection with the exercise of the Receiver's powers and duties, including without limitation, those conferred by this Order. The Receiver is specifically authorized and permitted to use the solicitors for the Applicant herein as its own counsel in respect of any matter where there is no conflict of interest. In respect of any legal advice or issue where a conflict may exist or arise in respect of the Applicant and the Receiver or a third party, the Receiver shall utilize independent counsel.

#### **GENERAL**

27. **THIS COURT ORDERS** that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

28. **THIS COURT ORDERS** that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Borrower.

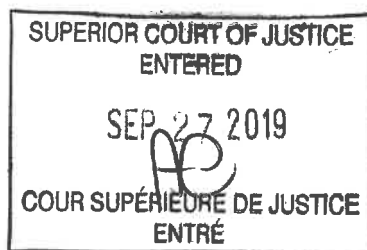
29. **THIS COURT ORDERS** that the Land Registry Office for the Land Titles Division of Toronto (No. 66) shall register this Order against title to the real property municipally known as 3070 Ellesmere Road, Scarborough, Ontario, M1E 4C3, and more specifically described as PIN06186-0033 (LT) – Legal Description: PCL J-1 SECT M1227 BLK J PLAN 66M1227, CITY OF TORONTO.

30. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

31. **THIS COURT ORDERS** that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

32. **THIS COURT ORDERS** that the Applicant shall have its costs of this application, up to and including entry and service of this Order, provided for by the terms of the Applicant's security or, if not so provided by the Applicant's security, then on a substantial indemnity basis to be paid by the Receiver from the Borrower's estate through borrowings obtained by the Receiver in accordance with paragraph 20 hereof.

33. **THIS COURT ORDERS** that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.



A handwritten signature in black ink, appearing to read "A. Hainey". The signature is written in a cursive style and is positioned to the right of the court stamp.

**SCHEDULE "A"**

**RECEIVER CERTIFICATE**

CERTIFICATE NO. \_\_\_\_\_

AMOUNT \$ \_\_\_\_\_

TO: 2478888 ONTARIO INC.

1. THIS IS TO CERTIFY that RSM Canada Limited, the receiver (the “**Receiver**”) of certain real property of 3070 Ellesmere Developments Inc. (the “**Borrower**”) including all proceeds thereof (collectively, the “**Property**”) appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) dated the \_\_\_ day of \_\_\_\_\_, 2019 (the “**Order**”) made in an action having Court file number \_\_-CL-\_\_\_\_\_, has received as such Receiver from the holder of this certificate (the “**Lender**”) the principal sum of \$ \_\_\_\_\_, being part of the total principal sum of \$ \_\_\_\_\_ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded monthly, not in advance, on the 1<sup>st</sup> day of each month after the date hereof at a rate per annum equal to 9.75% per cent above the prime commercial lending rate of the Toronto Dominion Bank (TD Bank Prime Rate) in effect from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person other than the Lender, but subject to the priority of the charges set out in paragraph 21 of the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the \_\_\_\_ day of \_\_\_\_\_, 2018.

**RSM Canada Limited**, solely in its capacity as  
Receiver of the Property, and not in its personal  
capacity

Per: \_\_\_\_\_

Name:

Title:

IN THE MATTER OF Section 101 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43, as amended, and in the matter of Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

2478888 ONTARIO INC.

- and -

3070 ELLESMERE DEVELOPMENTS INC.

Applicant

Respondent

Court File No.: CV-19-00627187-00CL

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

Proceedings commenced at Toronto, Ontario

**ORDER  
(appointing Receiver)**

**THORNTON GROUT FINNIGAN LLP**  
TD West Tower, Toronto-Dominion Centre  
100 Wellington Street West, Suite 3200  
Toronto, Ontario M5K 1K7  
Fax: (416) 304-1313

**D.J. Miller (LSO# 34393P)**  
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**Owen Gaffney (LSO#75017B)**  
Tel: (416) 304-1109 / Email: [ogaffney@tgf.ca](mailto:ogaffney@tgf.ca)

Lawyers for the Applicant, 2478888 Ontario Inc.

# **SCHEDULE “2”**

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

**IN THE MATTER OF** Section 101 of the *Courts of Justice Act*, R.S.O. 1990 c.C.43, as amended, and in the matter of Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

**B E T W E E N:**

**2478888 ONTARIO INC.**

Applicant

**- and -**

**3070 ELLESMERE DEVELOPMENTS INC.**

Respondent

**AFFIDAVIT OF HENRY GOLDBERG  
(Sworn September 11, 2019)**

I, HENRY GOLDBERG, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

- I. I am an Officer, holding the title of General Manager of 2478888 Ontario Inc. (the “**Lender**”) having primary responsibility for this matter on behalf of the Lender and, as such, I have personal knowledge of the matters to which I depose herein. Unless I indicate otherwise, the facts herein are within my own personal knowledge and are true. Where I have indicated that I have obtained facts from other sources, I have identified the sources and I believe those facts to be true.



2. This affidavit is sworn in support of an application by the Lender for an order appointing RSM Canada Limited (“**RSM**”) as the receiver (the “**Receiver**”), of the real property owned by 3070 Ellesmere Developments Inc. (the “**Borrower**”) pursuant to Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, and Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”).

### **Respondents**

3. According to the records maintained by the Ministry of Government Services (the “**Ministry**”), the Borrower was incorporated pursuant to the laws of Ontario on January 3, 2014. The registered head office of the Borrower is listed as 1600 16<sup>th</sup> Avenue, Richmond Hill, Ontario, L4B 4N6. Attached hereto and marked as **Exhibit “A”** is a true copy of the Corporation Profile Report with respect to the Borrower.
4. The Borrower is a single purpose entity incorporated as a holding company for a planned residential real estate development. The Borrower is the registered title holder of certain real property municipally known as 3070 Ellesmere Road, Scarborough (the “**Property**”). The Property is a vacant parcel of land with no existing rental income. To my knowledge, the Borrower does not carry on any other business.
5. I understand from my review of the motion record filed in connection with the September 11 Motion (as herein defined) that, on or about May 13, 2016, the Borrower entered into a Joint Venture Agreement (as amended, the “**JV Agreement**”) with 2518358 Ontario Inc. (“**Rise**”). The Lender was not aware of the JV Agreement at the time of the Loan Commitment and any advances thereunder. Pursuant to the JV Agreement, Rise was to receive an undivided fifty percent (50%) beneficial interest in the Property upon certain

conditions being met, including the commencement of excavation on the Property. There is ongoing litigation between the Borrower and Rise regarding the JV Agreement and Rise's entitlements thereunder. Rise maintains that it has a 50% beneficial interest in the Property; however, the Borrower maintains that the condition precedent to the granting of such beneficial interest was not satisfied.

### **Mortgage Loan Commitment**

6. Pursuant to a Mortgage Loan Commitment dated August 19, 2016 (as amended, the "**Loan Commitment**") issued by Toronto Capital Corp. (in Trust) as agent for a group of individual lenders including the Lender (collectively, "**TCC**"), TCC made a mortgage loan available to the Borrower in the original principal amount of \$5,000,000 plus interest and costs (the "**TCC Mortgage Loan**"). Attached hereto and marked as **Exhibit "B"** is a true copy of the Loan Commitment.
7. At the time of the Loan Commitment, Cameron Stephens Financial Corporation ("**Cameron Stephens**") held a first priority mortgage over the Property in the amount of \$6,000,000 (the "**Cameron Stephens Mortgage**"). Pursuant to the Loan Commitment, in the event Cameron Stephens called for the Cameron Stephen Mortgage to be repaid, TCC was obliged to immediately pay such mortgagee and assume Cameron Stephens' position as first mortgagee on title to the Property.
8. In consideration of the Loan Commitment, the Borrower granted to TCC a second-ranking charge in the principal amount of \$5,000,000 (the "**TCC Charge**") and delivered an Assignment of Rents Agreement to the Lender, each in respect of the Property. The TCC Charge and a Notice of Assignment of Rents were each registered against title to the

Property on September 15, 2016. The TCC Charge was subsequently assigned to the Lender on May 18, 2018. Attached hereto and marked as **Exhibit “C”** are true copies of the TCC Charge and Notice of Assignment of Rents instruments registered on title to the Property.

9. TCC advanced the funds pursuant to the Loan Commitment, as secured by the TCC Charge, in three installments on September 15, 2016, September 20, 2016, and November 21, 2016. As is described below, the TCC Charge is now the first-ranking charge as a result of an advance and protective disbursement made to Cameron Stephens to repay the Cameron Stephens Mortgage, in accordance with the terms of the Loan Commitment.
10. As at September 6, 2019, the Borrower was indebted to the Lender in the amount of CAD\$6,545,298.24 (which includes principal, accrued interest, and bonus) in respect of the Protective Disbursement portion of the TCC Charge, together with accruing interest thereon and all costs and fees, including legal fees and disbursements, incurred by the Lender until the Protective Disbursement (as herein defined) is paid in full.
11. Together with the Subordinate Interest (as defined herein), a total of approximately \$13.5 million is secured by the TCC Charge and is currently due and owing by the Borrower.
12. There are several subsequent encumbrances on title to the Property:
  - (a) a second-ranking charge in the amount of \$2,000,000 in favour of Rise;
  - (b) a third-ranking charge in the amount of \$1,000,000 in favour of Cassels Brock & Blackwell LLP (the “**Cassels Charge**”) registered on December 3, 2018;



- (c) a notice dated January 16, 2019 related to Cassel's Charge increasing the amount of same to \$2,000,000; and
- (d) a \$299,137 tax lien registered by the Canada Revenue Agency.

### **Payment of Cameron Stephens Loan**

13. Paragraph 13 of the Charge Provisions attached as a schedule to the TCC Charge states:

The Chargor covenant and agree... to keep all encumbrances and agreements in good standing... The failure by the Chargor to comply with this covenant shall constitute an event of default hereunder and entitle the Chargees, at their sole option, to avail themselves of the remedies available hereunder and at law... In addition, at the Chargees' sole option, the Chargor hereby agrees that the Chargees may, if the Chargor fails to comply as aforesaid, satisfy any matter raised in the preceding paragraph or other encumbrance now or hereafter existing or to arise or to be claimed upon the mortgage premises, and the amount so paid, together with all costs associated therewith, shall be added to the principal sum hereby secured and bear interest at the rate of interest set out herein and shall be payable forthwith by the Chargor, and, in default of payment, the entire principal sum, all accrued and unpaid interest and all costs shall become immediately payable at the option of the Chargees and the remedies hereby given and/or available at law may be exercised forthwith without notice.

14. In December 2017, the Borrower defaulted under the Cameron Stephens Mortgage. As a result, on or about January 10, 2018 the Lender made an advance by way of a protective disbursement in the amount of \$5,218,776.21 (the "**Protective Disbursement**") to repay the Cameron Stephens Mortgage.
15. The Protective Disbursement was added to the indebtedness secured by the TCC Charge, such that the TCC Charge secured the principal amount of \$11,886,240.45 as of August 14, 2018, together with accruing interest thereon and all costs and fees that have accrued and been incurred since that date.

## 261 Ontario Assignment Transaction

16. On May 18, 2018, the Lender sold its interest (the “**Subordinate Interest**”) in the TCC Mortgage Loan to 2615333 Ontario Inc. (“**261 Ontario**”). The two parties entered into an Inter-Lender Agreement of the same date (the “**Inter-Lender Agreement**”). Pursuant to the terms of the Inter-Lender Agreement, the Lender’s Protective Disbursement remained as a first-ranking priority interest over the TCC Mortgage Loan. The Lender also retained the sole right to bring enforcement actions in respect of the TCC Charge. Attached hereto and marked as **Exhibit “D”** is a true copy of the Inter-Lender Agreement.
  
17. On the same date, the Lender, Borrower, and 261 Ontario entered into a Borrower Confirmation Agreement (the “**Borrower Confirmation Agreement**”). Pursuant to the Borrower Confirmation Agreement, the Borrower confirmed, among other things:
  - (a) the TCC Charge secures the TCC Mortgage Loan as well as the Protective Disbursement and is a good and valid mortgage, enforceable in accordance with its respective terms;
  - (b) the Protective Disbursement was validly added to the balance of the indebtedness secured by the TCC Charge;
  - (c) the Lender is entitled to interest on the Protective Disbursement at the interest rate set out in the TCC Charge;
  - (d) the Borrower was in default under the TCC Mortgage Loan; and
  - (e) the total amount outstanding as of the date thereof was \$11,201,842.98, plus interest.

18. The Borrower further confirmed that it would not take, or cause or permit any other person to take on its behalf, any steps or actions by which, among other things, the enforceability of the TCC Charge and the rights of the Lender under the Borrower Confirmation Agreement would be challenged, delayed, defeated, impaired or diminished in any way. Furthermore, the Borrower agreed that it would not challenge, object to, compete with or impede in any manner any enforcement action, including the appointment of a Receiver, in respect of the TCC Charge. Attached hereto and marked as **Exhibit "E"** is a true copy of the Borrower Confirmation Agreement.
19. Also on May 18, 2018, as noted above, TCC assigned the TCC Charge and the Notice of Assignment of Rents from the group of lenders it represented, to the Lender alone. This transfer of charge was registered against title to the Property. Attached hereto and marked as **Exhibit "F"** is a true copy of the parcel register for the Property.

#### **Default and Issuance of Notice of Sale and Intent to Enforce Security**

20. As a result of certain defaults, on September 29, 2017 the Lender issued a Notice of Intent to Enforce Security pursuant to s. 244 of the BIA (the "**2017 Notice of Intent**") in respect of the TCC Mortgage Loan. Attached hereto and marked as **Exhibit "G"** is a true copy of the 2017 Notice of Intent.
21. On September 29, 2017, the Lender issued a Notice of Sale Under Mortgage ("**Notice of Sale**"). Attached hereto and marked as **Exhibit "H"** is a true copy of the Notice of Sale.
22. On August 14, 2018, the Lender issued a new Notice of Intent to Enforce Security pursuant to s. 244 of the BIA (the "**2018 Notice of Intent**") and, collectively with the



2017 Notice of Intent, the “**Notices of Intent**”) listing the aggregate amount of the TCC Mortgage Loan and Protective Disbursement secured by the TCC Charge at that time. Attached hereto and marked as **Exhibit “I”** is a true copy of the 2018 Notice of Intent.

23. The Lender provided the Borrower with ample time to redeem the mortgage following the 2018 Notice of Intent. The Borrower assured the Lender that such redemption would occur and offered to enter into a forbearance agreement. No such redemption ultimately transpired. Attached hereto and marked as **Exhibit “J”** is a true copy of certain e-mail exchanges with counsel to the Borrower in this regard.
24. As noted in more detail below, as a result of ongoing litigation between, among others, the Borrower and one of its shareholders, the Borrower no longer has the ability to sell or encumber the Property. The Lender’s mortgage has also not been redeemed or refinanced.
25. The relevant notice periods under the Notices of Intent and Notice of Sale have expired and the Lender is in a position to enforce all of its rights and remedies against the Borrower, including the right to seek the appointment of the Receiver. Pursuant to the Borrower Confirmation Agreement, the Borrower has agreed not to challenge, object to, or impede in any manner and enforcement action by the Lender in respect of the TCC Charge, including the appointment of a Receiver. The Lender requires that that Borrower Confirmation Agreement be respected, at the very time and in the precise circumstances in which it was intended to apply.

## **BIA Proposal Proceedings**

26. On August 20, 2019, the Borrower filed a Notice of Intention to File a Proposal (the proceedings commenced thereby, the “**NOI Proceedings**”). The Borrower subsequently served materials dated August 29, 2019 for a motion (the “**September 11 Motion**”) in which the Borrower is seeking, among other things:

- (a) the appointment of a Chief Restructuring Advisor of the Borrower;
- (b) approval of a Sales and Investment Solicitation Process (the “**SISP**”);
- (c) approval of the retention of Avison Young Commercial Real Estate (Ontario) Inc. as the sales process agent for the SISP (in such capacity, the “**SPA**”);
- (d) approval of a Stalking Horse Purchase Agreement (the “**SHPA**”); and
- (e) certain court-ordered charges against the Property in the aggregate amount of \$1.1 million in favour of parties including counsel for the Borrower, the Chief Restructuring Advisor, the Proposal Trustee and others.

27. The Lender does not support the relief sought in the September 11 Motion, and specifically opposes it. The September 11 Motion is brought in direct contravention of the Borrower Confirmation Agreement, pursuant to which the Borrower agreed, among other things, to not take any steps or action to compete with or impede in any manner any enforcement action taken by the Lender. Furthermore, the Lender has lost all trust in the Borrower’s principal, which extends to any and all professionals directed or selected by the Borrower’s principal.



28. There are also significant issues related to the costs that the various parties propose to incur during the SISP, to pursue a sale of a vacant parcel of land. A debtor-in-possession in a BIA Proposal proceeding, a Chief Restructuring Advisor, a Sale Process Advisor and a proposal trustee are not all required to conduct a SISP that the Receiver alone could run at significantly lower cost in a substantially similar timeline.
29. The Lender is not prepared to have the Property sold by any process involving the Borrower or parties it has appointed, selected, retained or who would be consulting in any capacity with the Borrower. The Borrower has also not provided any appraisal of the Property to support the Purchase Price under the SHPA. As noted below, certain aspects of the SISP in its current form are likely to dissuade third parties from participating in the process. An open process run by the proposed Receiver may result in a higher recovery for the Borrower's other creditors. If the Receiver determines that the SHPA is the best path forward, it will be open to the Receiver to engage with that purchaser and pursue same.
30. The Lender has completely lost faith in the Borrower and does not believe that a debtor-run sales process is in its best interest, or that of all stakeholders. The Lender is outside of the stay of proceedings in the BIA proposal proceedings commenced by the Borrower, and intends to enforce its rights in respect of the Property.

### **The Need for a Receiver**

31. As a result of its former use as a municipal waste disposal site, the Property is subject to various environmental liabilities. The Receiver, once appointed, will be in the best position to determine whether it is preferable to proceed with the SHPA notwithstanding

the potential for a significant rebate of the purchase price based on remediation costs for environmental clean-up, or seek to address that uncertainty.

32. The Receiver, once appointed, may determine that an updated Phase II Environmental Assessment may be required to determine, among other things, the potential remediation costs associated with the Property. The Borrower has not conducted a Phase II Environmental Assessment and has given no indication that one will be conducted prior to the sale of the Property. The Borrower has also not obtained an estimate of the remediation costs associated with the Property. The lack of certainty regarding potential environmental liabilities may have a chilling effect on bids during the Borrower's proposed SISF. It may also result in significant potential adjustments or rebates being included in offers received from prospective purchasers, or be subject to extensive due diligence relating to environmental concerns. This would not allow any vendor to assess offers on a like basis, with an "apples to apples" comparison based on common information available to all prospective purchasers.
33. The process the Borrower is seeking to commence with the September 11 Motion is wasteful, inefficient and presents a significant risk to the interests of mortgagees. Moreover, the other mortgagees oppose the debtor-run sales process and support the appointment of the Receiver by the Court on application by the Lender.
34. The SHPA contemplates a dollar for dollar adjustment to the Purchase Price thereunder in the event the remediation costs associated with Property exceed \$2,000,000. Without the Phase II Environmental Assessment noted above, there is no certainty regarding the

quantum of such remediation costs, and therefore actual Purchase Price and recovery for other mortgagees and unsecured creditors.

35. I believe that the appointment of a Receiver is necessary, and just and convenient in the circumstances as:

- (a) the TCC Charge is in default and has not been repaid;
- (b) all relevant notice periods have expired;
- (c) the Borrower is legally prohibited from selling the Property itself, and the introduction of layers of professionals in various capacities with a view to appearing to distance the Borrower from controlling the process is wasteful and unnecessary;
- (d) the Receiver can bring efficiency, transparency, distance from the Borrower and a “fresh slate” to the realization of the Property for the benefit of all stakeholders.

36. The Lender is prepared to make a loan advance to the Receiver in the amount of \$300,000 (subject to an increase, if required) (the “**Receiver’s Advance**”) upon an Order being made by the Court appointing RSM as Receiver. The Receiver’s Advance will be available to fund costs and disbursements of the receivership, including those relating to preservation of the Property, and professional fees. The amount of the Receiver’s Advance will be added to the TCC Charge in favour of the Lender, and accrue interest at the same rate as is payable under the Mortgage Loan Commitment.

37. The Order sought by the Lender also proposes that as a matter of cost efficiency, the Receiver be permitted if it chooses, and provided no conflict exists or arises, to utilize


counsel for the Applicant in carrying out its mandate as Receiver. Independent counsel will be retained to address any matters where any conflict may arise or exist.

38. The Lender requests that the Receiver be appointed, as it is just and convenient in the circumstances and is necessary to protect and realize upon the TCC Charge to repay amounts owing to the Lender and the Borrower's other creditors.

39. I swear this affidavit in support of an application by the Lender for the appointment of the Receiver and for no other or improper purpose.

'SWORN before me at the City of Toronto,  
in the Province of Ontario, this 11<sup>th</sup> day of  
September, 2019.

  
Commissioner for Taking Affidavits

  
HENRY GOLDBERG



IN THE MATTER OF Section 101 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43, as amended, and in the matter of Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

2478888 ONTARIO INC.

- and -

3070 ELLESMERE DEVELOPMENTS INC.

Applicant

Respondent

Court File No.: CV-19-00627187-00CL

ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

Proceedings commenced at Toronto, Ontario

AFFIDAVIT OF HENRY GOLDBERG

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# **SCHEDULE “3”**

**Court of Appeal No.:**  
**Bankruptcy Court File No.:** BK-19-2547832-31  
**Estate File No.:** 31-2547832  
**Commercial List Court File No.:** CV-19-00627187-00CL

**COURT OF APPEAL FOR ONTARIO**

**B E T W E E N:**

2478888 Ontario Inc.

Applicant

(Respondent in Appeal)

and

3070 Ellesmere Developments Inc.

Respondent

(Appellant)

**NOTICE OF APPEAL**

**THE APPELLANT**, 3070 Ellesmere Developments Inc. **APPEALS** to the Court of Appeal from the decision of The Honourable Justice Hailey dated September 27, 2019 (the “**Receivership Order**”) made at Toronto.

**THE APPELLANT ASKS** that the Receivership Order be set aside and an Order be granted as follows:

1. Rescinding and declaring null and void the Order of Justice Hailey issued September 27<sup>th</sup>, 2019 appointing a receiver over the assets of the Appellant including the real property known as 3070 Ellesmere Road, Scarborough, Ontario (the “**Property**”);
2. Dismissing, with prejudice, the Application by the Respondent to appoint the Receiver (the

“**Application**”);

3. Costs of this appeal in favour of the Appellant on a substantial indemnity basis;
  4. Costs of the Application below in favour of the Appellant on a substantial indemnity basis;
- and
5. Such further or other relief as this Honourable Court deems just.

**THE GROUNDS OF APPEAL** are as follows:

6. On August 20<sup>th</sup>, 2019, the Appellants filed a notice of intention to file a proposal in accordance with section 50.4 of the *Bankruptcy and Insolvency Act* (the “**Act**”) with the Superintendent of Bankruptcy and commenced restructuring proceedings pursuant to the Act (the “**NOI Proceedings**”).

7. Pursuant to the provisions of the Act, in particular section 69, all creditors (including secured creditors) were thereafter stayed from enforcing any rights which they held against the Appellant or its property. Section 69 states:

69 (1) Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,

(a) No creditor has any remedy against the insolvent person or the insolvent person’s property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,

8. On September 13, 2019, the Appellant brought a motion before Justice Hailey of the Ontario Superior Court (Commercial List) to, inter alia, approve a sale process for the sale of its principal asset (being the Property, which is valued at the least \$16,000,000) (the “**Sale Process Motion**”).



9. In accordance with the Sale Process Motion, the Appellant intended to conduct a stalking horse process which would have resulted in the sale of the Property by November 30, 2019 with a guaranteed minimum price for the Property of \$16,000,000.

10. The Appellant had entered into a binding agreement with a proposed Stalking Horse, which agreement was put before the court for approval (the “**Stalking Horse Agreement**”).

11. The Sale Process and Stalking Horse Agreement was recommended for approval to the Court by the Proposal Trustee.

12. In response to that motion, the Respondent issued the Application to appoint a receiver in accordance with section 243 of the Act and section 101 of the *Courts of Justice Act* (Ontario), which was also returnable and heard on September 13, 2019.

13. The Respondent asserts that they hold the first mortgage on the Property in the amount of approximately \$6,500,000 and are therefore a secured creditor.

14. The Respondent did not bring a motion in the NOI Proceedings to lift the stay, or a motion to terminate the proposal proceedings under section 50.4(11) of the Act. Their application sought only the appointment of a receiver.

15. The court issued a one page endorsement on September 13, 2019, with effect as at September 27, 2019, granting an order appointing a receiver in accordance with the Respondent’s Application.

16. The Receivership Order appointed a receiver over the Property, and contained the standard provisions of the Commercial List Users Committee standard form of order, including a borrowing charge provision allowing borrowing up to \$500,000 and an unlimited charge for the payment of professional fees incurred in the receivership.

17. The Receivership Order did not terminate the NOI Proceedings.
18. The two week period between the endorsement and the Receivership Order was created to allow the Appellant to repay the Respondent. The Appellant failed to do so and the Receivership Order appealed from was effective on September 27, 2019.
19. In concluding that the Respondent was entitled to the appointment of a receiver, the learned application Judge made the following errors:
  - (a) The court failed to dismiss the Application as fatally flawed (given the existence of the stay of proceedings in the NOI Proceedings pursuant to section 69 of the Act), given that the Application did not ask to lift the stay to allow the receiver to be appointed.
  - (b) The court did not properly consider whether or not the Respondent met the test for the lifting of the stay pursuant to section 69.4 of the Act. In particular, the court did not consider or make any finding required by the Act that:
    - (i) the creditor or person [seeking to lift the stay] is likely to be materially prejudiced by the continued operation of those sections [being the stay provisions]; or,
    - (ii) it is equitable on other grounds to make such a declaration.
  - (c) The court erroneously failed to dismiss the Application, given the existence of the NOI Proceedings, given that the Respondent failed to require that the NOI Proceedings be terminated in accordance with section 50.4(11) of the Act.
  - (d) The court did not properly consider whether or not the Respondent met the factors set out in section 50.4(11) of the Act allowing for the NOI Proceedings to be

terminated, which factors are:

- (i) the insolvent person has not acted, or is not acting, in good faith and with due diligence;
  - (ii) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question;
  - (iii) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors;  
or,
  - (iv) the creditors as a whole would be materially prejudiced were the application under this subsection rejected.
- (e) The court erroneously considered a Notice of Intention to Enforce Security (a “NITES”) in accordance with section 244 of the Act issued by the Respondent in November 2017 and again in August 2018, the latter being 12 months prior to the issuance of the NOI, when in fact those NITES had lapsed and were of no force or effect at the time of the NOI filing or the hearing of the Application.
- (f) The court provided no reasons or authority to explain or support its decision to allow the Application for the appointment of a receiver in these unusual circumstances.
- (g) The court erroneously concluded that the Application had to be heard on an urgent basis when there was no urgency, given that the Respondent was under court supervision in the NOI Proceedings and under the supervision of the Proposal Trustee in those proceedings (who supported the Appellant’s motion and opposed

the appointment of a receiver).

- (h) The court erred in appointing a receiver while allowing the NOI Proceedings to continue, thereby creating an unnecessarily duplicative process dealing with the same assets and parties.
- (i) The court did not properly consider the law set out in section 244 (2.1) of the Act that consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice required by section 244 of the Act.
- (j) The court did not properly consider the law set out in section 69 of the Act that,
  - (b) No provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on
    - (i) The insolvent person's insolvency,
    - (ii) The default by the insolvent person of an obligation under the security agreement, or,
    - (iii) The filing by the insolvent person of a notice of intention under section 50.4.

the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as he would otherwise have, has any force or effect.

- (k) The court did not properly consider that granting a receivership in these circumstances frustrates the intent of Parliament who expressly provided in the Act the opportunity for debtors to have protection from enforcement by all of its creditors, including secured creditors, for a finite period of time, as was being sought by the Appellant in this case.

- (l) The court erred in determining that it had inherit jurisdiction to contravene the express provisions of the Act or in finding that there was a “gap” in the Act into which inherit jurisdiction could apply.
- (m) The court erred in failing to approve the Sale Process which was in the best interest of the secured and unsecured creditors of the Appellant. The debt claimed as owing by the Respondent was materially less than the amount to be realized by the Stalking Horse Agreement.
- (n) The court erred in failing to give proper weight to the impact of the Application and the Sale Process on the other stakeholders of the Appellant beyond the Respondent (who would be fully repaid upon the completion of the Stalking Horse sale).
- (o) The Court erred in failing to provide any reasons why the Stalking Horse was not in the best interest of the creditors in the NOI Proceedings.

**THE BASIS OF THE APPELLATE COURT’S JURISDICTION IS:**

20. Section 6(1)(b) of the *Courts of Justice Act*, RSO 1990, c C43, as amended, as the order under appeal is a final order of a judge of the Superior Court of Justice and is not an order referred to in section 19(1)(a) or an order from which an appeal lies to the Divisional Court under another Act; and,

21. The Receivership Order appointed a receiver jointly under the *Courts of Justice Act* and the Act;

22. Although the motion was heard on Sept 13, and an endorsement was issued that same day, the Receivership Order was suspended, in accordance with its terms until September 27, 2019;

23. No publically known steps have been taken by the Court appointed receiver since

September 27, 2019, in respect of the receivership. No further court attendances have been scheduled and no sale process has been commenced. The parties remain in the same position on October 15 as they were in on September 27;

24. There remains a parallel insolvency proceeding in accordance with the NOI Proceedings as set out above. The suspension of the Receivership Order pending appeal does not leave the assets or the business exposed or without the oversight of a court officer;

25. Sections 193 (a), (b), and (c) of the Act;

26. The appointment of a receiver and the decision to appoint the receiver in place of allowing for the Sale Process involved property that exceeds \$10,000 in value as the motion empowers the receiver to sell the Property worth in excess of \$16,000,000 and denies the Appellant's motion to sell that Property;

27. The Receivership Order also empowers the receiver to borrow up to \$500,000 in priority to all creditors and grants charges over the Property in an unlimited amount for professional fees in priority to all creditors;

28. The Receivership Order also impacts the future rights of the creditors in the NOI Proceedings who are prejudiced by the appointment of the receiver and the dismissal of the Sale Process in the NOI Proceedings; and,

29. As such, leave to appeal is not required.

30. The question as to how long a secured creditor can continue to rely upon a NITES (which it issues but takes no steps to enforce for more than a year) to exempt that secured creditor from the stay of proceedings in an NOI is an essential question which must be understood to allow the proper operation of the law of insolvency in Canada.

31. In the alternative, if leave to appeal is required under section 193(e) of the Act, the Appellant seeks leave to appeal for the reasons set out above, and requests that the motion for leave be heard at the same time as the appeal.

**Date:** October 15, 2019

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**Court of Appeal No.:**  
**Bankruptcy Court File No.:** BK-19-2547832-31  
**Estate File No.:** 31-2547832  
**Commercial List Court File No.:** CV-19-00627187-00CL

2478888 Ontario Inc.

and

3070 Ellesmere Developments Inc.

Applicant (Respondent in Appeal)

Respondent (Appellant)

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**COURT OF APPEAL FOR ONTARIO**

Proceeding commenced at Toronto

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**NOTICE OF APPEAL**

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# **SCHEDULE “4”**

**COURT OF APPEAL FOR ONTARIO**

**B E T W E E N:**

**2478888 ONTARIO INC.**

Applicant (Respondent) / Moving Party

- and -

**3070 ELLESMERE DEVELOPMENTS INC.**

Respondent (Appellant) / Responding Party

**NOTICE OF MOTION**

The Applicant (Respondent) / Moving Party, 2478888 Ontario Inc., will make a motion to a panel of the Court of Appeal on a date to be fixed by the Registrar, at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

**PROPOSED METHOD OF HEARING:** The motion is to be heard orally.

**THE MOTION IS FOR:**

1. An Order quashing the Appellant's appeal from the Order of the Honourable Justice Hainey dated September 13, 2019 (the "**Receivership Order**").
2. In the alternative to (1), an Order:
  - (a) granting the Respondent security for costs of the appeal in the amount of \$50,000, or some other amount as the Court deems just; and

- (b) directing that the appeal from the Receivership Order be heard on an expedited basis.
- 3. Costs of this motion on a full indemnity scale.
- 4. Such further and other relief as this Court shall deem just.

**THE GROUNDS FOR THE MOTION ARE AS FOLLOWS:**

**Overview**

- 1. The Appellant, 3070 Ellesmere Developments Inc. (the “**Appellant**” or the “**Borrower**”), is a single purpose entity incorporated as a holding company for a future residential real estate development. The Borrower is the registered title holder of certain real property municipally known as 3070 Ellesmere Road, Scarborough (the “**Property**”).
- 2. The Property is a vacant parcel of land with no rental or other income derived from it. The Borrower does not carry on any other business or have any tangible assets other than the Property.
- 3. The Appellant is insolvent, and had commenced proceedings pursuant to the *Bankruptcy and Insolvency Act* (Canada) (the “**BIA**”) confirming its insolvency prior to the Receivership Order being issued.
- 4. As set out in more detail below:



- (a) The Borrower is prohibited by two court Order in two separate proceedings from taking any steps to sell or encumber the Property. One of those orders is the Receveirship Order which is the subject of this appeal. The other order was made in a separate proceeding on February 26, 2019, as discussed below, and has never been appealed or set aside and remains in effect.
- (b) The Receivership Order was issued on terms which included the consent of the Appellant, in consideration for a period of time given to the Appellant by the Motions Judge to satisfy his obligations to the Respondent, which terms were not fulfilled.
- (c) This appeal was brought outside of the ten-day time period required by the *Bankruptcy and Insolvency Act* Rules, and no extension of time was requested or ought to be granted.
- (d) As the Receivership Order that is the subject of this appeal was a consent order, leave to appeal is required pursuant to section 133 of the *Courts of Justice Act* (Ontario) and leave ought not to be granted.
- (e) In accordance with section 193 of the BIA and the decisions of this Court providing guidance on the circumstances within which leave may be granted from orders appointing a Receiver, leave to appeal is required and ought not to be granted.

- (f) The appeal is frivolous and moot in any event, by virtue of a prior Order which has never been appealed, prohibiting the Appellant from being able to deal with the Property over which the Receiver was appointed, which is what the Appellant seeks to be able to do through the appeal.
- (g) The Appellant contractually agreed that it would not take any steps at any time to delay or thwart enforcement steps taken by the Lender (as defined below) specifically including any application for the appointment of a Receiver which is the Receivership Order that is the subject of the appeal.
- (h) Leave to appeal ought not be granted and, if granted, the appeal ought to be expedited. Creditors of the insolvent Appellant are prejudiced by the appeal for which there is no ability to mitigate or be compensated, due to the single-asset nature of the Appellant's property and the ongoing costs in respect of the Property during the period of any non-expedited appeal.

### **The Relationship Between the Appellant and Respondent**

5. Pursuant to certain transactions, 2478888 Ontario Inc. (the "**Lender**" or the "**Respondent**") is the holder of a mortgage that is secured by a charge registered against the Property (the "**Mortgage**"). As of September 18, 2019, the amount required to discharge the Mortgage was \$13,616,330.52.

6. On May 18, 2018 following earlier defaults under the Mortgage, the Lender and Borrower entered into a Borrower Confirmation Agreement (the “**Borrower Confirmation Agreement**”). Pursuant to the Borrower Confirmation Agreement, the Borrower confirmed the amount of its indebtedness at that time and, among other things, confirmed that it would not take, or cause or permit any other person to take on its behalf, any steps or actions by which, among other things, the enforceability of the Mortgage and the rights of the Lender under the Borrower Confirmation Agreement would be challenged, delayed, defeated, impaired or diminished in any way. Furthermore, the Borrower agreed that it would not challenge, object to, compete with or impede in any manner any enforcement action, including the appointment of a Receiver, whether by the Court upon application by the Lender or by the Lender privately, in respect of the Mortgage.

#### **Default and Issuance of Notice of Sale and Intent to Enforce Security**

7. As a result of certain defaults under the Mortgage, the Lender issued Notices of Intent to Enforce Security pursuant to s. 244 of the BIA on September 29, 2017 and August 14, 2018 (the “**Notices of Intent**”).
8. The Borrower was given ample time to repay the indebtedness secured by the Mortgage following the Notices of Intent. No such repayment or redemption occurred.

### **Borrower Prohibited from Selling the Property**

9. The Borrower had been involved in ongoing litigation with, among others, one of its shareholders (and now its judgment creditor), 2449880 Ontario Inc.
10. In those separate court proceedings, an Order was granted on February 26, 2019 by Justice Hainey against the Borrower and others ordering, among other things, that the Appellant is “enjoined from taking any steps to sell or otherwise encumber the property known municipally as 3070 Ellesmere Road in Scarborough, Ontario...” (the “**Prohibition Order**”). The Prohibition Order was never appealed or set aside.

### **The NOI Proceeding**

11. Notwithstanding the Prohibition Order, on August 20, 2019 the Borrower filed a Notice of Intention to File a Proposal with the Official Receiver of the Superintendent of Bankruptcy’s Office (the proceedings commenced thereby, the “**NOI Proceeding**”) pursuant to the BIA. The Borrower subsequently served motion materials within the NOI Proceeding dated August 29, 2019 for a motion originally returnable on September 11, 2019 (the “**September 11 Motion**”) in which the Borrower sought, among other things:
  - (a) the appointment of a Chief Restructuring Advisor of the Borrower, whose only asset is the Property - a parcel of vacant land;
  - (b) court approval of a Sales and Investment Solicitation Process (the “**SISP**”) for the Property;

- (c) court approval of the retention of Avison Young Commercial Real Estate (Ontario) Inc. as the sales process agent for the SISP in order to sell the Property;
  - (d) court approval of a Stalking Horse Purchase and Sale Agreement executed by the Borrower in respect of the Property; and
  - (e) certain court-ordered priority charges against the Property in the aggregate amount of \$1.1 million in favour of parties including counsel for the Borrower, the proposed Chief Restructuring Advisor, the Proposal Trustee and others.
12. The Lender and other creditors opposed the September 11 Motion, expressing serious concerns about, among other things, the significant costs that would be incurred if the September 11 Motion was granted, specifically the various professional fees that were contemplated, and the proposed involvement of the Borrower's principal in any potential sale of the Property, in whom the Lender and other creditors had lost confidence.

### **The Lender Brings a Receivership Application**

13. The Lender issued a Notice of Application on September 11, 2019 (the “**Receivership Proceedings**”) and served an application record seeking the appointment by the Court of RSM Canada Limited as receiver (the “**Receiver**”) over the assets of the Borrower, consisting of the Property.

14. As part of the Receivership Order, the Lender sought and obtained a provision permitting the Receiver to retain the Lender's counsel as its own counsel on any matter where there was no conflict of interest. In any situation of a potential or actual conflict, independent counsel to the Receiver would be used. This provision was included in order to create efficiencies and limit the amount of professional fees incurred in selling the vacant Property of the insolvent Borrower, for the benefit of its creditors. The Receivership Order was supported by other mortgagees and creditors.

#### **The Competing September 11 Motion and Receivership Proceedings**

15. The parties first appeared before Justice Hainey of the Commercial List on September 11, 2019. At this appearance, Justice Hainey adjourned the hearing to September 13, 2019 which attendance took place in Chambers with counsel on behalf of many stakeholders.
16. At the September 13, 2019 court attendance the Court was presented with two options: (i) grant the September 11 Motion sought by the Appellant in the NOI Proceeding to permit the Borrower to deal with a sale of the Property; or (ii) grant the application brought by the Respondent Lender and supported by other creditors for the appointment of a Receiver by the Court.
17. In an effort to prevent the granting of the Receivership Order, counsel for the Appellant requested a period of time within which to satisfy the concerns of the Lender and repay amounts secured by the Mortgage. Justice Hainey asked counsel for the Appellant if the

Receivership Order would be on consent in the event that the order was held in abeyance for a two-week period to permit the Appellant to do so.

18. The Appellant's counsel advised Justice Hainey and the other counsel in attendance that the Appellant consented to the Receivership Order in consideration for the two-week period within which to satisfy the Lender's concerns for full repayment to avoid the Receivership Order becoming automatically effective. The Lender's counsel confirmed that its client was prepared to proceed on that basis.
19. Justice Hainey signed the original signed Receivership Order and provided it to counsel for the Lender to be held in abeyance for a two-week period, to Friday, September 27, 2019.
20. The stay of proceedings in the NOI Proceeding was extended to September 27, 2019 to prevent an automatic assignment into bankruptcy during this same two-week abeyance period.
21. A payout statement was provided to the Borrower on September 18, 2019. Repayment was not received.

### **Subsequent Developments**

22. The Appellant did not repay its indebtedness to the Respondent, and the Receivership Order was issued and entered by the Court on September 27, 2019 with immediate effect.

23. On September 27, 2019, the same day on which the Receivership Order that had been signed on September 13, 2019 became effective, the Appellant filed a formal proposal to its creditors with the Official Receiver in the NOI Proceeding (the “**Proposal**”), even though the Receivership Order had the effect of staying all further dealings with the property of the Appellant. The foundational aspect of the Proposal filed by the Borrower was to purport to allow the Appellant to deal with the Property, including a sale thereof.
24. Upon the filing of the Proposal, certain statutory steps under the BIA automatically occurred, including the scheduling of a first meeting of creditors (the “**Creditors’ Meeting**”) to be held on October 18, 2019. The Creditors’ Meeting in the NOI Proceeding was later adjourned *sine die*.

### **This Appeal Proceeding**

25. On October 15, 2019, without serving any notice of the change of counsel, Blaney McMurtry LLP (“**Blaneys**”) served a copy of a Notice of Appeal appealing the Receivership Order (the “**Notice of Appeal**”) on behalf of the Appellant. The Notice of Appeal was served and filed after the expiry of the applicable appeal ten-day period under the BIA rules.
26. In correspondence with the Receiver’s counsel, Blaneys took the position, among others, that the Appellant had not consented to the Receivership Order and therefore leave was not required.



### **Status of Receivership Order Pending Appeal**

27. Appellant's counsel took the position that the Receivership Order is automatically stayed pending this appeal. While not accepting this interpretation or effect, the Receiver has decided (on a without prejudice basis) not to take any further steps pursuant to the Receivership Order while this appeal is pending.
28. However, given that the Receivership Order went into effect on September 27, 2019 and the Receiver did not receive the Notice of Appeal until October 15, 2019, the Receiver had already taken certain steps pursuant to the Receivership Order.
29. As the Receivership Order went into effect on September 27, 2019 and the Receiver did not receive the Notice of Appeal until October 15, 2019, the Receiver had already taken certain steps pursuant to the Receivership Order, such as:
  - (a) arranging insurance;
  - (b) issuing the notice and statement of receiver pursuant to sections 245(1) and 246(1) of the BIA;
  - (c) issuing a receiver's certificate and borrowing \$500,000 in order to be in a position to pay protective disbursements that may arise;
  - (d) paying outstanding property tax arrears;
  - (e) contracting an environmental remediation costing report;

- (f) planning and organizing for a sales process;
  - (g) responding to creditors' communications;
  - (h) instructing the Receiver's real estate counsel, Fogler Rubinoff LLP, to conduct title searches for inclusion in a data room to market the Property and to draft a purchase agreement for the ultimate sale of the Property;
  - (i) dealing with the City of Toronto Legal Department and its Municipal Licencing and Standards Investigations Services division in respect of illegal dumping, security and safety of the site. As such, the Receiver is attending to receipt of quotations to arrange the requisite work to be done to comply with the City of Toronto requirements; and
  - (j) communicating with Tarion regarding remaining outstanding purchaser (consumer) deposits and status of bonding matters.
30. While the Receivership Order is subject to this pending appeal, significant costs are being incurred related to the Property. Those costs include:
- (a) daily interest on the Receiver's borrowings authorized pursuant to the Receivership Order, in respect of which an advance in the amount of \$500,000 had been made to the Receiver's account prior to the Notice of Appeal being served;

- (b) interest on the various mortgages registered against the Property, which is accruing and unpaid while the Property sits and is not listed for sale or sold. Interest on the Lender's mortgage alone is \$4,214.01 per day pursuant to the Mortgage Discharge Statement provided on September 18, 2019;
- (c) protective disbursements incurred by the Receiver to ensure public safety for the Property including fencing, garbage removal (all of which is required as the City of Toronto has issued work orders and has threatened to conduct the remedial work directly, which will be more costly to the estate) and soon to include snow removal;
- (d) property taxes; and
- (e) costs related to the steps taken as outlined in the previous paragraph.

### **This Appeal Should be Quashed**

31. The Receivership Order was made pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act* (BIA) and s. 101 of the *Courts of Justice Act* (CJA). As such, leave to appeal is required pursuant to s. 193 of the BIA.
32. The Receivership Order was made on consent, in consideration for the Appellant being provided with a period of time to resolve and repay an indebtedness which it did not then repay. As such, leave to appeal is required pursuant to s. 133 of the CJA.

33. The Appellant did not obtain leave before purporting to file its Notice of Appeal from the Receivership Order.
34. The Notice of Appeal was served after the expiry of the applicable ten-day period within which to appeal. An extension of time within which to appeal should not be granted.
35. Leave to appeal should not be granted to the Appellant.

**If the Appeal is not Quashed, Alternative Relief is Appropriate**

36. In the alternative, security for costs of the appeal should be granted to the Respondent in the amount of \$50,000, or such other amount as the Court deems just.
37. There is good reason to believe that the appeal is frivolous and vexatious and that the Appellant has insufficient assets in Ontario to pay the costs of the appeal, as the Appellant is admittedly insolvent and commenced proceedings pursuant to the BIA that are exclusively available to insolvent parties.
38. In the further alternative, if the appeal is not quashed, it should be heard on an expedited basis to limit the prejudice to the various stakeholders in this proceeding and to quickly remedy the uncertainty caused by the appeal from the Receivership Order.
39. The *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, including ss. 101 and 133.
40. The *Bankruptcy and Insolvency Act*, RSC 1985, c B3, as amended, including ss. 193 and 243.

41. The Bankruptcy and Insolvency General Rules, CRC c. 368, as amended, including rules 31 and 32.
42. The *Rules of Civil Procedure*, RRO 1990, Reg 194, as amended, including Rules 61.03.1, 61.04, 61.06(1)(a), and 61.16.
43. Such further and other grounds as counsel may advise.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

1. The Affidavit of Bryan Tannenbaum, sworn November 15, 2019, and the exhibits attached thereto.
2. Such further and other materials as counsel may advise and this Court may permit.

**CERTIFICATE**

I, D.J. Miller, lawyer the Applicant (Respondent) / Moving Party, 2478888 Ontario Inc., certify that the estimated time required by the Appellant for oral argument is 45 minutes, not including reply.

November 15, 2019



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**2478888 ONTARIO INC.**

and

**3070 ELLESMERE DEVELOPMENTS INC.**

Applicant  
(Respondent/Moving Party)

Respondent  
(Appellant/Responding Party)

Court File No.: C67565

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**COURT OF APPEAL FOR ONTARIO**

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**NOTICE OF MOTION  
(Motion to Quash Appeal)**

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Party, 2478888 Ontario Inc.

# **SCHEDULE “5”**

**COURT OF APPEAL FOR ONTARIO**

THE HONOURABLE JUSTICE ROBERTS )  
THE HONOURABLE JUSTICE PACIOCCO )  
THE HONOURABLE JUSTICE HARVISON YOUNG )

TUESDAY, THE 7th  
DAY OF JANUARY, 2020

BETWEEN:

**2478888 ONTARIO INC.**

Applicant (Respondent) / Moving Party

- and -

**3070 ELLESMERE DEVELOPMENTS INC.**

Respondent (Appellant) / Responding Party

**ORDER**

**THIS MOTION** made by 2478888 Ontario Inc. for an Order quashing the Appellant's appeal from the Order of the Honourable Justice Hailey dated September 13, 2019 (the "**Receivership Order**"), was heard this day at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

**ON READING** the Motion Record of 2478888 Ontario Inc. dated November 15, 2019 and upon being advised that the Appellant consents to the Order sought, and on hearing submissions of counsel for 2478888 Ontario Inc.,


1. **THIS COURT ORDERS** that the within appeal from the Receivership Order be and is hereby quashed.

ENTERED AT / INSCRIT À TORONTO  
ON / BOOK NO:  
LE / DANS LE REGISTRE NO:

JAN 7 2020

PER / PAR:



  
\_\_\_\_\_  
Registrar, Court of Appeal for Ontario

2478888 ONTARIO INC.

and

3070 ELLESMERE DEVELOPMENTS INC.

Applicant (Respondent/Moving Party)

Respondent (Appellant/Responding Party)

Court File No.: C67565/M51047

**COURT OF APPEAL FOR ONTARIO**

Proceedings commenced at Toronto

**ORDER**

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**Scott McGrath (LSO# 59346K)**  
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Lawyers for the Moving Party, 2478888 Ontario Inc.



COURT OF APPEAL FOR ONTARIO

BEFORE Roberts, Paciocco, Hansen Yang JSA

DATE JAN 07 2020

DISPOSITION OF MOTION

2478888 Ontario Inc.

Applicant (Respondent in Appeal)

and

3070 Ellesmere Developments Inc.

Respondent (Appellant)

Court of Appeal No.: C67565  
Bankruptcy Court File No.: BK-19-2547832-31  
Estate File No.: 31-2547832  
Commercial List Court File No.: CV-19-00627187-00CL

*January 7, 2019  
The parties have  
settled this motion  
in accordance  
with the decept order.  
Roberts JA*

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

APPEAL BOOK AND COMPENDIUM  
Volume 1 of 3

BLANEY McMURTRY LLP  
Barristers and Solicitors  
2 Queen Street East, Suite 1500  
Toronto, ON M5C 3G5

David Ullmann (LSO #423571)  
Tel: (416) 596-4289  
Fax: (416) 594-2437  
dullmann@blaney.com

Mervyn D. Abramowitz (LSO # 28325R)  
Tel: (416) 597-4887  
Fax: (416) 593-3396  
Email: mabramowitz@blaney.com

Lawyers for 3070 Ellesmere Developments Inc.

# **SCHEDULE “6”**

Court File No. CV-18-592726-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

THE HONOURABLE

)

TUESDAY, THE 26<sup>th</sup>

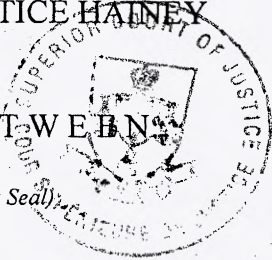
JUSTICE HAINES

)

DAY OF FEBRUARY, 2019

B E T W E E N

(Court Seal)



2449880 ONTARIO INC.

Plaintiff

and

3070 ELLESMERE DEVELOPMENTS INC., TONG LIU, LEMINE  
INVESTMENT GROUP INC., LEMINE DEVELOPMENT CORP.,  
CENTRAL PARK AJAX DEVELOPMENTS PHASE 1 INC., 9654372  
CANADA INC., 9654488 CANADA INC., 9654461 CANADA INC.,  
9617680 CANADA INC. and AJAX MASTER HOLDING INC.

Defendants

**ORDER**

THIS MOTION made by the Plaintiff to strike the Defendants' Statement of Defence and for judgment, was heard this day at the court house, 330 University Avenue, 8th Floor, Toronto, Ontario, M5G 1R7.

ON READING the Amended Motion Record and Factum of the Plaintiff, and on hearing the submissions of counsel for the plaintiff and the submissions of Thomas Liu on behalf of the defendants,

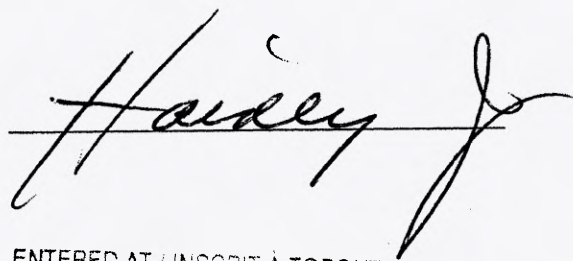
-2-

1. THIS COURT ORDERS that the Statement of Defence of the Defendants dated April 9, 2018 is struck without leave to amend.
2. THIS COURT ORDERS that default judgment is granted against the Defendants.
3. THIS COURT ORDERS that the Defendants shall forthwith pay to the Plaintiff \$3.2 million.
4. THIS COURT ORDERS that paragraphs 2 and 3 of this Order are stayed for a period of 60 days.
5. THIS COURT ORDERS that the Defendants, including 3070 Ellesmere Developments Inc., are enjoined from taking any steps to sell or otherwise encumber the property known municipally at 3070 Ellesmere Road in Scarborough, Ontario (the “**Property**”), which is more fully described in Schedule “A”, and the Land Registrar for the Land Registry office of Metropolitan Toronto No. 66 & 64 shall be authorized to register this Order against title to the Property on Application by the Plaintiff.
6. THIS COURT ORDERS that the Defendants may bring a motion to vary paragraphs 1, 2 and 3 of this Order if, within 60 days, they comply strictly with the Orders of McEwen J. dated October 16, 2018 and Penny J. dated December 3, 2018.
7. THIS COURT ORDERS that the Defendants shall pay costs to the Plaintiff in an amount to be determined.

-3-

8. THIS COURT ORDERS that the Order of Justice Hainey dated February 26, 2019 that is attached as Schedule "B" to this Order is revoked and replaced with this Order.

THIS ORDER BEARS INTEREST at the rate of 15 percent per annum beginning on March 4, 2019.

A handwritten signature in black ink, appearing to read "Hainey J.", written over a horizontal line.

ENTERED AT / INSCRIT À TORONTO  
ON / BOOK NO:  
LE / DANS LE REGISTRE NO:

MAR 14 2019

PER / PAR: 

**SCHEDULE "A"**

PCL J-1 SECT m1227 BLK J PLAN 66M1227, City of Toronto

PIN No. 06186-0033(LT)

# **SCHEDULE “7”**

District of	Ontario
Division No.	09 – Toronto
Court No.	31-2547832
Estate No.	32-2547832

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(IN BANKRUPTCY AND INSOLVENCY)**

**IN THE MATTER OF THE PROPOSAL OF**  
**3070 ELLESMERE DEVELOPMENTS INC.**  
**OF THE TOWN OF RICHMOND HILL,**

**IN THE REGIONAL MUNICIPALITY OF YORK,**  
**IN THE PROVINCE OF ONTARIO**

**PROPOSAL**

**SEPTEMBER 27, 2019**

**3070 ELLESMERE DEVELOPMENTS INC.** hereby submits the following Proposal to its Creditors pursuant to Part III of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended.

**ARTICLE 1 - DEFINITIONS**

**1.1 Definitions:**

In this Proposal:

- (a) **“Administrative Fees and Expenses”** means the proper fees and expenses, including legal fees and disbursements, of the Trustee and the Debtor, incurred at the standard rates and charges of the Trustee and legal counsel to the Trustee and the Debtor, on and incidental to the negotiation, preparation, presentation, consideration and implementation of the Proposal, and all proceedings and matters relating to or arising out of the Proposal;
- (b) **“Approval Date”** means the date that the Approval Order is issued by the Court;
- (c) **“Approval Order”** means an order of the Court approving the Proposal;
- (d) **“BIA”** means the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended and in force as at the Filing Date;



- (e) “**Business Day**” means a day, other than a Saturday, Sunday, or statutory holiday, on which banks are generally open for business in Toronto, Ontario;
- (f) “**Claim**” means any right of any Person against the Debtor in connection with any indebtedness, liability or obligation of any kind of the Debtor which indebtedness, liability or obligation is in existence at the Filing Date, whether or not reduced to judgement, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known, unknown, by guarantee, by surety or otherwise and whether or not such a right is executory in nature, including, without limitation, the right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future based in whole or in part on facts which exist prior to or at the time of the Filing Date;
- (g) “**Court**” means the Ontario Superior Court of Justice (in Bankruptcy and Insolvency);
- (h) “**Creditor**” means any Person having a Claim and may, if the context requires, mean a trustee, receiver, receiver-manager or other Person acting on behalf or in the name of such Person;
- (i) “**Crown Claims**” means any Claims of Her Majesty in Right of Canada or a province as described in subsection 60(1.1) of the BIA;
- (j) “**Debtor**” means 3070 ELLESMERE DEVELOPMENTS INC.;
- (k) “**Employee Claims**” means any Claims of employees and former employees of the Debtor as described in subsection 60(1.3) of the BIA;
- (l) “**Filing Date**” means August 20, 2019 (the date the Debtor filed a notice of intention to make a proposal);
- (m) “**Person**” means any individual, partnership, joint venture, trust, corporation, unincorporated organization, government or any agency or instrumentality thereof, or any other entity howsoever designated or constituted;
- (n) “**Preferred Creditors**” means the Unsecured Creditors that are required by the BIA to be paid in priority to all other unsecured claims under a proposal made by a debtor;
- (o) “**Proposal**” means this proposal together with any amendments thereto;
- (p) “**Proposal Proceeds**” has the meaning ascribed to the term in paragraph 4.1 hereof;
- (q) “**Real Property**” refers to the property municipally known as 3070 Ellesmere Road, Scarborough, Ontario, M1E 4C3;

- (r) “**Related Persons**” has the meaning ascribed to the term in subsection 4(2) of the BIA;
- (s) “**Secured Creditor**” means a Person holding a mortgage, hypothec, pledge, charge, lien, or security interest on or against the property or assets of the Debtor as security for a debt due or accruing due to the Person from the Debtor;
- (t) “**Trustee**” means Crowe Soberman Inc. or its duly appointed successor or successors; and
- (u) “**Unsecured Creditors**” means the Preferred Creditors and any Creditor who is not a Secured Creditor.

## **1.2 Articles of Reference**

The terms “hereof”, “hereunder”, “herein” and similar expressions refer to the Proposal and not to any particular article, section, subsection, clause or paragraph of the Proposal and include any agreements supplemental hereto. In the Proposal, a reference to an article, section, subsection, clause or paragraph will, unless otherwise stated, refer to an article, section, subsection, clause or paragraph of the Proposal.

## **1.3 Interpretation Not Affected by Headings**

The division of the Proposal into articles, sections, subsections, clauses or paragraphs and the insertion of a table of contents and headings are for convenience of reference only and will not affect the construction or interpretation of this Proposal.

## **1.4 Date for Any Action**

In the event that any date on which any action is required to be taken hereunder is not a Business Day, such action will be required to be taken on the next succeeding day which is a Business Day.

## **1.5 Time**

All times expressed herein are local time in Toronto, Ontario, Canada unless otherwise stipulated.

## **1.6 Numbers**

In the Proposal, where the context requires, a word importing the singular number will include the plural and *vice versa* and a word or words importing gender will include all genders.

## **1.7 Currency**

Unless otherwise stated herein, all references to currency in the Proposal are to lawful money of Canada.

## **ARTICLE 2 - PURPOSE AND EFFECT OF PROPOSAL**

### **2.1 Purpose of Proposal**

The purpose of this Proposal is to effect an orderly wind down of the business and affairs of the Debtor in the expectation that all Creditors will derive a greater benefit from the orderly realization of the property and assets of the Debtor than would result from a forced liquidation upon a bankruptcy.

This Proposal provides the essential terms upon which all Claims will be fully and finally resolved and settled.

## **ARTICLE 3 - CLASSIFICATION AND TREATMENT OF CREDITORS**

### **3.1 Classes of Creditors**

For the purposes of voting on the Proposal, there shall be two classes of Creditors, Secured Creditors and Unsecured Creditors.

### **3.2 Secured Creditors**

The proven Claims of Secured Creditors shall be paid from the proceeds from the realization of their collateral, net of the costs of realization, in accordance with their relative priority. For distribution purposes, to the extent that the net proceeds realized from the collateral are not sufficient to satisfy the proven Claim of a Secured Creditor, that Secured Creditor shall be an Unsecured Creditor for any portion of that Secured Creditor's proven Claim that remains outstanding.

## **ARTICLE 4 - FUNDING OF PROPOSAL**

### **4.1 Funding of Proposal**

Following acceptance of the Proposal by the Creditors of the Debtor and the making of the Approval Order, the Debtor shall take steps to realize on all of its property and assets for the benefit of its Creditors. The property and assets of the Debtor primarily consists of the Real Property and potential amounts recovered via ongoing legal proceedings in various stages. The sale of the Real Property will be conducted via a Court approved sales process.

The net proceeds from the realization of the Debtor's property and assets, after payment of all valid mortgages, hypothecs, pledges, charges, liens, or security interest against the property and assets, and payment of reasonable fees, expenses and costs related to the realization, including without limitation legal fees and disbursements, shall be paid to the Trustee for distribution pursuant to the provisions of this Proposal (the "**Proposal Proceeds**").

Provided that Proposal is approved by the Creditors and the Approval Order is issued, the principal of the Debtor shall provide their services to the Debtor to complete the realization of the Debtor's property and assets on a without charge basis.

## **ARTICLE 5 - DISTRIBUTION**

### **5.1 Distribution**

Subject to paragraph 5.2, the Proposal Proceeds shall be distributed by the Trustee to pay proven Claims of Creditors, without interest, as soon as practicable in accordance with the scheme of priority as set out in the BIA as follows:

- (a) First, to payment of Crown Claims, if any;
- (b) Second, to payment of the unpaid Administrative Fees and Expenses;
- (c) Third, to payment of the Office of the Superintendent of Bankruptcy levy payable under section 147 of the BIA;
- (d) Fourth, to payment of Employee Claims, if any;
- (e) Fifth, to payment of all Claims of any other Preferred Creditors in the priority set out in section 136 of the BIA; and
- (f) Sixth, each ordinary Unsecured Creditor will be paid the balance on a *pro rata* basis.

### **5.2 Administrative Fees and Expenses**

Administrative Fees and Expenses shall be paid pursuant to section 60(2) of the BIA. The Trustee shall be at liberty from time to time to apply reasonable amounts, out of the Proposal Proceeds against its Administrative Fees and Expenses, and such amounts shall constitute advances against the Administrative Fees and Expenses when and as approved by the Court.

### **5.3 Discharge of Trustee**

Upon the payment by the Trustee of the amounts contemplated in this article, the Trustee shall have discharged its duties as Trustee and the Trustee shall be entitled to apply for its discharge as Trustee. For greater certainty, the Trustee will not be responsible or liable for any obligations of the Debtor and will be exempt from any personal liability in fulfilling any duties or exercising any powers conferred upon it by this Proposal, other than for gross negligence or willful misconduct.

## **ARTICLE 6 - MISCELLANEOUS**

### **6.1 Appointment of Inspectors**

At the statutory meeting of Unsecured Creditors to be held to consider the Proposal, the Unsecured Creditors may appoint up to five (5) Inspectors whose powers will be limited to: (a) advising the Trustee concerning any dispute which may arise as to the validity of Claims; and (b) advising the Trustee from time to time with respect to any other matter that the Trustee may refer to them.

## **6.2 Modification of Proposal**

The Debtor may propose an alteration or modification to the Proposal prior to the vote taking place on the Proposal.

## **6.3 Release of Officers and/or Directors**

Any Claims by against the directors and/or officers of the Debtor that arose prior to the Filing Date and relate to obligations of the Debtor where directors and/or officers are under any law liable in their capacity as directors and/or officers for the payment of such Claims shall be, and upon the issuance of the Approval Order, are released and forever discharged as against the directors and/or officers of the Debtor, other than Claims of the nature detailed in subsection 50(14) of the BIA.

# **ARTICLE 7 - GENERAL**

## **7.1 Foreign Currency Obligations**

For purposes of this Proposal, Claims denominated in a currency other than Canadian funds will be converted to Canadian Dollars at the closing spot rate of exchange of the Bank of Canada on the Filing Date.

## **7.2 Applicable Law**

This Proposal shall be construed in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein and shall be treated in all respects as an Ontario contract.

## **7.3 Non Severability**

It is intended that all provisions of this Proposal shall be fully binding on and effective between all Persons named or referred to in this Proposal and in the event that any particular provision or provisions of this Proposal is or are found to be void, voidable or unenforceable for any reason whatever, then the remainder of this Proposal and all other provisions shall be void and of no force or effect

**DATED** at the City of Toronto in the province of Ontario, this 27<sup>th</sup> day of September, 2019.

**3070 ELLESMERE DEVELOPMENTS  
INC.**

Per:

A handwritten signature in black ink, appearing to be 'Tong (Thomas) Liu', written over a horizontal line. The signature is stylized and somewhat cursive.

Name: Tong (Thomas) Liu

Title: Director & Officer

# **SCHEDULE “8”**

## Owen Gaffney

---

**From:** D. J. Miller  
**Sent:** Thursday, January 16, 2020 4:56 PM  
**To:** 'David T. Ullmann'; Mervyn D. Abramowitz  
**Cc:** Rebecca Kennedy; Owen Gaffney  
**Subject:** RE: 3070 Ellesmere

David: this is a single purpose entity, that holds a parcel of undeveloped vacant land. If you or your client are aware of any contracts that are “personal” to 3070 Ellesmere Developments Inc., please identify what those are. Tax losses are similarly inapplicable here.

If you or your client are aware of any legitimate basis upon which the company should not be bankrupt, or if you believe that there is any value for the benefit of 3070’s creditors that would be lost as a result of a bankruptcy, please advise. Thank you.

D.J.

---

**From:** David T. Ullmann [mailto:DUllmann@blaney.com]  
**Sent:** Thursday, January 16, 2020 2:45 PM  
**To:** D. J. Miller <DJMiller@tgf.ca>; Mervyn D. Abramowitz <MAbramowitz@blaney.com>  
**Cc:** Rebecca Kennedy <Rkennedy@tgf.ca>; Owen Gaffney <OGaffney@tgf.ca>  
**Subject:** RE: 3070 Ellesmere

DJ,

Thanks DJ. No worries on the delays.

I agree that the sale will be done by the receiver. I was thinking of something else. In my experience having a proposal can assist a purchaser who wants to look into tax losses or the continuation of approvals or contracts which may be personal to the debtor corporation. I have not delved deeply into this file on that side to know if those are relevant points here, but my own view is that the proposal may have some benefit and it costs nothing to leave it alone. If you are just worried about confusion that could be dealt with by agreement. In any event, I have spoken to Mr. Liu and he will not consent to the bankruptcy of the company. I do not yet have instructions to oppose it either btw. We will wait for your report and see what instructions we get from there.

Regards,

David

David T. Ullmann  
Partner  
[dullmann@blaney.com](mailto:dullmann@blaney.com)  
📞 416-596-4289 | 📞 416-594-2437

---

**From:** D. J. Miller [mailto:DJMiller@tgf.ca]  
**Sent:** January 16, 2020 2:32 PM  
**To:** David T. Ullmann <DUllmann@blaney.com>; Mervyn D. Abramowitz <MAbramowitz@blaney.com>  
**Cc:** Rebecca Kennedy <Rkennedy@tgf.ca>; Owen Gaffney <OGaffney@tgf.ca>  
**Subject:** RE: 3070 Ellesmere



Hi David: sorry for the delayed response, as I'm traveling today.

Please advise of your client's position on the continuation of the proposal proceeding, and the intended bankruptcy, following your meeting this morning.

In our view, there is no scenario in which a purchaser of the property would have anything to do with a BIA proposal proceeding. Any purchaser will be obtaining title through an Approval and Vesting Order granted by the Court in a receivership proceeding, and in no other manner. To the extent that the sale of the property results in amounts being available to unsecured creditors after paying amounts owing to secured creditors, that will be done in accordance with a court Order in the receivership proceeding.

The existence of the proposal proceeding notwithstanding the appointment of the receiver (and the issuance of a Report by the Proposal Trustee in early October) has already caused confusion with creditors. It also creates the perception that a debtor-in-possession process exists whereby 3070 has any capacity to deal with the property. Your client's actions in continuing to deal with the property after the granting of the September 13, 2019 Order has exacerbated that concern. The Proposal filed by your client is premised entirely on its ability to deal with the property, which was rejected by Justice Hainey in granting the Receivership Order.

Please let us know as soon as possible, so that we can finalize our materials for service one way or the other. Thanks.

D.J.



D. J. Miller | Direct Line: +1 416 304-0559 | Thornton Grout Finnigan LLP | [www.tgf.ca](http://www.tgf.ca)

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---

**From:** David T. Ullmann [<mailto:DUllmann@blaney.com>]

**Sent:** Thursday, January 16, 2020 9:44 AM

**To:** D. J. Miller <[DJMiller@tgf.ca](mailto:DJMiller@tgf.ca)>; Mervyn D. Abramowitz <[MAbramowitz@blaney.com](mailto:MAbramowitz@blaney.com)>

**Cc:** Rebecca Kennedy <[Rkennedy@tgf.ca](mailto:Rkennedy@tgf.ca)>; Owen Gaffney <[OGaffney@tgf.ca](mailto:OGaffney@tgf.ca)>

**Subject:** RE: 3070 Ellesmere

Thanks for asking DJ. I am speaking with Mr. Liu at 11:30 today and will report back. In the interim, can you advise what is the hurry in bankrupting the company? The proposal is, as far as I know, adjourned sine die and I can imagine certain scenarios where a potential purchaser of the land might appreciate the flexibility that a proposal might provide. Can't we just work out some kind of standstill on the proposal instead so that it does not present an obstacle to the receivership (to the extent it does, which is a little unclear to me) or add any costs to anyone?

Also, on your response yesterday on the confidentiality of purchase prices it is my practice, when acting for a court officer who is contemplating the sale of an asset, to keep all sale agreements confidential until one is chosen and approved by the court, to ensure that the sale process is not prejudiced if another offer needs to be chosen in its place or the asset has to be remarketed. Is this not the reason that a receiver's appendix of offers received in a sale process, and the purchaser price of the chosen offer, is often sealed/redacted when approval is sought? I would expect the same rationale to apply in this case. The Receiver can, of course, include my email you referred to in whatever report you wish, but again presumably the price could be redacted out of it without marring whatever point you want to make with the inclusion of that email.

David

David T. Ullmann  
Partner

dullmann@blaney.com

📞 416-596-4289 | 📠 416-594-2437

---

**From:** D. J. Miller [<mailto:DJMiller@tgf.ca>]

**Sent:** January 16, 2020 7:06 AM

**To:** David T. Ullmann <[DUllmann@blaney.com](mailto:DUllmann@blaney.com)>; Mervyn D. Abramowitz <[MAbramowitz@blaney.com](mailto:MAbramowitz@blaney.com)>

**Cc:** Rebecca Kennedy <[Rkennedy@tgf.ca](mailto:Rkennedy@tgf.ca)>; Owen Gaffney <[OGaffney@tgf.ca](mailto:OGaffney@tgf.ca)>

**Subject:** 3070 Ellesmere

David:

The Receiver will be moving to bankrupt the company, with RSM acting as Trustee. Would your client like to do that itself (in coordination with RSM) or have it done by court order?

Please let me know by the end of the day today, as that's when I expect we'll be in a position to serve. Thanks.

D.J.



D. J. Miller | [DJMiller@tgf.ca](mailto:DJMiller@tgf.ca) | Direct Line: +1 416 304-0559 | Thornton Grout Finnigan LLP | Suite 3200, TD West Tower, 100 Wellington Street West, P.O. Box 329, Toronto-Dominion Centre, Toronto, Ontario M5K 1K7 | 416-304-1616 | Fax: 416-304-1313 | [www.tgf.ca](http://www.tgf.ca)

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# **SCHEDULE “9”**



Blaney McMurtry LLP | Lawyers  
2 Queen Street East | Suite 1500  
Toronto, Ontario M5C 3G5

☎ 416-593-1221  
🌐 Blaney.com

David T. Ullmann  
D: 416-596-4289 F: 416-594-2437  
dullmann@blaney.com

January 9, 2020

VIA EMAIL @ [bryan.tannenbaum@rsmcanada.com](mailto:bryan.tannenbaum@rsmcanada.com)

Mr. Bryan A. Tannenbaum  
RSM Canada Limited  
11 King Street West  
Suite 700  
Toronto, ON, M5H 4C7

Dear Mr. Tannenbaum:

**Re: 3070 Ellesmere Developments Inc.**

As you are aware, during the period when the receivership was of no effect due to the appeal, the company has continued with its efforts to market and sell the subject property. In this regard, I am pleased to enclose a binding agreement which was negotiated by the company (after considerable marketing efforts over the past several months with various parties, including Mr. Chochla's client), with 11696289 Canada Inc. dated December 23rd for the sale of the property with a purchase price of [REDACTED]. The agreement is unconditional but for the requirement of an approval and vesting order. The agreement and the transaction set out therein is obviously acceptable to the company (who executed it) and to the creditors committee of unsecured creditors. The purchaser is in the process of retaining Minden Gross as its counsel. Neither Minden Gross nor Blaney McMurtry prepared the form of agreement, but it does appear to us on review to be a binding agreement of purchase and sale.

Obviously, while the appeal was pending there was no practical way for the company to seek court approval of this transaction, but now that the appeal is behind us, the company would like the receiver to immediately proceed to seek the necessary approval to complete this sale, and to do so without incurring any other material costs. Our client has advised the purchaser of the appointment of the receiver and we are advised that the purchaser is prepared to provide such reasonable amendments as you may require in order to make it clear that the receiver, and not the company, will complete the sale. I also imagine you will not want the deposit held by our firm (we do not have any funds as yet, as you can see that the deposit is due on court approval) as the agreement currently requires.

We recognize that given that you are now receiver over the company our role is tenuous as company counsel however, we are available to assist with this transaction to the extent that is of assistance. In this regard, we are prepared to attend to closing the sale for you, if it would be expedient or efficient for us to do so. We can also prepare

court materials supporting the reasonableness of the sale, but of course would have to have the funds to do so. We have no funds at this time for this purpose.

Yours very truly,  
Blaney McMurtry LLP



David T. Ullmann  
DTU/ab

c.c.: Timothy Dunn @ [TDunn@mindengross.com](mailto:TDunn@mindengross.com)  
Thomas Liu @ [thomas.liu@leminegroup.com](mailto:thomas.liu@leminegroup.com)  
Jessica Wang @ [jessica.wang@leminegroup.com](mailto:jessica.wang@leminegroup.com)  
Rebecca Kennedy @ [Rkennedy@tgf.ca](mailto:Rkennedy@tgf.ca)  
Greg Azeff @ [gazeff@millerthomson.com](mailto:gazeff@millerthomson.com)  
Hans Rizarri @ [hans.rizarri@crowesoberman.com](mailto:hans.rizarri@crowesoberman.com)

# Agreement of Purchase and Sale Commercial

**Form 500**

for use in the Province of Ontario



This Agreement of Purchase and Sale dated this 23 day of December, 2019

**BUYER:** 11696289 Canada Inc.  
(Full legal names of all Buyers) agrees to purchase from

**SELLER:** 3070 ELLESMERE DEVELOPMENTS INC.  
(Full legal names of all Sellers) the following

**REAL PROPERTY:**

Address 3070 Ellesmere Road, Toronto, ON

fronting on the side of

in the City of TORONTO, ON M1E 4C3

and having a frontage of more or less by a depth of more or less

and legally described as PCL J-1 SECT M1227 BLK J PLAN 66M1227, CITY OF TORONTO

(Legal description of land including easements not described elsewhere) (the "property")

**PURCHASE PRICE:** Dollars (CDN\$) [REDACTED]  
Dollars

**DEPOSIT:** Buyer submits as described in Schedule A  
(Herewith/Upon Acceptance/as otherwise described in this Agreement)  
Dollars (CDN\$) [REDACTED]

by negotiable cheque payable to Blaney McMurtry LLP "Deposit Holder"  
to be held in trust pending completion or other termination of this Agreement and to be credited toward the Purchase Price on completion. For the purposes of this Agreement, "Upon Acceptance" shall mean that the Buyer is required to deliver the deposit to the Deposit Holder within 24 hours of the acceptance of this Agreement. The parties to this Agreement hereby acknowledge that, unless otherwise provided for in this Agreement, the Deposit Holder shall place the deposit in trust in the Deposit Holder's non-interest bearing Real Estate Trust Account and no interest shall be earned, received or paid on the deposit.

Buyer agrees to pay the balance as more particularly set out in Schedule A attached.

**SCHEDULE(S) A** attached hereto form(s) part of this Agreement.

1. **IRREVOCABILITY:** This offer shall be irrevocable by Buyer until 5 p.m. on the 23 day of December, 2019, after which time, if not accepted, this offer shall be null and void and the deposit shall be returned to the Buyer in full without interest.

2. **COMPLETION DATE:** This Agreement shall be completed by no later than 6:00 p.m. on the 31 day of March, 2020. Upon completion, vacant possession of the property shall be given to the Buyer unless otherwise provided for in this Agreement.

INITIALS OF BUYER(S):

[Handwritten initials]

INITIALS OF SELLER(S):

[Handwritten initials]

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3. **NOTICES:** The Seller hereby appoints the Listing Brokerage as agent for the Seller for the purpose of giving and receiving notices pursuant to this Agreement. Where a Brokerage (Buyer's Brokerage) has entered into a representation agreement with the Buyer, the Buyer hereby appoints the Buyer's Brokerage as agent for the purpose of giving and receiving notices pursuant to this Agreement. **Where a Brokerage represents both the Seller and the Buyer (multiple representation), the Brokerage shall not be appointed or authorized to be agent for either the Buyer or the Seller for the purpose of giving and receiving notices.** Any notice relating hereto or provided for herein shall be in writing. In addition to any provision contained herein and in any Schedule hereto, this offer, any counter-offer, notice of acceptance thereof or any notice to be given or received pursuant to this Agreement or any Schedule hereto (any of them, "Document") shall be deemed given and received when delivered personally or hand-delivered to the Address for Service provided in the Acknowledgement below, or where a facsimile number or email address is provided herein, when transmitted electronically to that facsimile number or email address, respectively, in which case, the signature(s) of the party (parties) shall be deemed to be original.

FAX No.: .....  
 (For delivery of Documents to Seller)

FAX No.: .....  
 (For delivery of Documents to Buyer)

Email Address: .....  
 (For delivery of Documents to Seller)

Email Address: .....  
 (For delivery of Documents to Buyer)

4. **CHATELS INCLUDED:** N/A .....

Unless otherwise stated in this Agreement or any Schedule hereto, Seller agrees to convey all fixtures and chattels included in the Purchase Price free from all liens, encumbrances or claims affecting the said fixtures and chattels.

5. **FIXTURES EXCLUDED:** N/A .....

6. **RENTAL ITEMS (Including Lease, Lease to Own):** The following equipment is rented and **not** included in the Purchase Price. The Buyer agrees to assume the rental contract(s), if assumable:

N/A

The Buyer agrees to co-operate and execute such documentation as may be required to facilitate such assumption.

7. **HST: If the sale of the property (Real Property as described above) is subject to Harmonized Sales Tax (HST), then such tax shall be in addition to the Purchase Price.** The Seller will not collect HST if the Buyer provides to the Seller a warranty that the Buyer is registered under the Excise Tax Act ("ETA"), together with a copy of the Buyer's ETA registration, a warranty that the Buyer shall self-assess and remit the HST payable and file the prescribed form and shall indemnify the Seller in respect of any HST payable. The foregoing warranties shall not merge but shall survive the completion of the transaction. If the sale of the property is not subject to HST, Seller agrees to certify on or before closing, that the transaction is not subject to HST. Any HST on chattels, if applicable, is not included in the Purchase Price.

INITIALS OF BUYER(S):

INITIALS OF SELLER(S):

8. **TITLE SEARCH:** Buyer shall be allowed until 6:00 p.m. on the 16 day of March, 2020 (Requisition Date) to examine the title to the property at his own expense and until the earlier of: (i) thirty days from the later of the Requisition Date or the date on which the conditions in this Agreement are fulfilled or otherwise waived or; (ii) five days prior to completion, to satisfy himself that there

are no outstanding work orders or deficiency notices affecting the property, that its present use (VACANT LAND) may be lawfully continued and that the principal building may be insured against risk of fire. Seller hereby consents to the municipality or other governmental agencies releasing to Buyer details of all outstanding work orders and deficiency notices affecting the property, and Seller agrees to execute and deliver such further authorizations in this regard as Buyer may reasonably require.

9. **FUTURE USE:** Seller and Buyer agree that there is no representation or warranty of any kind that the future intended use of the property by Buyer is or will be lawful except as may be specifically provided for in this Agreement.

10. **TITLE:** Provided that the title to the property is good and free from all registered restrictions, charges, liens, and encumbrances except as otherwise specifically provided in this Agreement and save and except for (a) any registered restrictions or covenants that run with the land providing that such are complied with; (b) any registered municipal agreements and registered agreements with publicly regulated utilities providing such have been complied with, or security has been posted to ensure compliance and completion, as evidenced by a letter from the relevant municipality or regulated utility; (c) any minor easements for the supply of domestic utility or telecommunication services to the property or adjacent properties; and (d) any easements for drainage, storm or sanitary sewers, public utility lines, telecommunication lines, cable television lines or other services which do not materially affect the use of the property. If within the specified times referred to in paragraph 8 any valid objection to title or to any outstanding work order or deficiency notice, or to the fact the said present use may not lawfully be continued, or that the principal building may not be insured against risk of fire is made in writing to Seller and which Seller is unable or unwilling to remove, remedy or satisfy or obtain insurance save and except against risk of fire (Title Insurance) in favour of the Buyer and any mortgagee, (with all related costs at the expense of the Seller), and which Buyer will not waive, this Agreement notwithstanding any intermediate acts or negotiations in respect of such objections, shall be at an end and all monies paid shall be returned without interest or deduction and Seller, Listing Brokerage and Co-operating Brokerage shall not be liable for any costs or damages. Save as to any valid objection so made by such day and except for any objection going to the root of the title, Buyer shall be conclusively deemed to have accepted Seller's title to the property.

11. **CLOSING ARRANGEMENTS:** Where each of the Seller and Buyer retain a lawyer to complete the Agreement of Purchase and Sale of the property, and where the transaction will be completed by electronic registration pursuant to Part III of the Land Registration Reform Act, R.S.O. 1990, Chapter L4 and the Electronic Registration Act, S.O. 1991, Chapter 44, and any amendments thereto, the Seller and Buyer acknowledge and agree that the exchange of closing funds, non-registrable documents and other items (the "Requisite Deliveries") and the release thereof to the Seller and Buyer will (a) not occur at the same time as the registration of the transfer/deed (and any other documents intended to be registered in connection with the completion of this transaction) and (b) be subject to conditions whereby the lawyer(s) receiving any of the Requisite Deliveries will be required to hold same in trust and not release same except in accordance with the terms of a document registration agreement between the said lawyers. The Seller and Buyer irrevocably instruct the said lawyers to be bound by the document registration agreement which is recommended from time to time by the Law Society of Ontario. Unless otherwise agreed to by the lawyers, such exchange of Requisite Deliveries shall occur by the delivery of the Requisite Deliveries of each party to the office of the lawyer for the other party or such other location agreeable to both lawyers.


12. **DOCUMENTS AND DISCHARGE:** Buyer shall not call for the production of any title deed, abstract, survey or other evidence of title to the property except such as are in the possession or control of Seller. If requested by Buyer, Seller will deliver any sketch or survey of the property within Seller's control to Buyer as soon as possible and prior to the Requisition Date. If a discharge of any Charge/Mortgage held by a corporation incorporated pursuant to the Trust And Loan Companies Act (Canada), Chartered Bank, Trust Company, Credit Union, Caisse Populaire or Insurance Company and which is not to be assumed by Buyer on completion, is not available in registrable form on completion, Buyer agrees to accept Seller's lawyer's personal undertaking to obtain, out of the closing funds, a discharge in registrable form and to register same, or cause same to be registered, on title within a reasonable period of time after completion, provided that on or before completion Seller shall provide to Buyer a mortgage statement prepared by the mortgagee setting out the balance required to obtain the discharge, and, where a real-time electronic cleared funds transfer system is not being used, a direction executed by Seller directing payment to the mortgagee of the amount required to obtain the discharge out of the balance due on completion.

13. **INSPECTION:** Buyer acknowledges having had the opportunity to inspect the property and understands that upon acceptance of this offer there shall be a binding agreement of purchase and sale between Buyer and Seller.

14. **INSURANCE:** All buildings on the property and all other things being purchased shall be and remain until completion at the risk of Seller. Pending completion, Seller shall hold all insurance policies, if any, and the proceeds thereof in trust for the parties as their interests may appear and in the event of substantial damage, Buyer may either terminate this Agreement and have all monies paid returned without interest or deduction or else take the proceeds of any insurance and complete the purchase. No insurance shall be transferred on completion. If Seller is taking back a Charge/Mortgage, or Buyer is assuming a Charge/Mortgage, Buyer shall supply Seller with reasonable evidence of adequate insurance to protect Seller's or other mortgagee's interest on completion.

INITIALS OF BUYER(S):

INITIALS OF SELLER(S):

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- 15. PLANNING ACT:** This Agreement shall be effective to create an interest in the property only if Seller complies with the subdivision control provisions of the Planning Act by completion and Seller covenants to proceed diligently at his expense to obtain any necessary consent by completion.
- 16. DOCUMENT PREPARATION:** The Transfer/Deed shall, save for the Land Transfer Tax Affidavit, be prepared in registrable form at the expense of Seller, and any Charge/Mortgage to be given back by the Buyer to Seller at the expense of the Buyer. If requested by Buyer, Seller covenants that the Transfer/Deed to be delivered on completion shall contain the statements contemplated by Section 50(22) of the Planning Act, R.S.O. 1990.
- 17. RESIDENCY:** (a) Subject to (b) below, the Seller represents and warrants that the Seller is not and on completion will not be a non-resident under the non-residency provisions of the Income Tax Act which representation and warranty shall survive and not merge upon the completion of this transaction and the Seller shall deliver to the Buyer a statutory declaration that Seller is not then a non-resident of Canada;  
(b) provided that if the Seller is a non-resident under the non-residency provisions of the Income Tax Act, the Buyer shall be credited towards the Purchase Price with the amount, if any, necessary for Buyer to pay to the Minister of National Revenue to satisfy Buyer's liability in respect of tax payable by Seller under the non-residency provisions of the Income Tax Act by reason of this sale, Buyer shall not claim such credit if Seller delivers on completion the prescribed certificate.
- 18. ADJUSTMENTS:** Any rents, mortgage interest, realty taxes including local improvement rates and unmetered public or private utility charges and unmetered cost of fuel, as applicable, shall be apportioned and allowed to the day of completion, the day of completion itself to be apportioned to Buyer.
- 19. TIME LIMITS:** Time shall in all respects be of the essence hereof provided that the time for doing or completing of any matter provided for herein may be extended or abridged by an agreement in writing signed by Seller and Buyer or by their respective lawyers who may be specifically authorized in that regard.
- 20. PROPERTY ASSESSMENT:** The Buyer and Seller hereby acknowledge that the Province of Ontario has implemented current value assessment and properties may be re-assessed on an annual basis. The Buyer and Seller agree that no claim will be made against the Buyer or Seller, or any Brokerage, Broker or Salesperson, for any changes in property tax as a result of a re-assessment of the property, save and except any property taxes that accrued prior to the completion of this transaction.
- 21. TENDER:** Any tender of documents or money hereunder may be made upon Seller or Buyer or their respective lawyers on the day set for completion. Money shall be tendered with funds drawn on a lawyer's trust account in the form of a bank draft, certified cheque or wire transfer using the Large Value Transfer System.
- 22. FAMILY LAW ACT:** Seller warrants that spousal consent is not necessary to this transaction under the provisions of the Family Law Act, R.S.O. 1990 unless the spouse of the Seller has executed the consent hereinafter provided.
- 23. UFFI:** Seller represents and warrants to Buyer that during the time Seller has owned the property, Seller has not caused any building on the property to be insulated with insulation containing ureaformaldehyde, and that to the best of Seller's knowledge no building on the property contains or has ever contained insulation that contains ureaformaldehyde. This warranty shall survive and not merge on the completion of this transaction, and if the building is part of a multiple unit building, this warranty shall only apply to that part of the building which is the subject of this transaction.
- 24. LEGAL, ACCOUNTING AND ENVIRONMENTAL ADVICE:** The parties acknowledge that any information provided by the brokerage is not legal, tax or environmental advice, and that it has been recommended that the parties obtain independent professional advice prior to signing this document.
- 25. CONSUMER REPORTS:** The Buyer is hereby notified that a consumer report containing credit and/or personal information may be referred to in connection with this transaction.
- 26. AGREEMENT IN WRITING:** If there is conflict or discrepancy between any provision added to this Agreement (including any Schedule attached hereto) and any provision in the standard pre-set portion hereof, the added provision shall supersede the standard pre-set provision to the extent of such conflict or discrepancy. This Agreement including any Schedule attached hereto, shall constitute the entire Agreement between Buyer and Seller. There is no representation, warranty, collateral agreement or condition, which affects this Agreement other than as expressed herein. For the purposes of this Agreement, Seller means vendor and Buyer means purchaser. This Agreement shall be read with all changes of gender or number required by the context.
- 27. TIME AND DATE:** Any reference to a time and date in this Agreement shall mean the time and date where the property is located.

INITIALS OF BUYER(S):



INITIALS OF SELLER(S):



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**28. SUCCESSORS AND ASSIGNS:** The heirs, executors, administrators, successors and assigns of the undersigned are bound by the terms herein. SIGNED, SEALED AND DELIVERED in the presence of: IN WITNESS whereof I have hereunto set my hand and seal:

*[Signature]*  
 (Witness)  
 \_\_\_\_\_  
 (Witness)

*11696289 Canada Inc.*  
*[Signature]*  
 (Buyer/Authorized Signing Officer) (Seal) *Dec 23, 2019* (Date)  
 \_\_\_\_\_  
 (Buyer/Authorized Signing Officer) (Seal) (Date)

I, the Undersigned Seller, agree to the above offer. I hereby irrevocably instruct my lawyer to pay directly to the brokerage(s) with whom I have agreed to pay commission, the unpaid balance of the commission together with applicable Harmonized Sales Tax (and any other taxes as may hereafter be applicable), from the proceeds of the sale prior to any payment to the undersigned on completion, as advised by the brokerage(s) to my lawyer.

SIGNED, SEALED AND DELIVERED in the presence of:  
*[Signature]*  
 (Witness)  
 \_\_\_\_\_  
 (Witness)

IN WITNESS whereof I have hereunto set my hand and seal:  
*3070 Zillmore Developments Inc.*  
*[Signature]*  
 (Seller/Authorized Signing Officer) (Seal) *Dec 23, 2019* (Date)  
 \_\_\_\_\_  
 (Seller/Authorized Signing Officer) (Seal) (Date)

**SPOUSAL CONSENT:** The undersigned spouse of the Seller hereby consents to the disposition evidenced herein pursuant to the provisions of the Family Law Act, R.S.O. 1990, and hereby agrees to execute all necessary or incidental documents to give full force and effect to the sale evidenced herein.

\_\_\_\_\_  
 (Witness) (Spouse) (Seal) (Date)

**CONFIRMATION OF ACCEPTANCE:** Notwithstanding anything contained herein to the contrary, I confirm this Agreement with all changes both typed and written was finally accepted by all parties at *2:00* (a.m./p.m.) this *23* day of *December*, 20*19*.  
 \_\_\_\_\_  
 (Signature of Seller or Buyer)

INFORMATION ON BROKERAGE(S)	
Listing Brokerage .....	(Tel.No.)
(Salesperson/Broker/Broker of Record Name)	
Co-op/Buyer Brokerage .....	(Tel.No.)
(Salesperson/Broker/Broker of Record Name)	

**ACKNOWLEDGEMENT**

I acknowledge receipt of my signed copy of this accepted Agreement of Purchase and Sale and I authorize the Brokerage to forward a copy to my lawyer.  
*[Signature]* *Dec 23, 2019*  
 (Seller) (Date)  
 \_\_\_\_\_  
 (Seller) (Date)  
 Address for Service .....

I acknowledge receipt of my signed copy of this accepted Agreement of Purchase and Sale and I authorize the Brokerage to forward a copy to my lawyer.  
*[Signature]* *Dec 23, 2019*  
 (Buyer) (Date)  
 \_\_\_\_\_  
 (Buyer) (Date)  
 Address for Service .....

FOR OFFICE USE ONLY	COMMISSION TRUST AGREEMENT
To: Co-operating Brokerage shown on the foregoing Agreement of Purchase and Sale:	
In consideration for the Co-operating Brokerage procuring the foregoing Agreement of Purchase and Sale, I hereby declare that all moneys received or receivable by me in connection with the Transaction as contemplated in the MLS® Rules and Regulations of my Real Estate Board shall be receivable and held in trust. This agreement shall constitute a Commission Trust Agreement as defined in the MLS® Rules and shall be subject to and governed by the MLS® Rules pertaining to Commission Trust.	
DATED as of the date and time of the acceptance of the foregoing Agreement of Purchase and Sale.	Acknowledged by:
_____ (Authorized to bind the Listing Brokerage)	_____ (Authorized to bind the Co-operating Brokerage)

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This Schedule is attached to and forms part of the Agreement of Purchase and Sale between:

**BUYER:** 11696289 Canada Inc. ...., and

**SELLER:** 3070 ELLESMERE DEVELOPMENTS INC. ....

for the purchase and sale of 3070 Ellesmere Road, Toronto, ON ..... TORONTO, ON M1E 4C3

..... dated the 23 ..... day of December ..... 20.19

Buyer agrees to pay the balance as follows:

- (1) The Seller and Buyer have agreed to enter into this Agreement to set forth the terms whereby the Buyer has agreed to purchase, and the Seller has agreed to sell, the property known municipally as 3070 Ellesmere Road in Toronto, Ontario and legally described in Scheduled in this Agreement (the "Property");
- (2) It is a condition of this Agreement that the issuance of an Approval and Vesting Order by the Court, accepted to the Buyer;
- (3) The Buyer agrees to pay [REDACTED] Deposit before the closing of the Property upon the below schedule:
  - 3.1 Initial Deposit of [REDACTED] is payable upon the Court Approval;
  - 3.2 Second Deposit of [REDACTED] is payable 15 days after the Initial Deposit;
- (4) The Buyer agrees to pay the balance of the purchase price, subject to adjustments, to the Seller on completion of this transaction, with funds drawn on a lawyer's trust account in the form of a bank draft, certified cheque or wire transfer using the Large Value Transfer System;
- (5) The Seller acknowledges that it is the intention of the Buyer to develop the property and shall provide the Buyer following documents whichever at Seller's possession:
  - 5.1 Copies of all physical and planning reports;
  - 5.2 Site Plan and specifications of the lot and other improvements on the Purchased Property, if available; Survey of the Purchased Property showing the location of the property and all easements and rights-of-way thereon and any encroachments on or affecting the Purchased Property prepared by a qualified Land Surveyor;
  - 5.3 Complete copy of all engineering or soil test reports on the Purchased Property or any part thereof, if any, and a copy of any appraisal reports affecting the Purchased Property in the possession of the Seller or subject to its reasonable control;
- (6) The Seller agrees to cooperate on the verification of current city approval process and gives Buyer access on planning related information.
- (7) The Seller agrees that the Buyer has the right to assume or discharge the current 1st and 2nd mortgages.
- (8) The Seller has requested financial assistance from the Buyer to fund the professional expenses related to the transaction. The Buyer has agreed to release the Deposit for the above expenses;

This form must be initialed by all parties to the Agreement of Purchase and Sale.

INITIALS OF BUYER(S):

INITIALS OF SELLERS(S):

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# Schedule A

## Agreement of Purchase and Sale - Commercial



### Form 500

for use in the Province of Ontario

This Schedule is attached to and forms part of the Agreement of Purchase and Sale between:

**BUYER:** 11696289 Canada Inc. ...., and

**SELLER:** 3070 ELLESMERE DEVELOPMENTS INC. ....

for the purchase and sale of 3070 Ellesmere Road, Toronto, ON ..... TORONTO, ON M1E 4C3

..... dated the 23 ..... day of December ..... 20 19 .....

(9) The Buyer shall have the right at any time prior to closing, to assign the within Offer to any person, persons or corporation, either existing or to be incorporated, and upon delivery to the Seller of notice of such assignment, together with the assignee's covenant in favour of the Seller to be bound hereby as Buyer, the Buyer herein before named shall stand released from all further liability hereunder.

(10) The parties hereto consent and agree to the use of electronic signature pursuant to the Electronic Commerce Act 2000, S.O. 2000, c17 as amended from time to time with respect to this Agreement and any other documents respecting this transaction.

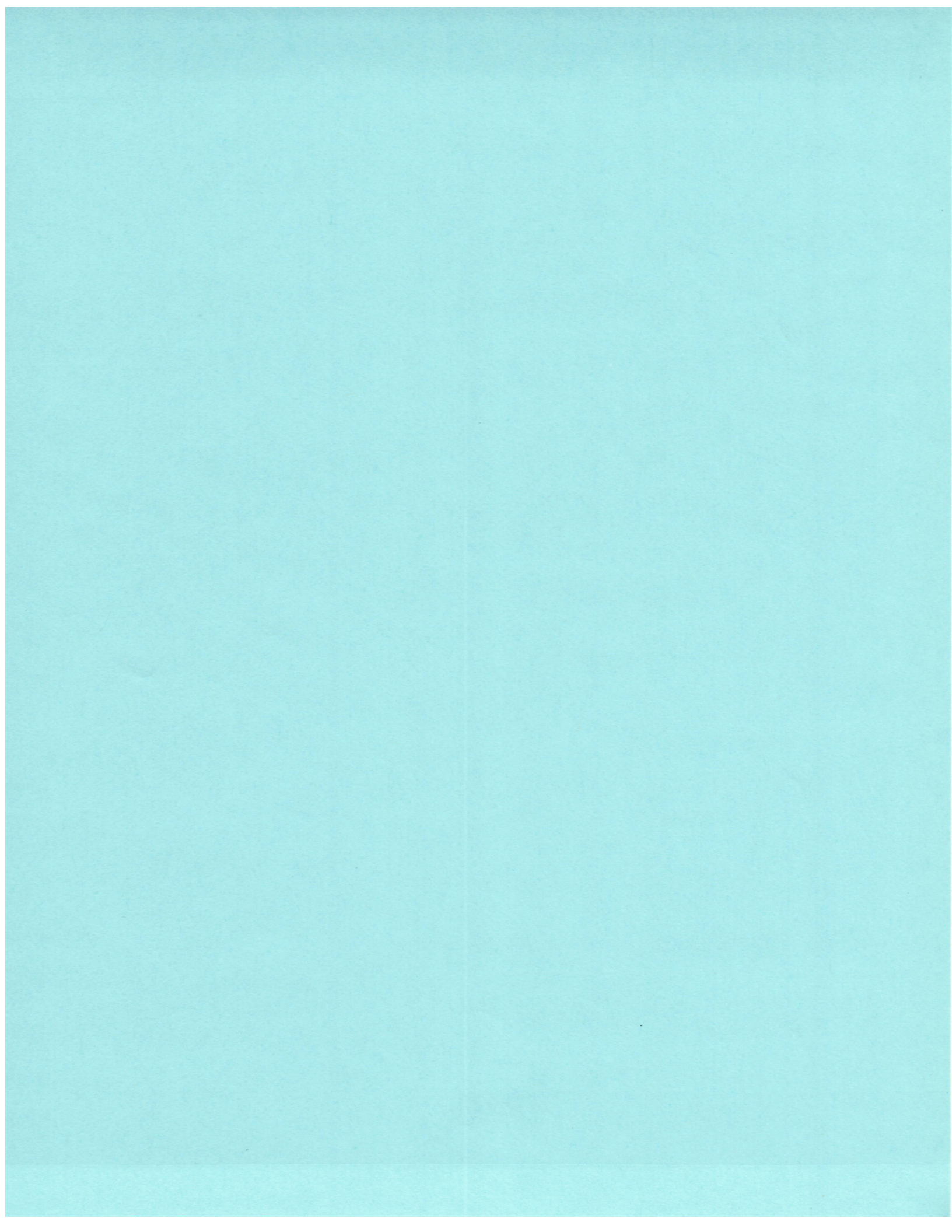
This form must be initialed by all parties to the Agreement of Purchase and Sale.

INITIALS OF BUYER(S):

INITIALS OF SELLER(S):

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Thornton Grout Finnigan LLP  
RESTRUCTURING + LITIGATION

Toronto-Dominion Centre  
100 Wellington Street West  
Suite 3200, P.O. Box 329  
Toronto, ON Canada M5K 1K7  
T 416.304.1616 F 416.304.1313

D.J. Miller  
T: 416-304-0559  
E: djmiller@tgf.ca  
File No. 2003-001

January 13, 2020

Blaney McMurtry LLP  
2 Queen Street East, Suite 1500  
Toronto, ON  
M5C 3G5

**Attention: David T. Ullman**

Dear Mr. Ullman:

**Re: In the Matter of the Receivership of 3070 Ellesmere Developments Inc. (the “Debtor”)**

We refer to your letter dated January 9, 2020 and take this opportunity to respond.

Your client is, and has been since February 26, 2019, specifically enjoined from dealing in any manner with the subject property (the “**Property**”) pursuant to the terms of the Order of Justice Hailey dated February 26, 2019 (the “**February Order**”). Since September 13, 2019 an Order of Justice Hailey has been in place appointing RSM Canada Limited as Receiver (the “**Receivership Order**”) over the Property, and expressly prohibiting anyone, including your client, from dealing with the Property. The agreement of purchase and sale purporting to deal with the Property that you have delivered to us on behalf of your client represents a continued and flagrant disregard for the clear terms of these prior Orders.

Your client must immediately cease and desist from purporting to take any steps to deal with the Property, or from communicating with any party to the effect that he has any legal authority to do so. Should your client continue to attempt to deal with the Property in contravention of the court orders that exist, we will have no choice but to schedule an immediate attendance before Justice Hailey. These actions appear to be part of a continuing effort on the part of your client to create confusion or uncertainty, and delay attempts by the Debtor’s creditors to have the Property sold by the Receiver in accordance with the Receivership Order.

Your client’s decision to seek to appeal the Receivership Order that was issued on consent, and then abandon the appeal by consenting to the Motion to Quash the appeal on January 7, 2020, has caused significant prejudice to creditors. The 3 month delay in taking steps to sell the Property under the Receivership Order following delivery of your client’s Notice of Appeal has resulted in a financial detriment to creditors of approximately \$420,000 as at December 16, 2019 with additional amounts accruing since that date.

Your client’s appeal of the Receivership Order has been quashed and the Property will be sold by the Receiver in accordance with the Receivership Order. The Receiver will not be seeking





Thornton Grout Finnigan LLP

2.

approval of the agreement of purchase and sale attached to your January 9, 2020 letter. Should 11696289 Canada Inc. wish to participate in the sale process conducted by the Receiver, you may advise them that they are welcome to do so.

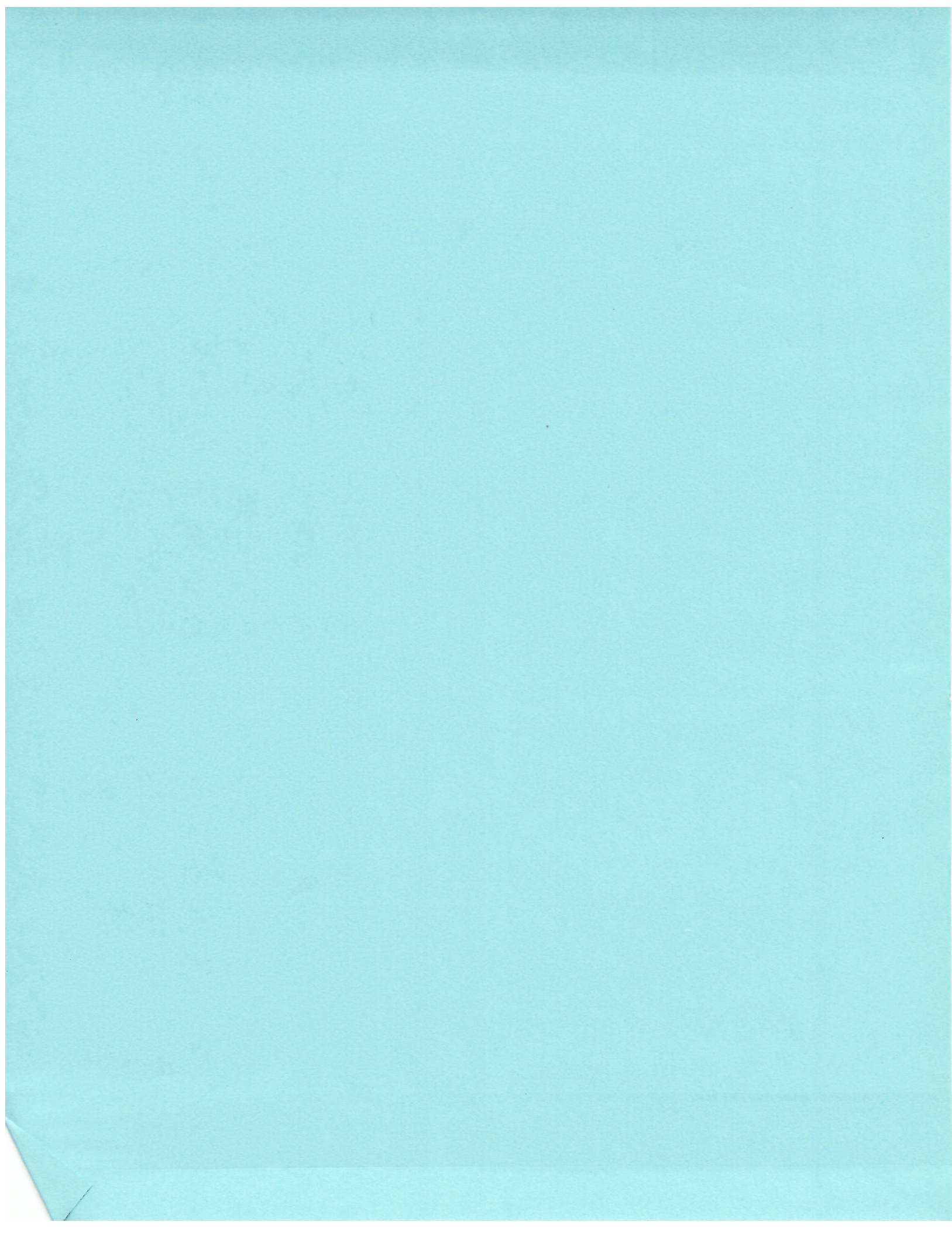
Yours truly,

**Thornton Grout Finnigan LLP**

A handwritten signature in black ink, appearing to read 'D.J. Miller'.

D.J. Miller

DJM/OG





## Owen Gaffney

---

**From:** D. J. Miller  
**Sent:** Wednesday, January 15, 2020 3:49 PM  
**To:** 'David T. Ullmann'  
**Cc:** Rebecca Kennedy; Owen Gaffney; Mervyn D. Abramowitz; Thomas Liu; Jessica Wang  
**Subject:** RE: Receivership of 3070 Ellesmere Developments Inc.

David:

I'm not sure why you would assume that the purchase price in an offer presented by your client (that is not being accepted by the Receiver) would be redacted in a Report filed by the Receiver. We can think of no legitimate basis for withholding that information from interested stakeholders in the proceeding. Furthermore, the purchase price is separately referred to in your email to us on Monday at 4:38 pm.

Thank you for the confirmation on behalf of your client as set out below. For greater certainty we will be seeking a specific term in the next Order we seek, which will confirm his assurance to the Receiver as set out below.

D.J.

---

**From:** David T. Ullmann [mailto:DUllmann@blaney.com]  
**Sent:** Wednesday, January 15, 2020 1:28 PM  
**To:** D. J. Miller <DJMiller@tgf.ca>  
**Cc:** Rebecca Kennedy <Rkennedy@tgf.ca>; Owen Gaffney <OGaffney@tgf.ca>; Mervyn D. Abramowitz <MAbramowitz@blaney.com>; Thomas Liu <thomas.liu@leminegroup.com>; Jessica Wang <jessica.wang@leminegroup.com>  
**Subject:** RE: Receivership of 3070 Ellesmere Developments Inc.

DJ,

Thank you for your note. We look forward to the report from the receiver. In the interim, I just wanted to confirm our understanding that the receiver will keep the purchase price in the agreement we have provided to you confidential pending the completion of the sale or sale process as the court may direct. I assumed you would do this anyway, but I just wanted to be clear on that point.

Also, I have confirmed with Thomas Liu that he will not interfere with any sale process ordered by the court for the receiver or do anything inconsistent with the receivership order which is now in place. This does not, of course, preclude him from attending court to advise of any objection he may have to such a sale process, fees, etc. To the extent the court does not direct the receiver to simply proceed with the agreement in hand and orders a process, Mr. Liu would be happy to discuss how he can assist the Receiver in that process.

Regards,

David

David T. Ullmann  
Partner

dullmann@blaney.com  
☎ 416-596-4289 | ☎ 416-594-2437

**From:** D. J. Miller [mailto:DJMiller@tgf.ca]  
**Sent:** January 13, 2020 4:50 PM  
**To:** David T. Ullmann <DUllmann@blaney.com>  
**Cc:** Rebecca Kennedy <Rkennedy@tgf.ca>; Owen Gaffney <OGaffney@tgf.ca>; Mervyn D. Abramowitz <MAbramowitz@blaney.com>  
**Subject:** RE: Receivership of 3070 Ellesmere Developments Inc.

David:

We have your position. Threats of “sanctions” against the court-appointed Receiver in your email below are inappropriate and will be brought to the Court’s attention.

The Receiver will be reporting to the Court and all stakeholders shortly, and you will receive same when it is served.

D.J.

**From:** David T. Ullmann [mailto:DUllmann@blaney.com]  
**Sent:** January-13-20 4:38 PM  
**To:** D. J. Miller <DJMiller@tgf.ca>  
**Cc:** Rebecca Kennedy <Rkennedy@tgf.ca>; Owen Gaffney <OGaffney@tgf.ca>; Mervyn D. Abramowitz <MAbramowitz@blaney.com>  
**Subject:** RE: Receivership of 3070 Ellesmere Developments Inc.

DJ,

Thank you for your letter. We can agree to disagree as to who is at fault for the passage of time in this process. Suffice to say your lender client chose to interfere with a court process which would have seen them repaid months ago. Any prejudice to their position was of their own making and will certainly be argued about when or if any payout is to be made to them (other than the appeal costs, as agreed). As to your view on the impact of previous orders, the agreement for the property is subject to court approval, and any previous order from the court could and would be considered at that time. I do not believe it would prevent the court from considering if this offer is in the best interest of the creditors.

The dominant fact remains that there is an urgent need to sell this property and to stop any further professional fees from accruing. Indeed, in the event the Receiver does anything other than proceed immediately to seek approval of this offer by the court you can expect that any further fees which it incurs down any other path will be challenged as a waste in the face of this agreement, not just by the company but by the unsecured and other creditors. This would especially be the case if the Receiver runs a process which ultimately fails to sell the property for at least ████████ net of costs and any further accrued taxes caused by the delay in not simply proceeding to approve this deal. This matter could be over in a matter of weeks, which, given your client's alleged concern about prejudice (which prejudice was never mentioned until an adjournment of the appeal was sought) should be of great appeal to your client.

In any event, the fact remains that there is a binding agreement in place and the Receiver cannot disregard it just because of your personal interpretation of court orders which may no longer apply. In the event the Receiver moves to sell the property without first addressing the agreement in place with the court, I am quite certain it will be subject to sanction by the Court for doing so.

I continue to optimistically believe you will reconsider your position or that the Receiver will get independent counsel to allow it to take an independent view of this. If that proves not to be the case, I anticipate that I will be asked to schedule a

court appearance to deal with this. We will seek costs of such an appearance, as we are without funds and you will be requiring us to take Court action when it is otherwise completely avoidable.

Regards,

David

David T. Ullmann

Partner

dullmann@blaney.com

☎ 416-596-4289 | ☎ 416-594-2437

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**From:** D. J. Miller [<mailto:DJMiller@tgf.ca>]

**Sent:** January 13, 2020 11:23 AM

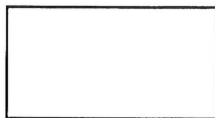
**To:** David T. Ullmann <[DUllmann@blaney.com](mailto:DUllmann@blaney.com)>

**Cc:** Rebecca Kennedy <[Rkennedy@tgf.ca](mailto:Rkennedy@tgf.ca)>; Owen Gaffney <[OGaffney@tgf.ca](mailto:OGaffney@tgf.ca)>

**Subject:** RE: Receivership of 3070 Ellesmere Developments Inc.

I should add that all future correspondence from your firm should be addressed and directed to TGF, rather than the Receiver. Thank you.

D.J.



D. J. Miller | Direct Line: +1 416 304-0559 | Thornton Grout Finnigan LLP | [www.tgf.ca](http://www.tgf.ca)

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---

**From:** D. J. Miller

**Sent:** January-13-20 10:56 AM

**To:** [dullmann@blaney.com](mailto:dullmann@blaney.com)

**Cc:** Rebecca Kennedy <[Rkennedy@tgf.ca](mailto:Rkennedy@tgf.ca)>; Owen Gaffney <[OGaffney@tgf.ca](mailto:OGaffney@tgf.ca)>

**Subject:** Receivership of 3070 Ellesmere Developments Inc.

David:

Please see the attached letter.

Regards,

D.J.

# **SCHEDULE “10”**

CV-19-00632 309 0000

Court File No.

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

*(Court Seal)*

LEMINE INVESTMENT GROUP INC., LEMINE PROJECT HOLDING INC., AJAX MASTER HOLDING INC., 2432406 ONTARIO INC., 9654372 CANADA INC., 9654488 CANADA INC., 9654461 CANADA INC., 9617680 CANADA INC., TONG LIU, CENTRAL PARK AJAX DEVELOPMENTS PHASE 1 INC., 9654445 CANADA INC., 3070 ELLESMERE DEVELOPMENTS INC., LEMINE REAL ESTATE CONSULTING INC. and 9654364 CANADA INC.

Plaintiffs

- and -

XIAODONG ZHU and 2615333 ONTARIO INC.

Defendants

**STATEMENT OF CLAIM**

TO THE DEFENDANT

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

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the Plaintiffs' lawyer or, where the Plaintiffs do not have a lawyer, serve it on the Plaintiffs, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date December 5, 2019 Issued by " D. Lee "  
Local Registrar

Address of court office: 393 University Avenue, 10th Floor  
Toronto ON  
M5G 1E6

TO: **XIAODONG ZHU**  
851 Woodland Acres Cres  
Maple, ON  
L6A 1G2

AND TO: **2615333 ONTARIO INC.**  
851 Woodland Acres Cres  
Maple, ON  
L6A 1G2

**CLAIM**

1. The plaintiffs, 9654372 Canada Inc., 9654488 Canada Inc., 9654461 Canada Inc., 9617680 Canada Inc., Central Park Ajax Developments Phase 1 Inc., 9654445 Canada Inc., 3070 Ellesmere Developments Inc. ("**3070 Ellesmere**"), LeMine Real Estate Consulting Inc., 9654364 Canada Inc., LeMine Investment Group Inc. ("**LeMine Investment**"), LeMine Project Holding Inc. ("**LeMine Holding**") and Ajax Master Holding Inc. ("**Ajax Master Holding**"), claim:

- (a) damages in the amount of \$33,500,000 for misrepresentation, breach of contract and breach of fiduciary duty;
- (b) damages in the amount of \$8,000,000 for breach of the duty of loyalty, oppression and conversion;
- (c) an interim and interlocutory order restraining the defendants from disclosing, divulging or using any and all Confidential Information (as defined below) belonging to the plaintiffs listed in paragraph 1;
- (d) a permanent and mandatory order restraining the defendants from disclosing, divulging or using any and all Confidential Information (as defined below) belonging to the plaintiffs listed in paragraph 1; and
- (e) an order requiring the defendants to return to the plaintiffs listed in paragraph 1 the Confidential Information (as defined below) in the possession or control of the defendants, their subsidiaries, agents, employees, servants, affiliates, successors, and assigns, any person or

entity controlled by the defendants, and any person or entity acting on behalf of or under the authority of the defendants.

2. The plaintiffs, 9654372 Canada Inc., 9654488 Canada Inc., 9654461 Canada Inc., 9617680 Canada Inc., Central Park Ajax Developments Phase 1 Inc., 9654445 Canada Inc., 3070 Ellesmere Developments Inc., LeMine Real Estate Consulting Inc. and 9654364 Canada Inc., claim:

- (a) an interim and interlocutory order restraining the defendant, 2615333 Ontario. Inc. ("**Zhu Holdco**") from commencing, continuing, or directing any enforcement proceedings pursuant to the notices of sale dated November 22, 2018 ("**Notices of Sale**") issued against the following properties: 134 Harwood Avenue South, Ajax, Ontario; 148 Harwood Avenue South, Ajax, Ontario; 152 Harwood Avenue South, Ajax, Ontario; 184/188 Harwood Avenue South, Ajax Ontario; 214 Harwood Avenue South, Ajax, Ontario; 224 Harwood Avenue South, Ajax, Ontario; and 226 Harwood Avenue South, Ajax, Ontario, (collectively, the "**Project**").
- (b) a permanent and mandatory order restraining the defendants from commencing, continuing, or directing any enforcement proceedings pursuant to the Notices of Sale;
- (c) an order, if necessary, directing the defendants to return possession of any property taken in respect of any enforcement proceedings that have been commenced pursuant to the Notices of Sale.



3. The plaintiff Tong Liu ("**Liu**") claims:
  - (a) a declaration that the power of attorney dated May 14, 2018 ("**POA**") in favour of the defendant Xiaodong Zhu ("**Zhu**") is of no force and effect or, in the alternative, was revoked, or is otherwise unenforceable;
  - (b) an interim and interlocutory order restraining Zhu from taking any action, or directing that any action be taken, pursuant to the POA; and
  - (c) a mandatory and permanent order restraining Zhu from taking any action, or directing that any action be taken, pursuant to the POA.
  
4. The plaintiff 2432406 Ontario Inc. ("**2432406 Ontario**") claims:
  - (a) a declaration pursuant to section 248 of the OBCA that Zhu, in his capacity as a director and/or officer, or *de facto* director and/or officer of some or all of the plaintiff corporations and/or through Zhu Holdco has acted in a manner that is oppressive, unfairly prejudicial, and which unfairly disregards the interests of 2432406 Ontario in its capacity as a shareholder of LeMine Investment holding 100 percent of its shares, and otherwise; and
  - (b) damages for the oppressive conduct described in subparagraph 4(a) above in the amount of \$8,000,000.
  
5. All of the plaintiffs claim:

- (a) damages for all losses sustained as a result of the defendants' various breaches set out above and particularized below in connection with the Project in an amount to be specified prior to trial;
- (b) in the alternative to the damages claimed above as applicable, restitution for unjust enrichment;
- (c) punitive and exemplary damages for the defendants' blatant infringement and reckless disregard of the plaintiffs' rights;
- (d) pre-judgment and post-judgment interest in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. C. 45, as amended;
- (e) costs of this action on a substantial indemnity basis; and
- (f) such further and other relief as this Honourable Court may deem just.

### **Parties**

6. The plaintiff, Liu, is an individual residing in Toronto, Ontario. Liu is the director of the corporate plaintiffs described in paragraphs 7 to 19.

7. The plaintiff, 2432406 Ontario, is a corporation incorporated pursuant to the laws of the Province of Ontario with a registered office in North York, Ontario. 2432406 Ontario is the sole shareholder of LeMine Investment.

8. The plaintiff, LeMine Investment, is a corporation incorporated pursuant to the laws of the Province of Ontario with a registered office in Toronto, Ontario.

9. The plaintiff, LeMine Holding, is a corporation incorporated pursuant to the laws of Canada with a registered office in North York, Ontario.
10. The plaintiff, Ajax Master Holding, is a corporation incorporated pursuant to the laws of Canada with a registered office in Richmond Hill, Ontario.
11. The plaintiff, 9654372 Canada Inc., is a corporation incorporated pursuant to the laws of Canada with a registered office in North York, Ontario.
12. The plaintiff, 9654488 Canada Inc., is a corporation incorporated pursuant to the laws of Canada with a registered head office in Richmond Hill, Ontario.
13. The plaintiff, 9654461 Canada Inc., is a corporation incorporated pursuant to the laws of Canada with a registered office in Richmond Hill, Ontario.
14. The plaintiff, 9617680 Canada Inc., is a corporation incorporated pursuant to the laws of Canada with a registered office in North York, Ontario.
15. The plaintiff, Central Park Ajax Developments Phase 1 Inc., is a corporation incorporated pursuant to the laws of the Province of Ontario with a registered office in Richmond Hill, Ontario.
16. The plaintiff, 9654445 Canada Inc., is a corporation incorporated pursuant to the laws of Canada with a registered office in Richmond Hill, Ontario.
17. The plaintiff, 3070 Ellesmere Developments Inc., is a corporation incorporated pursuant to the laws of the Province of Ontario with a registered office in Richmond Hill, Ontario.

18. The plaintiff, LeMine Real Estate Consulting Inc., is a corporation incorporated pursuant to the laws of Canada with a registered office in Toronto, Ontario.

19. The plaintiff, 9654364 Canada Inc., is a corporation incorporated pursuant to the laws of Canada with a registered office in North York, Ontario.

20. All of the plaintiffs described in paragraphs 9 to 19 are subsidiaries of LeMine Investment and will be referred to collectively as "**Plaintiff Subsidiaries**" as applicable. The Plaintiff Subsidiaries operate out of LeMine Investment's head office located at 1600 16<sup>th</sup> Avenue, Richmond Hill, Ontario ("**LeMine Head Office**").

21. The defendant, Zhu Holdco, is a corporation incorporated pursuant to the laws of the Province of Ontario.

22. The defendant, Zhu, is an individual residing in Maple, Ontario. Zhu is the officer, director and shareholder of Zhu Holdco.

### **Central Park Ajax Project**

23. The corporate plaintiffs (collectively, "**LeMine**"), carry on the business of real estate development in the Greater Toronto Area.

24. The Project is a high profile, multi-phase, multi-use development project that is situated in downtown Ajax. With the support of the Town of Ajax ("**Town**"), the Project was conceived to transform and revitalize downtown Ajax.

25. The genesis of the revitalization project was a downtown Community Improvement Plan ("**CIP**"), adopted by the Ajax Town Council through By-Law 44-2005, and approved by the Ministry of Municipal Affairs and Housing on July 18, 2005.

26. Due to the high degree of difficulty associated with implementing the CIP, and the lack of an obvious and motivated developer prepared to undertake a downtown revitalization project without incentives, the Town offered extraordinary tax and development-charge incentives to the developer accepting the Project.

27. The Town originally engaged Windcorp Grand Harwood Place Ltd. ("**Windcorp**") to act as developer of the Project pursuant to the terms of a Developer Agreement and Agreement of Purchase and Sale ("**Development Agreement**") signed on July 15, 2013. Pursuant to the Development Agreement, the developer was to purchase the lands required to develop the project ("**Project Lands**") directly from the Town on favourable tax terms and subject to other significant financial incentives.

28. The Project was to be developed in phases. Once the initial phase of the Project was complete, Phase II of the Project would begin, and the developer would once again be entitled to purchase the underlying lands on terms favourable for the purposes of development. Similar procedures would be followed for all six stages of the revitalization of the Central Park Ajax site.

29. Prior to the closing of the Project Lands, Windcorp withdrew as developer.

30. With the consent of the Town, LeMine succeeded to all the developer's responsibilities, liabilities, and interest in the Development Agreement, subject to some

modifications pursuant to an amending agreement. The Development Agreement was assigned to certain of the Plaintiff Subsidiaries on June 29, 2015.

31. In June of 2015 the Town approved a Site Plan for the Project that permitted the development of a 10-story building.

32. LeMine engaged Milborne Group, one of Canada's largest pre-construction sales and consulting agencies, to advise on the Project.

33. Sales of residential units began in May of 2016. Following five months of extensive target-market research and planning, LeMine sold out 70% of pre-sale units in just two weekends.

34. LeMine prepared and submitted a revised Site Plan in November 2016.

35. By April of 2017 pre-sales of the Project units had reached 85% of target. The Project has an excellent location, a compelling Site Plan, and all of the numbers to back up unit values as solid real estate investments.

36. On the strength of the pre-sales and the Site Plan, LeMine sought and obtained construction financing in respect of the Project.

37. Also during this period, in or about the summer of 2017, the Project encountered certain delays relating to required Town approvals in respect of the revised Site Plan. This is because the Town indicated its preference for the original Site Plan which featured a 10-storey building to be constructed, rather than the 12-storey one envisioned in the revised Site Plan application.

38. LeMine's management and project team engaged the Town, and prepared submissions and attempted to address the Town's concerns regarding the proposed revised Site Plan application. LeMine was optimistic that the Town's concerns could be addressed and the revised Site Plan would be approved.

#### **Zhu Invests and Assumes Management Responsibility at LeMine**

39. In or about November 2017, LeMine's President, Liu, was introduced to Zhu as a potential equity investor in LeMine. Zhu presented himself as an experienced investor, project manager, and real estate developer of substantial means who was interested in making a large investment in a high profile development project in the GTA.

40. Throughout November 2017, Liu and Zhu met and discussed the terms upon which Zhu would be prepared to invest in LeMine. Negotiations culminated in a final meeting in December 2017 at which point the parties agreed to key contractual terms.

41. Specifically, Zhu agreed that: (i) he would subscribe for and purchase a 50% equity interest in Ajax Master Holding, by subscribing for 10,000,000 common shares for an aggregate purchase price of \$10,000,000; (ii) going forward, for future phases of the Project, he would similarly commit to sustain a 50% equity interest in the company by making such additional share capital contributions as may be required.

42. On or about January 3, 2018, Liu and Zhu met again. Zhu affirmed his commitment to provide 50% of the equity investment in the Project. He further

undertook to assist LeMine in meeting its ongoing monthly operating cost by funding up to \$250,000 per month, pending completion of the Project ("**January Agreement**").

43. Zhu's investment commitment was documented in part on January 12, 2018. LeMine Project Holding and Zhu entered into a share purchase agreement pursuant to which Zhu agreed to pay \$10,000,000 to purchase 50% of the shares of Ajax Master Holding from LeMine Project Holding ("**Share Purchase Agreement**"). By this time, Zhu had already advanced or caused to be advanced a \$2,000,000 deposit as required by the Share Purchase Agreement. It was agreed that the \$8,000,000 balance of the purchase price was to be paid within 60 days of January 12, 2018.

44. On January 15, 2018, Liu and Zhu attended a shareholders' meeting for Ajax Master Holding. During the meeting, Zhu expressed a desire to assume senior management responsibility within LeMine. He also reiterated the specific promises and commitments previously made to financially support the Project through and beyond the development of Phase I.

45. Thereafter, drafts of a shareholder agreement in respect of Zhu's investment in Ajax Master Holding were prepared by Zhu's lawyer.

46. Zhu requested, and the initial draft shareholders agreement confirmed, that he would assume the responsibilities of "Vice President" of Ajax Master Holding for a two year term ending December 31, 2019.

47. Beginning in early 2018, Zhu assumed the title and responsibilities of an owner and senior executive of LeMine. In those capacities, he held himself out to employees



of LeMine, investors, the Town, and third party service providers and contractors, as having full corporate and management authority for LeMine.

48. By April 2018, Zhu had moved into the LeMine Head Office and was exercising all manner of discretionary authority and day-to-day management responsibility in respect of LeMine and the Project, including, but not limited to:

- (a) Negotiating on behalf of LeMine with current mortgage lenders and potential take-out lenders, including in respect of the TCC Loan (as hereinafter defined);
- (b) Managing LeMine's relations with its investor group, and prospective investors, by meeting with investors and prospective investors, and making presentations to them, and otherwise responding to questions and exchanging information;
- (c) Directing and supervising employees of LeMine, including by setting their job responsibilities, tasks, and reporting requirements; and
- (d) instructing LeMine employees to make available to him Project related financial projections and models, design and development information, operations information, business plans, forecasts, marketing and sales strategies, contracts with developers, leases, and contact information for current and prospective investors (collectively, "**Confidential Information**").

49. On the basis that he was a co-owner, a significant investor, and senior executive of LeMine, Zhu took it upon himself to exercise progressively increasing direction and control over LeMine and its business and affairs. In doing so, Zhu generally exercised such powers and responsibilities unilaterally, and without reporting to, consulting with, or seeking the approval of others, including Liu who was nominally President of the company. Zhu was often times secretive such that in many instances Liu and other employees of LeMine had no clear knowledge or understanding as to what Zhu was and was not doing on behalf of LeMine, despite their best efforts to stay informed.

50. In the above circumstances, the plaintiffs plead that Zhu had a duty to act in the best interests of LeMine, to conduct himself honestly and in good faith, and to avoid conflicts of duty and self-interest in accordance with the duty of loyalty.

51. Zhu did none of the above. Instead, and as further described below, he appropriated and converted LeMine's business and opportunities for himself and put the very ability of LeMine to continue as a going concern and complete the Project at risk. In flagrant breach of his fiduciary and other duties to LeMine, including his good faith obligations and duty to avoid conflicts of duty and self-interest, Zhu took advantage of his position at LeMine, benefitting personally and entirely disregarding LeMine's interests.

#### **Zhu's Efforts to Appropriate Project, Enforce Wrongfully Obtained Security**

52. In or about the spring of 2018, LeMine was looking for a take-out lender to refinance certain Project mortgage financing ("**TCC Loan**") which was then held by Toronto Capital Corp. ("**TCC**") and which was coming due.

53. Consistent with his assumed senior officer level responsibilities at LeMine, Zhu dealt directly with TCC on behalf of LeMine in discussing the terms of a potential TCC Loan extension, or a refinancing. In doing so, he assumed sole executive power and responsibility on behalf of LeMine to guide and direct negotiations in respect of this crucial refinancing.

54. However, unbeknownst to Liu, and other LeMine employees and investors, Zhu was also representing his own personal interests, and the interests of his personal holding company, Zhu Holdco, as a prospective acquirer of the TCC Loan. In doing so, Zhu was acting in a clear conflict of interest as he preferred his own interests to that of the LeMine entities that he was at the same time representing in the negotiation with TCC.

55. On or about May 16, 2018, Zhu through Zhu Holdco executed a commitment letter ("**Commitment Letter**") with LeMine Investment, Ajax Master Holding, and certain of the Plaintiff Subsidiaries whereby Zhu, through Zhu Holdco, agreed to purchase the TCC Loan, register the transfer of charge on title to the properties comprising the Project, and extend the maturity date of the TCC Loan.

56. In his dealings in respect of the Commitment Letter and the TCC Loan, Zhu represented to the plaintiffs that the Commitment Letter and the Zhu Holdco acquisition of the TCC Loan were in the best interests of LeMine because the TCC Loan could then be extended and/or discharged so as would best accommodate LeMine's cash flow needs, and the successful completion of the Project.

57. Relying upon and trusting Zhu to act in the best interests of LeMine, the plaintiffs did not engage independent counsel or take legal advice in respect of the transactions that Zhu brokered on LeMine's behalf, including in respect of the Commitment Letter and the purchase of the TCC Loan by Zhu Holdco.

58. The Commitment Letter also required Liu to enter into a purportedly irrevocable power of attorney, which Liu did sign on May 14, 2018 (defined above as "POA"). Liu was not represented by counsel in connection with the POA. Relying upon Zhu's assurances as Vice President of LeMine that the POA was required and in the best interest of LeMine, Liu simply signed the POA without questioning, taking legal advice, or reviewing it in any detail.

59. As further pleaded below, Zhu breached his duties to LeMine and engaged in self-dealing in procuring the execution of the Commitment Letter and the POA for his own benefit and for the benefit of Zhu Holdco, while purporting to act in his capacity as Vice President of LeMine.

60. Further, and prior to Zhu's negotiations with TCC in respect of the TCC Loan, Zhu registered or caused to be registered a mortgage over certain of the properties comprising the Project, listing certain of the Plaintiff Subsidiaries as borrowers, in the amount of approximately \$3,000,000. Zhu amended, or caused to be amended, the charge in May 2018, increasing the principal amount purported to be secured from \$3,000,000 to \$4,000,000. Zhu has not advanced, or caused to be advanced, such funds in relation to this charge.

61. By May 2018, Zhu was in breach of the January Agreement, and his repeated promises and commitments to the plaintiffs, by ceasing to provide any measure of the promised financial support to LeMine.

62. Additionally, in breach of the Share Purchase Agreement, Zhu failed to advance the remaining \$8,000,000 share subscription price, required to be paid within sixty days of January 12, 2018.

63. Consequently, by the summer of 2018, LeMine was growing increasingly dependent on Zhu for financing its operating costs and day-to-day operations.

64. Unbeknownst to Liu, Zhu also began to exercise influence and control over LeMine to appropriate its business opportunities for himself in other ways. For example, Zhu began to liaise directly with the Town, with a view to distancing himself from LeMine and ultimately usurping the Project opportunity for himself.

65. In September of 2018, the Ontario Superior Court of Justice released a decision finding that, among other things, the Town had a right to serve a notice of repurchase in respect of a portion of the Project Lands, pursuant to the Development Agreement. Upon the release of this decision, Zhu began contacting LeMine shareholders and advising them to seek the return of their invested funds and invest money in his own company (i.e. Zhu Holdco) as well as to commence litigation against LeMine. Zhu also began encouraging key employees of LeMine to quit.

66. In mid-October, several weeks after the Ontario Superior Court decision was released, a large quantity of valuable furniture, fixtures, and equipment, collectively

worth approximately \$165,000, was stolen from the LeMine Head Office. Shortly thereafter, Liu discovered that the backdoor lock to the LeMine Head Office had been broken off and changed, and that the backdoor was used to access the building and steal the furniture. The plaintiffs plead that Zhu caused or directed the theft of the furniture, fixtures, and equipment from the LeMine Head Office to cause further loss and damage to LeMine in pursuit of his ultimate goal of usurping the Project for his personal benefit.

67. Zhu also caused or encouraged certain investors to lose confidence in the business and management of LeMine. On or about November 4, 2018, a meeting was held at the LeMine Head Office for preferred shareholders of certain of LeMine Investment's subsidiaries (including some of the Plaintiff Subsidiaries). The meeting was held to discuss converting shares of the Plaintiff Subsidiaries into shares of LeMine Investment, and to discuss injecting more equity into LeMine Investment to advance its development projects, including the Project. Zhu, however, repeatedly disrupted the meeting and instead encouraged shareholders to commence litigation against LeMine.

68. On or about November 22, 2018, Zhu Holdco, at the direction of Zhu, issued notices of sale over certain of the Project Lands. The plaintiffs plead that the notices of sale are invalid and unenforceable in that (among other things) the notices of sale, and any enforcement proceedings undertaken thereto, are in respect of money that was never advanced or money that was intended to be and is more properly characterized as equity. Further the mortgages underlying the notices of sale are

invalid and enforceable as they were acquired by Zhu in breach of his duties and by virtue of his unlawful conduct as pleaded herein.

### **Defendants' Breaches and the Damages Caused**

69. In the above circumstances, LeMine pleads that Zhu occupied a senior position of influence, and a position of trust, and was a director or officer, or in the alternative, a *de facto* director or officer, and a key employee of LeMine.

70. LeMine pleads that Zhu at all times owed fiduciary duties to the corporation (pursuant to the OBCA, CBCA, and at common law). Such fiduciary duties include: the duty of loyalty, the duty of honesty and good faith, the duty to avoid acting in self-interest, the duty to act in the best interest of the corporation, and the duty not to misuse confidential information and exploit opportunities that properly belong to LeMine.

71. Zhu exercised discretionary powers that could affect, and did affect, LeMine's interests such that it was vulnerable to Zhu's exercise of power. Zhu was the face of LeMine to the Town, investors, employees, and commercial partners, had discretion over the nature and amount of contact that he had with those parties, and exercised decision-making authority in respect of the business affairs and management of LeMine.

72. LeMine pleads that Zhu acted in a clear conflict of interest by negotiating and entering into various agreements in an effort to exert greater control and influence over the business, and for the purpose of ultimately usurping, or attempting to usurp, the Project for his own personal benefit. He breached his fiduciary duty by acting in his

own interests and contrary to the interests of LeMine. Without limiting the generality of the foregoing, Zhu breached his fiduciary duties and other duties by:

- (a) Creating an atmosphere of trust and confidence whereby LeMine relied upon, and became increasingly dependent upon, and vulnerable to, his power, discretion, authority, and financial support;
- (b) Wrongfully registering or causing to be registered a mortgage over certain of the properties comprising the Project, for the purpose of obtaining increased control for his own financial benefit and in his own personal interest over LeMine, and by doing so without advancing, or intending to advance, the funds purportedly secured by the charge;
- (c) Accessing Confidential Information owned by LeMine which Zhu knew or ought to have known was confidential for the purpose of assessing the viability of the Project, and contacting investors, and in furtherance of his determination to usurp the opportunity for his own personal benefit;
- (d) Obtaining for himself, or attempting to obtain for himself, secretly and without approval, the property, business advantage, and/or opportunity belonging to LeMine or for which LeMine had been negotiating, including but not limited to the Project;
- (e) Assuming a senior management position at LeMine for the purpose of (among other things) negotiating for his own benefit, and for the benefit of Zhu Holdco in respect of the TCC Loan to obtain the power to



commence enforcement proceedings pursuant to the notices of sale, ultimately with the intention of usurping or attempting to usurp the Project Lands and the Project for his own personal benefit;

- (f) Engaging in a clear conflict of interest and self-dealing by purporting to act in the best interests of LeMine regarding borrowings pursuant to the TCC Loan, all the while acting solely for his own personal financial interest and benefit;
- (g) Encouraging LeMine to execute the Commitment Letter and associated documents in relation to the purchase of the TCC Loan, and by falsely representing to LeMine that it was in the corporate interest to do so;
- (h) By taking advantage of his insider knowledge of LeMine, and access to Confidential Information, and the trust that the plaintiffs reposed in him, to act against LeMine's interests by purchasing the TCC Loan, and then shortly thereafter attempting to commence enforcement proceedings so he could take the benefit of the Project for himself;
- (i) Committing the acts done in paragraph 72(e) to (g) above to usurp or attempt to usurp the Project for the benefit of himself and Zhu Holdco, and to gain greater power, access, and control over other development projects owned or being pursued by LeMine;
- (j) Wrongfully appropriating, or directing another individual or entity to wrongfully appropriate on his behalf, LeMine property (including furniture,

office fixtures, and equipment) and Confidential Information, and wrongfully using such property and Confidential Information to benefit himself and to undermine the relationship that LeMine had with its investors, employees, and commercial partners;

- (k) Committing the acts done in paragraph 72(j) above with the intention of encouraging or inducing employees of LeMine to quit their employment thereby intending to cause loss and damage to LeMine; and
- (l) Contacting shareholders and investors of LeMine, and disrupting shareholder meetings held by LeMine, to encourage shareholders to seek a repurchase of their shares and/or commence litigation against LeMine.

73. At all material times, Zhu was aware that Liu and LeMine were not represented by counsel in respect of the agreements concluded with him. Zhu was, however, represented by counsel throughout. Moreover, at all material times, Zhu repeatedly professed his support for and financial obligations to LeMine as a means of securing the plaintiffs' trust and confidence in him, and as a means of inducing LeMine to enter into the self-dealing transactions that are the subject of this claim.

74. LeMine pleads that Zhu's conduct as outlined in paragraphs 72 and 73 constitutes a breach of fiduciary duties owing to LeMine. The plaintiffs have suffered and will continue to suffer irreparable harm and/or damage as a result of Zhu's breach of his fiduciary duties.

75. LeMine pleads that Zhu's conduct as described in paragraphs 72(c) and 72(j) above breached their confidence and constituted conversion of their property.

76. Liu pleads that Zhu induced him to execute the POA knowing that Liu was vulnerable to, and trusted, Zhu to act in the best interests of LeMine. Liu further pleads that Zhu induced him to execute the POA for the purpose of permitting Zhu to act in his own self-interest and for his own benefit. Liu pleads that the POA is of no force and effective, was revoked, or is otherwise now unenforceable.

77. Zhu also breached his contractual obligations pursuant to the January Agreement and the Share Purchase Agreement by failing to provide financial support and investment in LeMine, as promised.

78. LeMine has suffered and will continue to suffer damages as a result of the defendants' breaches and wrongful conduct. Without limiting the generality of the foregoing, as a result of Zhu's actions, LeMine was unable to satisfy operating expenses (including payment of employees' salaries) and its ability to complete the Project, and other projects, is at jeopardy.

79. The plaintiffs further plead that Zhu is the directing mind of Zhu Holdco, that Zhu and Zhu Holdco are one and the same, and that any acts purported to be done by Zhu Holdco were in fact done by Zhu.

80. The plaintiffs further plead in the alternative, and as appropriate, that Zhu and/or Zhu Holdco have been unjustly enriched by their wrongful conduct as outlined above to the detriment and deprivation of the plaintiffs.

81. As a result of the defendants' various breaches, the plaintiffs have suffered and continue to suffer damages for which the defendants are responsible.

82. The plaintiffs plead that the defendants' conduct was and is deliberate, flagrant, deceitful, malicious, motivated by greed and has shown callous disregard for his fiduciary duties (both statutory and at common law) and contractual obligations.

83. The plaintiffs plead and rely on the OBCA, particularly sections 134 and 248. The plaintiffs further plead and rely on the CBCA, particularly section 122.

84. The plaintiffs propose that this action be tried in Toronto, Ontario.

December 5, 2019

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Lawyers for the Plaintiffs

LEMINE INVESTMENT GROUP INC. et al  
Plaintiff

and

XIAODONG ZHU and 261533 Ontario Inc.  
Defendant

CV-19-00632309000

Court File No.

ONTARIO  
SUPERIOR COURT OF JUSTICE  
PROCEEDING COMMENCED AT  
TORONTO

STATEMENT OF CLAIM

CERTIFIED TO BE A TRUE COPY OF THE ORIGINAL PROCESS ISSUED HEREIN  
COPIE AUTHENTIQUE CERTIFIÉE ET CONFORME À L'ACTE INTRODUCI D'INSTANCE DÉLIVRÉ CI-INCLUS FAIT LE:  
DATED: Dec 5 2019  
PER: David Ullmann  
SOLICITOR FOR THE AVOCAT POUR LE

BLANEY MCMURTRY LLP  
Lawyers  
2 Queen Street East, Suite 1500  
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Lawyers for the Plaintiffs



# **SCHEDULE “11”**



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Scott McGrath  
T: 416-304-1592  
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File No. 1996-001

December 16, 2019

**VIA FACSIMILE**

Sandra Theroulde  
Deputy Registrar and Manager of Court Administration  
The Court of Appeal for Ontario  
Osgoode Hall  
130 Queen Street West  
Toronto, ON M5H 2N5

Dear Ms. Theroulde:

**Re: 2478888 Ontario Inc. v. 3070 Ellesmere Developments Inc.  
Court File No.: C67565/M51047**

We are counsel to 2478888 Ontario Inc., the Respondent in the above-noted appeal. We write in response to correspondence from David T. Ullmann, counsel to the Appellant, of today's date. Mr. Ullmann did not send a draft of his correspondence to us for comment before its transmittal.

In his correspondence, Mr. Ullmann advises that he is seeking an adjournment of the Motion to Quash currently scheduled to be heard on January 7, 2020. Mr. Ullmann further represented that counsel for the Respondent "have not responded to provide their consent". Mr. Ullmann included correspondence with his letter dated December 13, 2019.

Mr. Ullmann failed to include with his letter the following:

- Correspondence from December 10, 2019, in which we advised that we would not consent to an adjournment. A copy of that correspondence, and Mr. Ullmann's response advising that he would book an attendance before the Registrar, is attached.
- An automatic out-of-office response from the undersigned advising that the undersigned was out of the office on Friday (the undersigned was also in Court today and was sending automatic out-of-office responses accordingly).

The Respondent does not consent to an adjournment of the Motion to Quash given the costs and associated prejudice created by any delays. The Order appealed from in this matter is an Order appointing a Receiver over the Appellant's assets. That Order is effectively on hold pending the appeal.

The per diem property tax, insurance and interest costs in this matter are approximately \$4,400 per day, which would mean that these costs total roughly \$420,000 since the date of the Order under appeal (September 13, 2019).

In addition, Mr. Ullmann's partner was in attendance before the Registrar on December 9, 2019 and agreed to the date of the motion of January 7, 2020.

In the circumstances, an adjournment of the Motion to Quash is not appropriate. Mr. Ullmann or one of his colleagues are fully capable of arguing the motion, and a delay that prejudices the creditors of the Appellant's estate is neither just nor appropriate.

Yours truly,

**Thornton Grout Finnigan LLP**



Scott McGrath

Encl.

cc: David T. Ullmann, counsel to the Appellant (via e-mail)



## Scott McGrath

---

**From:** Scott McGrath  
**Sent:** December-10-19 5:27 PM  
**To:** 'David T. Ullmann'; Rebecca Kennedy  
**Cc:** D. J. Miller; Mervyn D. Abramowitz  
**Subject:** RE: 3070 - Ellesmere Motion to Quash - date

David,

The Court of Appeal did not advise us that you have an additional 25 days to respond to our motion, for which you have had our motion materials since November 15. In fact, that would make no sense (it would make your materials due January 6 for a January 7 motion).

I don't know what you are referring to with respect to perfecting a motion.

As you say, please let us know ASAP if/when you schedule an appearance before the Registrar.

Scott

---

**From:** David T. Ullmann [mailto:DUllmann@blaney.com]  
**Sent:** December-10-19 5:03 PM  
**To:** Scott McGrath <SMcGrath@tgf.ca>; Rebecca Kennedy <Rkennedy@tgf.ca>  
**Cc:** D. J. Miller <DJMiller@tgf.ca>; Mervyn D. Abramowitz <MAbramowitz@blaney.com>  
**Subject:** RE: 3070 - Ellesmere Motion to Quash - date

Thank you Scott. We obviously disagree with your interpretation of the rules.

We do not agree that your motion was properly perfected and the Court of Appeal advised that we would have 25 days to provide responding materials to your motion following the perfection of our appeal (and thereby your motion) which would only have been yesterday.

We will schedule an appearance before the Registrar to set a new date and you can choose to attend or not. I will advise when that date has been set.

Regards,

David

David T. Ullmann  
Partner  
dullmann@blaney.com  
☎ 416-596-4289 | ☎ 416-594-2437

---

**From:** Scott McGrath [mailto:SMcGrath@tgf.ca]  
**Sent:** December 10, 2019 4:45 PM  
**To:** David T. Ullmann <DUllmann@blaney.com>; Rebecca Kennedy <Rkennedy@tgf.ca>  
**Cc:** D. J. Miller <DJMiller@tgf.ca>; Mervyn D. Abramowitz <MAbramowitz@blaney.com>  
**Subject:** RE: 3070 - Ellesmere Motion to Quash - date

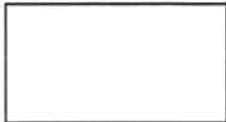
David,

The earliest date for the hearing of the Motion to Quash had already been requested from the Registrar prior to yesterday's appearance. It was your client's perfection of its appeal that allowed the Registrar to officially schedule the date.

The Motion to Quash has been pending for several weeks and your appeal is causing prejudice to our client. We are not inclined to consent to an adjournment of that motion. Given you have co-counsel involved, we would expect that you can coordinate yourselves for this motion.

Today is the deadline for filing your responding Factum on the Motion to Quash, and we have not yet received same. Please confirm that you will be doing so by 5 p.m. today.

Scott



Scott McGrath | Direct Line: +1 416 304-1592 | Thornton Grout Finnigan LLP | [www.tgf.ca](http://www.tgf.ca)

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**From:** David T. Ullmann [<mailto:DUllmann@blaney.com>]

**Sent:** December-10-19 4:17 PM

**To:** Rebecca Kennedy <[Rkennedy@tgf.ca](mailto:Rkennedy@tgf.ca)>

**Cc:** D. J. Miller <[DJMiller@tgf.ca](mailto:DJMiller@tgf.ca)>; Scott McGrath <[SMcGrath@tgf.ca](mailto:SMcGrath@tgf.ca)>; Mervyn D. Abramowitz <[MAbramowitz@blaney.com](mailto:MAbramowitz@blaney.com)>

**Subject:** 3070 - Ellesmere Motion to Quash - date

Rebecca,

As you are aware, yesterday at the hearing dealing with perfection issues the Registrar of the Court of Appeal also scheduled the date for the return of your Motion to Quash in our matter to be heard January 7, 2020. I was did not attend the hearing ( and indeed thought the question of what date your motion would be heard would be dealt with on some other day). My colleague did not have my dates with him when this issue came up. I am on vacation from December 20, 2019 to January 6, 2020, and would appreciate it if you would agree to move this hearing from the January 7, 2020 to another date. We will consent to it being scheduled on an expedited basis, of course, which is, I believe, how Mr. McGrath secured this Jan 7<sup>th</sup> date.

My understanding is that the process is to attend before the Registrar to seek another date. Given that it was my absence/misunderstanding yesterday which results in the need for this second attendance, I am prepared to attend on my own if you can provide me with your dates or I can attend with Mr. McGrath. I expect we could get before the Registrar early next week to set a date or I could even go this Friday if the Registrar was available.

Regards,

David

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McMurtry** LLP 2 Queen Street East | Suite 1500  
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Partner

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**IN THE MATTER OF Section 101 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43, as amended, and in the matter of Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended**

**2478888 ONTARIO INC.**

- and -

**3070 ELLESMERE DEVELOPMENTS INC.**

Applicant

Respondent

Court File No.: CV-19-00627187-00CL

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

Proceedings commenced at Toronto, Ontario

**FIRST REPORT OF THE RECEIVER  
(January 20, 2020)**

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Lawyers for RSM Canada Limited, as Receiver