

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

In the matter of Sections 97 and 100 of the Courts of Justice Act, R.S.O. 1990 c. C.43, as amended

B E T W E E N :

FIRM CAPITAL MORTGAGE FUND INC.

Applicant

- and -

**FORTRESS BROOKDALE INC., FORTRESS AVENUE ROAD
(2015) INC. and FERNBROOK HOMES (BROOKDALE) LIMITED**

Respondents

**SUPPLEMENTARY RESPONDING APPLICATION RECORD OF DIRCAM
ELECTRIC LIMITED
(Application Returnable On December 19, 2018)**

Beard Winter LLP
Barristers and Solicitors
130 Adelaide St. West, Suite 701
Toronto, ON M5H 2K4

Robert C. Harason LSUC#: 19535S
Tel: (416) 306-1707
Fax: (416) 593-7760

Lawyers for the Lien Claimant
Dircam Electric Limited

TO: THE ATTACHED SERVICE LIST

AMENDED SERVICE LIST
(as at October 11, 2018)

| | |
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| TO: | <p>THORNTON GROUT FINNIGAN LLP TD West Tower, Toronto-Dominion Centre 100 Wellington Street West, Suite 3200 Toronto, Ontario M5K 1K7 Fax: (416) 304-1313</p> <p>D.J. Miller Tel: (416) 304-0559 Email: djmiller@tgf.ca</p> <p>Leanne M. Williams Tel: (416) 304-0060 Email: lwilliams@tgf.ca</p> <p>Lawyers for the Applicant, Firm Capital Mortgage Fund Inc.</p> |
| AND TO: | <p>OWENS, WRIGHT LLP 20 Holly Street, Suite 300 Toronto, Ontario M4S 3B1 Fax: (416) 486-3309</p> <p>Randy H. Lebow Tel: (416) 848-4707 Email: rlebow@owenswright.com</p> <p>Real Estate counsel for the Applicant</p> |
| AND TO: | <p>RSM CANADA LIMITED Collins Barrow Place 11 King Street West, Suite 700 Toronto, Ontario M5H 4C7 Fax: (416) 480-2646</p> <p>Bryan A. Tannenbaum Tel: (416) 238-5055 Email: bryan.tannenbaum@rsmcanada.com</p> <p>Arif Dhanani Tel: (647) 725-0183 Email: arif.dhanani@rsmcanada.com</p> <p>Privately-appointed Receiver of the Respondents</p> |

| | |
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| AND TO: | <p>MEYER, WASSENAAR & BANACH, LLP 5001 Yonge Street, Suite 301 North York, Ontario M2N 6P6 Fax: (416) 223-9405</p> <p>Joseph Fried Tel: (416) 223-9191 (ext. 230) Email: jfried@mwb.ca</p> <p>Lawyers for RSM Canada Limited, in its capacity as Receiver</p> |
| AND TO: | <p>BORDEN LADNER GERVAIS LLP Bay Adelaide Centre, East Tower 22 Adelaide St. West Toronto, Ontario M5H 4E3 Fax: (416) 367-6749</p> <p>Roger Jaipargas Tel: (416) 367-6266 Email: rjaipargas@blg.com</p> <p>Xue Yan Tel: (416) 367-6322 Email: xyan@blg.com</p> <p>Lawyers for the Purchaser, Empire (Water Wave) Inc.</p> |
| AND TO: | <p>ROBINS APPLEBY LLP 2600-120 Adelaide Street W. Toronto, Ontario M5H 1T1 Fax: (416) 868-0306</p> <p>David A. Taub Tel: (416) 360-3354 Email: dtaub@robapp.com</p> <p>John Fox Tel: (416) 360-3349 Email: jfox@robapp.com</p> <p>Lawyers for the Respondents, Fortress Brookdale Inc. and Fortress Avenue Road (2015) Inc.</p> |

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| AND TO: | <p>MILLER THOMSON LLP 100 New Park Place, Suite 700 Vaughan, Ontario L4K 0H9</p> <p>Enzo Di Iorio Tel: (905) 532-6613 Email: ediiorio@millerthomson.com</p> <p>Riccardo Del Vecchio Tel: (905) 532-6617 Email: rdelvecchio@millerthomson.com</p> <p>GOLDMAN, SPRINGS, KICHLER & SANDERS LLP 40 Sheppard Avenue West, Suite 700 Toronto, Ontario M2N 6K9 Fax: (416) 225-4805</p> <p>Sheldon Spring Tel: (416) 225-9400 ext. 303 Email: sspring@goldmanspring.com</p> <p>Ari Reichman Tel: (416) 225-9400 ext. 342 Email: ari@goldmanspring.com</p> <p>Lawyers for the Respondent, Fernbrook Homes (Brookdale) Limited</p> |
| AND TO: | <p>CORSIANOS LEE 3800 Steeles Avenue West, Suite 203W Vaughan, Ontario L4L 4G9</p> <p>George Corsianos Tel: (905) 370-1092 Fax: (905) 370-1095 Email: gcorsianos@cl-law.ca</p> <p>Lawyers for Quincy Investments Limited, 969692 Ontario Limited, 969593 Ontario Limited, 2307271 Ontario Inc., Sasso Auto Consulting Inc., Angelo Grossi, David Mark Doubilet, Gus Stamatiou, Robert Di Matteo and Tonino Amendola</p> |

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| AND TO: | <p>AGUECI & CALABRETTA 5700 Yonge Street, Suite 1110 Toronto, Ontario M2M 4K2</p> <p>James M. Butson Tel: (416) 250-5700 x 215 Fax: (416) 250-5797 Email: james.butson@aclaw.ca</p> <p>Lawyers for Jaekel Capital Inc.</p> |
| AND TO: | <p>OSLER, HOSKIN & HARCOURT LLP 100 King Street West 1 First Canadian Place Suite 6200, P.O. Box 50 Toronto, Ontario M5X 1B8 Fax: (416) 862-6666</p> <p>Michael De Lellis Tel: (416) 862-5997 Email: mdelellis@osler.com</p> <p>Jeremy Dacks Tel: (416) 862-4923 Email: jdacks@osler.com</p> <p>Patrick Riesterer Tel: (416) 862-5947 Email: priesterer@osler.com</p> <p>Lawyers for FAAN Mortgage Administrators Inc., as Administrators for BDMC</p> |

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| AND TO: | <p>DLA PIPER (CANADA) LLP 1 First Canadian Place 100 King Street West, Suite 6000 PO Box 367 Toronto, Ontario M5X 1E2</p> <p>Derek J. Bell Tel: (416) 369-7960 Email: derek.bell@dlapiper.com</p> <p>Danny M. Nunes Tel: (416) 365-3421 Email: danny.nunes@dlapiper.com</p> <p>Lawyers for Computershare Trust Company of Canada, in its capacity as trustee pursuant to a trust indenture</p> |
| AND TO: | <p>COMPUTERSHARE TRUST COMPANY OF CANADA 100 University Avenue Toronto, Ontario M5J 2Y1</p> <p>Robert Armstrong Tel: (416) 263-9303 Email: robert.armstrong@computershare.com</p> |
| AND TO: | <p>FOGLER RUBINOFF LLP 77 King Street West Suite 3000, P.O. Box 95 TD Centre North Tower Toronto, Ontario M5K 1G8</p> <p>Vern W. DaRe Tel: (416) 941-8842 Email: vdare@foglery.com</p> <p>Lawyers for Computershare Trust Company of Canada, in its capacity as Mortgagee</p> |

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| AND TO: | AVIVA INSURANCE COMPANY OF CANADA c/o Aviva Trial Lawyers Ken Chan (Practice Assistant) 800 – 100 King Street West Toronto, Ontario M5X 2A2 Tel: (647) 788-7098 Email: ken.chan@aviva.com |
| AND TO: | TORYS LLP 79 WELLINGTON STREET WEST, SUITE 3000 TORONTO, ONTARIO M5K 1 N2 FAX: (416) 865-7380 ADAM SLAVENS TEL: (416) 865-7333 EMAIL: aslavens@torys.com LAWYERS FOR TARION WARRANTY CORPORATION |
| AND TO: | TARION WARRANTY CORPORATION 5160 Yonge St., 12 th Floor Toronto, Ontario M2N 6L9 Danielle M. Peck (Senior Counsel) Tel: (416) 229-3864 Fax: (416) 229-3845 Email: danielle.peck@tarion.com Timothy P. Schumacher (Vice-President & General Counsel) Tel: (416) 229-3874 Fax: (416) 229-3278 Email: tim.schumacher@tarion.com |
| AND TO: | OLYMPIA TRUST COMPANY 2200, 125-9 th Avenue SE Calgary, Alberta T2G 0P6 Jonathan Bahnuik (General Counsel) Tel: (403) 668-8365 Fax: (403) 265-1455 Email: bahnuikj@olympiatruster.com |

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| AND TO: | <p>FASKEN MARTINEAU DUMOULIN LLP Bay Adelaide Centre 333 Bay Street, Suite 2400 P.O. Box 20 Toronto, Ontario M5H 2T6 Fax: (416) 364-7813</p> <p>Jonathan F. Lancaster Tel: (416) 865-4479 Email: jlancaster@fasken.com</p> <p>Lawyers for Fiera Capital Corporation</p> |
| AND TO: | <p>CITY OF TORONTO Legal Services 26th Floor, Metro Hall Stn. 1260, 55 John Street Toronto, Ontario M5V 3C6 Fax: (416) 397-5624</p> <p>Amanda S. Hill Tel: (416) 338-5790 Email: ahill@toronto.ca</p> <p><u>Christopher J. Henderson</u> Tel: (416) 397-5624 Email: Christopher.Henderson@toronto.ca</p> |

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| AND TO: | <p>AIRD & BERLIS LLP Brookfield Place 181 Bay Street, Suite 1800 Toronto, Ontario M5J 2T9 Fax: (416) 863-1515</p> <p>Courtney V. Raphael Tel: (416) 865-3088 Email: craphael@airdberlis.com</p> <p>Sam Babe Tel: (416) 865-7718 Email: sbabe@airdberlis.com</p> <p>Danielle Muisse Tel: (416) 865-3963 Email: dmuisse@airdberlis.com</p> <p>Lawyers for the Lien Claimant, Summit Concrete & Drain Ltd.</p> |
| AND TO: | <p>AIRD & BERLIS LLP Brookfield Place 181 Bay Street, Suite 1800 Toronto, Ontario M5J 2T9 Fax: (416) 863-1515</p> <p>Courtney V. Raphael Tel: (416) 865-3088 Email: craphael@airdberlis.com</p> <p>Sam Babe Tel: (416) 865-7718 Email: sbabe@airdberlis.com</p> <p>Danielle Muisse Tel: (416) 865-3963 Email: dmuisse@airdberlis.com</p> <p>Lawyers for the Lien Claimant, Summit Forming Ltd.</p> |

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| AND TO: | <p>BIANCHI PRESTA LLP 9100 Jane Street 3rd Floor, Building A Vaughan, Ontario L4K 0A4 Fax: (905) 738-0528</p> <p>Domenic C.S. Presta Tel: (905) 738-1078 ext. 2223 Email: dpresta@bianchipresta.com</p> <p>Lawyers for the Lien Claimant, D. Zentil Mechanical Inc.</p> |
| AND TO: | <p>BARRY S. GREENBERG 7626A Yonge Street Thornhill, Ontario L4J 1V9</p> <p>Tel: (905) 886-9535 Fax: (905) 886-9540 Email: bsgreenberg@rogers.com</p> <p>Lawyer for the Lien Claimant, Atlas Dewatering Corporation</p> |
| AND TO: | <p>GLAHOLT LLP 800-141 Adelaide Street West Toronto, Ontario M5H 3L5 Fax: (416) 368-3467</p> <p>John Margie Tel: (416) 368-8280 ext: 211 Fax: (416) 368-3467 Email: jmargie@glaholt.com</p> <p>Keith Bannon Tel: (416) 368-8280 Email: kbannon@glaholt.com</p> <p>Lawyers for the Lien Claimants, INNOCON, A PARTNERSHIP OF LAFARGE CANADA INC., LEHIGH HANSON MATERIALS LIMITED AND INNOCON INC.</p> |

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| AND TO: | <p>BEARD WINTER LLP 130 Adelaide Street West, 7th Floor Toronto, Ontario M5H 2K4</p> <p>Robert C. Harason Tel: (416) 306-1707 Email: rharason@beardwinter.com</p> <p><u>Lawyers for the Lien Claimant, Dircam Electric Limited</u></p> |
| AND TO: | <p>SHIBLEY RIGHTON LLP 250 University Avenue Suite 700 Toronto, Ontario M5H 3E5 Fax: (416) 214-5400</p> <p>Andrea Lee White Tel: (416) 214-5200 Email: andrea.white@shibleyrighton.com</p> <p>Thomas McRae Tel: (416) 214-5206 Email: thomas.merae@shibleyrighton.com</p> <p><u>Lawyers for the Lien Claimant, Gilbert Steel Limited</u></p> |
| AND TO: | <p>RICHTER LAW 15 Bold St. Hamilton, Ontario L8P 1T3 Fax: (905) 523-6285</p> <p>Nicholas A. Richter Tel: (905) 523-7994 Email: nrichter@richterlaw.ca</p> <p><u>Lawyers for the Lien Claimant, Gilbert Steel Limited</u></p> |

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| AND TO: | <p>HAMMOND FLESIAS 3800 Steeles Avenue West Suite 300 Vaughan, Ontario L4L 4G9 Fax: (905) 850-9998</p> <p>Richard Hammond Tel: (905) 850-8550 ext. 400 Email: rhammond@hammondflesias.com</p> <p><u>Lawyers for the Lien Claimant, Concrane Equipment Inc.</u></p> |
| AND TO: | <p>JOSEPH P. MAGGISANO 201 Lonsmount Drive, Suite 100 Toronto, Ontario M5P 2Y6</p> <p>Tel: (416) 653-5353 Fax: (416) 653-2610 Email: jmaggisano@jpmlaw.ca</p> <p><u>Lawyers for the Lien Claimant, Global Precast Inc.</u></p> |
| AND TO: | <p>MICHAEL A. HANDLER PROFESSIONAL CORPORATION 10 Director Court, Suite 101 Woodbridge, Ontario L4L 7E8 Fax: (905) 265-2235</p> <p>Michael A. Handler Tel: (905) 265-2252 Email: mhandler@mhandlerlaw.com</p> <p><u>Lawyers for the Lien Claimant, The Fence People Limited</u></p> |

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| AND TO: | <p>GOLDMAN SLOAN NASH & HABER LLP 480 University Avenue, Suite 1600 Toronto, ON M5G 1V2 Fax: (416) 597-3370</p> <p>Catherine E. Willson Tel: (416) 597-6488 Email: willson@gsnh.com</p> <p>Christine Kellowan Tel: (416) 597-7877 Email: kellowan@gsnh.com</p> <p>Tyronne Hodgins (Law Clerk) Tel: (416) 597-9922 ext. 142 Email: hodgins@gsnh.com</p> <p>Lawyers for the Lien Claimant, Aluma Systems Inc.</p> |
| AND TO: | <p>FREDERIKSE LAW Barristers & Solicitors 4391 Harvester Road, Unit 5A Burlington, Ontario L7L 4X1 Fax: (289) 816-0353</p> <p>Barbara Frederikse Tel: (289) 813-2668 Email: barbara@frederlaw.ca</p> <p>Lawyers for the Lien Claimant, Stephenson's Rental Services Inc.</p> |
| AND TO: | <p>MINISTRY OF FINANCE (ONTARIO) Legal Services Branch 33 King Street West, 6th Floor Oshawa, Ontario L1H 8H5 Fax: (905) 436-4510</p> <p>Kevin O'Hara Tel: (905) 433-6934 Email: kevin.ohara@ontario.ca</p> |

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| AND TO: | DEPARTMENT OF JUSTICE Ontario Regional Office 120 Adelaide Street West, Suite 400 Toronto, Ontario M5H 1T1 Diane Winters Tel: (416) 973-3172 Email: diane.winters@justice.gc.ca |
| AND TO: | THE PURCHASERS OF RESIDENTIAL CONDOMINIUM UNITS |

**E-Service List
(as at October 11, 2018)**

djmiller@tgf.ca; lwilliams@tgf.ca; bryan.tannenbaum@rsmcanada.com;
arif.dhanani@rsmcanada.com; jfried@mwb.ca; rjaipargas@blg.com; xyan@blg.com;
dtaub@robapp.com; jfox@robapp.com; ediiorio@millerthomson.com;
rdelvecchio@millerthomson.com; sspring@goldmanspring.com; ari@goldmanspring.com;
gcorsianos@cl-law.ca; james.butson@aclaw.ca; mdelellis@osler.com; priesterer@osler.com;
jdacks@osler.com; derek.bell@dlapiper.com; danny.nunes@dlapiper.com;
robert.armstrong@computershare.com; ken.chan@aviva.com; aslavens@torys.com;
danielle.peck@tarion.com; tim.schumacher@tarion.com; bahnuikj@olympiatruster.com;
jlancaster@fasken.com; ahill@toronto.ca; Christopher.Henderson@toronto.ca;
craphael@airdberlis.com; sbabe@airdberlis.com; dmuise@airdberlis.com;
dpresta@bianchipresta.com; bsgreenberg@rogers.com; jmargie@glaholt.com;
kbannon@glaholt.com; rharason@beardwinter.com; andrea.white@shibleyrighton.com;
thomas.mcrae@shibleyrighton.com; nrichter@richterlaw.ca;
rhammond@hammondflerias.com; jmaggisano@jpmlaw.ca; mhandler@mhandlerlaw.com;
willson@gsnh.com; kevin.ohara@ontario.ca; diane.winters@justice.gc.ca;
barbara@frederlaw.ca; vdare@foglars.com; kellowan@gsnh.com; hodgins@gsnh.com

COURIER SERVICE LIST
(as at October 9, 2018)

| | |
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| TO: | FORTRESS REAL DEVELOPMENTS INC. 25 Brodie Drive, Unit 1 Richmond Hill, ON L4B 3K7 Attention: Vince Petrozza |
| AND TO: | CITYZEN DEVELOPMENT (2005) CORPORATION 56 The Esplanade, Suite 301 Toronto, ON M5E 1A7 Attention: Sam Crignano |
| AND TO: | CITYZEN DEVELOPMENT (2005) CORPORATION 56 The Esplanade, Suite 308 Toronto, ON M5E 1A7 Attention: Sam Crignano |
| AND TO: | AVIVA C/O WESTMOUNT GUARANTEE SERVICES INC. 600 Cochrane Dr. Suite 205 Markham, Ontario L3R 5K3 |
| AND TO: | VINCENZO PETROZZA a.k.a. Vince Petrozza 471 Sunset Beach Road Richmond Hill, ON L4E 3J3 |
| AND TO: | JAWAD RATHORE 2 Scandia Court Unionville, ON L6C 1G6 |

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 - A. Exhibit A – Email from Robert Harason to all counsel dated October 3, 2018 at 2:34 p.m. with copy of the draft vesting order
 - B. Exhibit B - Email from D.J. Miller to Robert Harason dated October 3, 2018 at 5:09 p.m.
 - C. Exhibit C - Email from Mr. Harason to D.J. Miller dated October 4, 2018 at 10:20 a.m.
 - D. Exhibit D - Email from D.J. Miller to Robert Harason dated October 4, 2018 at 10:50 a.m.
 - E. Exhibit E - Email from D.J. Miller to Robert Harason dated October 4, 2018 at 8:18 p.m.
 - F. Exhibit F – Email from Leanne Williams to all counsel dated December 6, 2018 at 7:21 p.m. with a copy of the Receiver’s Statement of Receipts and Disbursements and certificate of completion
 - G. Exhibit G – Email from Roxane Manea to all counsel dated October 17, 2018 at 2:37 p.m. with the factum of Firm Capital

TAB 1

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

**In the matter of Sections 97 and 100 of the Courts of Justice Act, R.S.O. 1990 c.
C.43, as amended**

B E T W E E N :

FIRM CAPITAL MORTGAGE FUND INC.

Applicant

- and -

**FORTRESS BROOKDALE INC., FORTRESS AVENUE ROAD
(2015) INC. and FERNBROOK HOMES (BROOKDALE) LIMITED**

Respondents

AFFIDAVIT OF KAREN LOUZADO

I, Karen Louzado, of the City of Mississauga in the Province of Ontario MAKE
OATH AND SAY:

1. I am a legal assistant with the law firm Beard Winter LLP, the lawyers for the Lien Claimant Dircam Electric Limited (“Dircam”), and as such have knowledge of the matters hereinafter deposed to.
2. Firm Capital provided a draft vesting order in its Application Record
3. By email dated October 3, 2018 at 2:34 p.m., from Robert Harason, counsel for Dircam, to DJ Miller, counsel for Firm Capital, Mr. Harason delivered to Ms. Miller and to all other counsel, a revised draft vesting order, with changes made with the consent of the lien claimants Gilbert Steel Limited, Aluma Systems Inc., The Fence People Limited, Atlas Dewatering Corporation, Summit Concrete & Drain Ltd., Summit Forming Ltd., Global Precast Inc. and Innocon.
4. Paragraphs 5 and 6 of the revised draft vesting order provided to Firm Capital’s lawyers provided as follows:

5. THIS COURT ORDERS AND DECLARES that the sum of \$10,764,973.50, out of the purchase price, to stand as security for the claims for lien and costs of the lien claimants, as set out in Schedule G hereto, is hereby paid into court, pursuant to the provisions of s. 44(1) of the Act, in order to vacate the registration of the construction liens and certificates of action listed in Schedule C hereto.

6. THIS COURT ORDERS that, upon completion of the Closing in accordance with the terms of the Sale Agreement and payment by the Receiver on behalf of the Respondents of the sum of \$10,764,973.50 into court, to stand as security for the claims for lien and costs of the lien claimants pursuant to the provisions of s. 44(1) of the Act, and payment by the Receiver of its fees and disbursements and of any amounts having legal priority over the Applicant's Mortgage, the Receiver shall pay the balance of the sale proceeds (the "Net Proceeds") into court for the benefit of all those claiming an interest in such Net Proceeds pending further order of the Court. Upon payment into court, the Receiver shall deliver a certificate to all parties on the service list herein (the "Certificate of Completion") confirming that the payments into court have been made in accordance with the terms of this Order.

Now shown to me and marked as **Exhibit A** to this my affidavit is a true copy of Mr. Harason's email to counsel dated October 3, 2018 at 2:34 p.m.

5. By email dated October 3, 2018 at 5:09 p.m. from D.J. Miller to Robert Harason, Ms. Miller wrote,

"Could we please schedule a call to discuss the concepts underlying your markup? Once we have an understanding on a conceptual level, we will be in a position to respond on the substance of your markup."

Now shown to me and marked as **Exhibit B** to this my affidavit is a true copy of an email from D.J. Miller to Robert Harason dated October 3, 2018 at 5:09 p.m.

6. By email dated October 4, 2018 at 10:20 a.m. from Robert Harason to D.J. Miller, Mr. Harason responded,

"The concept flows from the intention expressed in your order of securing the liens by the posting of security for the claims and 25% for costs and the need to expressly provide for that so that the liens are secured. The amount posted for the liens has then been carved out of the Net Proceeds. The lien actions are not dismissed against any defendants, except for the receiver (if a defendant), because of the priority claims made in the lien statements of claim."

Now shown to me and marked as **Exhibit C** to this my affidavit is a true copy of an email from Mr. Harason to D.J. Miller dated October 4, 2018 at 10:20 a.m.

7. By email dated October 4, 2018 at 10:50 a.m. from D.J. Miller to Robert Harason, D.J. Miller responded and stated,

“We are not providing any markup of the Vesting Order until such time as we have had a telephone discussion with you, as it appears clear from your markup and your email below that we view the situation differently.”

Now shown to me and marked as **Exhibit D** to this my affidavit is a true copy of an email from D.J. Miller to Robert Harason dated October 4, 2018 at 10:50 a.m.

8. Counsel for Firm Capital and Dircam did speak on October 4, 2018 and by email dated October 4, 2018 at 8:18 p.m. from D.J. Miller to Mr. Harason and counsel for the lien claimants, Ms. Miller wrote,

“Based on the email below and my brief discussion with Robert Harason today, I think that it would be beneficial to schedule a call with counsel for all lien claimants to discuss the terms of the APA for which the Vesting Order is being sought, the mechanics for closing, and the implications for all concerned.”

Now shown to me and marked as **Exhibit E** to this my affidavit is a true copy of an email from D.J. Miller to Robert Harason dated October 4, 2018 at 8:18 p.m.

9. I am advised by Robert Harason counsel for Dircam and verily believe that the conference call with Ms. Miller and all participating lien claimants proceeded on Tuesday, October 9, 2018 at 3:00 p.m. but neither Ms. Miller nor any other lawyer acting for Firm Capital ever responded to the revised draft vesting order provided by Mr. Harason on October 3, 2018, including paragraphs 5 and 6 thereof.

10. On December 6, 2018, the lawyers for Firm Capital delivered the Receiver’s Statement of Receipts and Disbursements for the period from June 11, 2018 to December 5, 2018, together with the Completion Certificate pursuant to the Order of Justice McEwen dated October 18, 2018. In the Receiver’s Statement, the payment of the sum of \$491,000.00 by Fortress Brookdale Inc. (“Fortress”) to the Receiver is noted, among other line items. Now shown to me and marked as **Exhibit F** to this my affidavit

is a true copy of the email from Leanne Williams to all counsel dated December 6, 2018 at 7:21 p.m., a copy of the Receiver's Statement of Receipts and Disbursements and certificate of completion.

11. I am advised by Robert Harason lawyer for Dircam Electric Limited ("Dircam") and verily believe that there is an issue regarding a claim that the sum of \$491,000.00 is holdback and additional amounts owing in relation to the improvement by Fortress upon which the lien claimants are entitled to a prior charge pursuant to the provisions of s. 21 of the Construction Act, R.S.O. 1990, c. C.30, as amended.

12. Now shown to me and marked as **Exhibit G** to this my affidavit is a true copy of an email from Roxane Manea dated October 17, 2018 at 2:37 p.m. to all counsel with the attached factum of Firm Capital delivered the day before the return of the Application on October 18, 2018.

SWORN BEFORE ME at the City of Toronto,
in the Province of Ontario this 14th day of
December, 2018.


A Commissioner for taking Affidavits (or as may be)

Nicole Mullins


Karen Louzado

EXHIBIT A

Robert C. Harason

From: Robert C. Harason
Sent: Wednesday, October 03, 2018 2:34 PM
To: djmiller@tgf.ca; Leanne Williams; Roxana Manea; 'Adam Slavens'; 'Amanda S. Hill'; 'Andrea Lee White'; 'Ari Reichman'; 'Arif Dhanani'; 'Barbara Frederikse'; 'Barry Greenberg'; 'Bryan A. Tannenbaum'; 'Catherine E. Willson'; 'Catherine Koch'; 'Christopher J. Henderson'; 'Courtney V. Raphael'; D. J. Miller; 'Danielle M. Peck'; 'Danielle Muise'; 'Danny M. Nunes'; 'David A. Taub'; 'David Kerr'; 'Derek J. Bell'; 'Diane Winters'; 'Domenic C.S. Presta'; 'Enzo Di Iorio'; 'George Corsianos'; 'James M. Butson'; 'John Fox'; 'John Margie'; 'Jonathan Bahnuik'; 'Jonathan F. Lancaster'; 'Joseph Fried'; 'Joseph Maggisano'; 'Keith Bannon'; 'Kevin O'Hara'; 'Lianne B. Furlong'; 'Michael A. Handler'; 'Michael De Lellis'; 'Nicholas A. Richter'; 'Patrick Riesterer'; 'Randy H. Lebow'; 'Riccardo Del Vecchio'; 'Richard Hammond'; 'Roger Jaipargas'; 'Sheldon Spring'; 'Thomas McRae'; 'Timothy P. Schumacher'; 'Xue Yan'
Subject: In the matter of the Application by Firm Capital Mortgage Fund Inc. re Fortress Brookdale Inc. et al. (Court file No. CV-18-604993-00CL)
Attachments: Fortress vesting order Ver 1 Oct 3'18 With Track Changes.docx; Fortress vesting order Ver 1 Oct 3'18 Without Track Changes.pdf

Dear Counsel,

Conditional on (i) the providing by the privately appointed receiver of a report containing satisfactory evidence that the receiver took reasonable steps to obtain an offer to purchase the project for fair market value and (ii) disclosure of the purchase price in the offer, the lien claimants Dircam Electric Limited, Gilbert Steel Limited, Aluma Systems Inc., The Fence People Limited, Atlas Dewatering Corporation, Summit Concrete & Drain Ltd., Summit Forming Ltd., Global Precast Inc. and Innocon will support the sale proposed by the receiver pursuant to the attached form of vesting order (in two versions; one in Word with track changes and one as a pdf without track changes from the form suggested by Firm Capital in its application record).

Please confirm your consent to the attached form of the vesting order by the close of business on Friday, October 5, 2018. If you have questions or concerns, please contact me by email or telephone prior to that time.

Robert C. Harason | Partner

rharon@beardwinter.com

Direct Line: 416.306.1707 | Direct Fax: 416.593.7760



BEARD WINTER LLP

BEARD WINTER LLP | LAWYERS

130 Adelaide Street West, 7th Floor

Toronto, Ontario M5H 2K4

Main: 416.593.5555 | Fax: 416.593.7760 | www.beardwinter.com

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This is Exhibit A referred to in the
affidavit of Karen Lougheed
sworn before me, this 14th
day of December 2018.

N. Mullin
A COMMISSIONER OF THE COURT

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

In the matter of Sections 97 and 100 of the Courts of Justice Act, R.S.O. 1990 c.C.43, as am.

THE HONOURABLE MR.) THURSDAY, THE 18TH
)
JUSTICE McEWEN) DAY OF OCTOBER, 2018

B E T W E E N:

FIRM CAPITAL MORTGAGE FUND INC.

Applicant

- and -

**FORTRESS BROOKDALE INC., FORTRESS AVENUE ROAD (2015) INC. and
FERNBROOK HOMES (BROOKDALE) LIMITED**

Respondents

VESTING ORDER

THIS APPLICATION, made by Firm Capital Mortgage Fund Inc. (the “**Applicant**”), for an order as contemplated by an agreement of purchase and sale (the “**Sale Agreement**”) between RSM Canada Limited (“**RSM**”), in its capacity as the receiver (the “**Receiver**”) of the Respondents, as vendor, and Empire (Water Wave) Inc., as purchaser (such purchaser or its permitted assignee, the “**Purchaser**”) dated August 23, 2018, vesting in the Purchaser, or as it may direct, the right, title and interest in and to the assets described in the Sale Agreement (the “**Purchased Assets**”) pursuant to, *inter alia*, Sections 97 and 100 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Application of the Applicant, the Affidavit of Forrest Todd sworn September 20, 2018 and the Exhibits thereto (the “**Todd Affidavit**”), the report of the Receiver dated September 20, 2018 and the confidential report of the Receiver dated September 20, 2018 (the “**Confidential Report**”) and on hearing the submissions of counsel for the Applicant, the Receiver, the Purchaser and such other counsel as were present, no one else appearing although duly served as appears from the Affidavits of Service of 2018 sworn September 20, 2018 filed,

UPON BEING SATISFIED THAT (i) the charge/mortgage of land granted by the Respondent, Fortress Brookdale Inc., to the Applicant over the real property identified in Schedule “A” hereto (the “**Lands**”) registered on June 7, 2017 as Instrument No. AT4591073 (the “**Mortgage**”) has matured and has not been repaid, (ii) the Applicant issued a demand for payment and a Notice of Intention to Enforce Security pursuant to the provisions of the *Bankruptcy and Insolvency Act* (Canada) (the “**BIA Notice**”), (iii) the Applicant issued a Notice of Sale under Charge/Mortgage of Land in respect of the Mortgage dated April 20, 2018 in accordance with the *Mortgages Act* (Ontario), which notice period has expired, (iv) the Receiver was appointed pursuant to the terms of the Applicant’s security after the issuance and expiry of a demand and BIA Notice by the Applicant and has executed the Sale Agreement in respect of the Purchased Assets, (v) the Mortgage has not been redeemed, (vi) the lien claimants claim priority over the Mortgage and over the other mortgages on title and (vii) the sum of \$10,764,973.50, out of the purchase price, to stand as security for the claims for lien and costs of the lien claimants, is hereby paid into Court, pursuant to the provisions of s. 44(1) of the *Construction Lien Act* (Ontario) (now *Construction Act* (Ontario)) (the “**Act**”), in order to vacate the registration of the claims for lien and certificates of action;

SERVICE

1. **THIS COURT ORDERS** that the time for service and filing of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof. For greater certainty, service of the Notice of Application and the Application Record on the holders of Unit

Agreements (as defined herein) in the manner described in the Todd Affidavit, is hereby approved.

2. **THIS COURT ORDERS** that capitalized terms not defined herein shall have the meanings ascribed thereto in the Sale Agreement.

VESTING

3. **THIS COURT ORDERS AND DECLARES** that, upon the delivery of a Receiver's certificate to the Purchaser substantially in the form attached as Schedule "B" hereto (the "**Receiver's Certificate**"), all of the Applicant's, the Receiver's, the Lien Claimants', the other encumbrancers' and the Respondents' right, title and interest in and to the Lands comprising the Purchased Assets shall vest absolutely in the Purchaser or as it may direct, free and clear of and from any and all any claim, demand, hypothecation, pledge, lien, charge, security agreement, security interest, lease, sublease, title retention agreement, mortgage, encumbrance, execution, easement, right-of-way, restrictive covenant, restriction, encroachment, option or adverse claim of any kind or character whatsoever, or similar interests or instruments charging or creating a security interest in, or against title to, such Purchased Assets, whether created by agreement, statute or otherwise at law, attaching to the property, assets or rights whether registered or unregistered, trusts or deemed trusts (whether contractual, statutory, or otherwise), levies, or other financial or monetary claim and encumbrance of any nature and kinds whatsoever, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (i) any Offers or other rights or claims of the purchaser or tenants under any Offers; (ii) the Construction Liens listed in Schedule C hereto and the remaining Claims listed on Schedule "C" hereto (all of which are collectively referred to as the "**Encumbrances**"), but for greater certainty the Encumbrances vested out herein shall not include the permitted encumbrances, easements and restrictive covenants listed on Schedule "D" hereto (the "**Permitted Encumbrances**") and, for greater certainty, this Court orders that the construction liens and certificates of action listed in Schedule C hereto are hereby vacated pursuant to the provisions of s. 44(1) of the Act, by the payment into court of the sum of \$10,764,973.50 out of the purchase price, to stand as security for the claims for lien and costs of the lien claimants, and the remaining Encumbrances affecting or relating to the Purchased Assets are hereby expunged and discharged as against the Purchased Assets on Closing.

4. **THIS COURT ORDERS** that upon the registration in the Land Registry Office for the Land Titles Division of the City of Toronto of an Application for Vesting Order in the form prescribed by the *Land Titles Act*, the Land Registrar is hereby directed to enter the Purchaser as

the owner of the Lands in fee simple, and is hereby directed to vacate the registration of the claims for lien and certificates of action pursuant to s. 44(1) of the Act and delete and expunge from title to the Lands all of the remaining encumbrances and Claims listed in Schedule "C" hereto.

CLOSING OF SALE AGREEMENT

5. **THIS COURT ORDERS AND DECLARES** that the sum of \$10,764,973.50, out of the purchase price, to stand as security for the claims for lien and costs of the lien claimants, as set out in Schedule G hereto, is hereby paid into court, pursuant to the provisions of s. 44(1) of the Act, in order to vacate the registration of the construction liens and certificates of action listed in Schedule C hereto.

6. **THIS COURT ORDERS** that, upon completion of the Closing in accordance with the terms of the Sale Agreement and payment by the Receiver on behalf of the Respondents of the sum of \$10,764,973.50 into court, to stand as security for the claims for lien and costs of the lien claimants pursuant to the provisions of s. 44(1) of the Act, and payment by the Receiver of its fees and disbursements and of any amounts having legal priority over the Applicant's Mortgage, the Receiver shall pay the balance of the sale proceeds (the "**Net Proceeds**") into court for the benefit of all those claiming an interest in such Net Proceeds pending further order of the Court. Upon payment into court,, the Receiver shall deliver a certificate to all parties on the service list herein, (the "**Certificate of Completion**") confirming that the payments into court have been made in accordance with the terms of this Order.

7. **THIS COURT ORDERS** that the Receiver shall holdback the amount of \$500,000 (the "**Holdback**") from the Net Proceeds before paying same into court. Such amount shall be used by the Receiver to pay any and all obligations of the Receiver in respect of the Property in connection with the implementation of the Vesting Order, the closing of the sale transaction and the expenses incurred by the Receiver to preserve and protect the Property (collectively, the "**Holdback Obligations**"). Upon the

earlier of (i) the Receiver being satisfied that it has no Holdback Obligations, and (ii) the issuance of a Distribution Order in respect of the Net Proceeds, the Receiver shall pay the balance, if any, of the Holdback into court in accordance with the terms as set out herein.

8. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims to the Net Proceeds, including but not limited to those asserted by any mortgagee, the Net Proceeds shall stand in place and instead of the Purchased Assets, and from and after the delivery of the Receiver's Certificate on Closing, the Encumbrances, except for the construction liens, shall attach to the Net Proceeds from the sale of the Purchased Assets with the same priority as existed immediately prior to the sale of the Purchased Assets.

9. **THIS COURT ORDERS** that upon the payment of the sum of \$10,764,973.50, to stand as security for the claims for lien and costs of the lien claimants, into court pursuant to the provisions of s. 44(1) of the Act, and delivery by the Receiver to the Service List herein of the Certificate of Completion (as defined below) in accordance with the terms of this Order, the Construction Lien actions listed on Schedule "E" hereto (the "**Construction Lien Actions**") that name the Receiver as a defendant shall thereby be dismissed without costs as against the Receiver, without further order.

GENERAL

10. **THIS COURT ORDERS AND DIRECTS** the Receiver to deliver to all parties on the service list and file with the Court, copies of the Receiver's Certificate and Certificate of Completion, forthwith after delivery thereof.

11. **THIS COURT ORDERS** that, notwithstanding:

- (a) the pendency of these proceedings;
- (b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Respondents or any one of them and any bankruptcy order issued pursuant to any such applications; and
- (c) any assignment in bankruptcy made in respect of any of the Respondents;

the vesting of the Purchased Assets in the Purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Respondents or any one of them and shall not be void or voidable by creditors of the Respondents, nor shall it constitute nor be deemed to be a reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

12. **THIS COURT ORDERS AND DECLARES** that the Applicant, the Receiver, the Purchaser and all persons acting in good faith in accordance with the terms of this Order shall have all of the protections available for so doing, in accordance with section 142 of the *Courts of Justice Act* (Ontario).

13. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada to give effect to this Order and to assist the Receiver in carrying out the terms of this Order.

SEALING

14. **THIS COURT ORDERS** that the Confidential Report be and is hereby sealed pending further Order of the Court and shall not form part of the public record.

E-SERVICE

15. **THIS COURT ORDERS** that the E-Service Guide of the Commercial List (the “**Guide**”) is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Guide (which can be found on the Commercial List website at: www.ontariocourts.ca//scj/practice/practice-directions/toronto/eservice-commercial/)

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 13 of the Guide, service of documents in accordance with the Guide will be effective on transmission. This Court further orders that a Case Website shall be established by the Receiver in accordance with the Guide with the following URL ‘<<https://rsmcanada.com/fortress-brookdale-inc>>’.

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

**Schedule C – Claims to be, in the case of the Construction Liens and
Certificates of Action, vacated upon security being posted under s. 44(1) of the
Act and, in the case of all other Encumbrances, deleted and expunged, from
title to Lands PIN 10189-0865:**

| Instrument No. | Date | Instrument Type | Parties From | Parties To |
|-----------------------|-------------|------------------------|---|---|
| AT3807259 | 2015/02/10 | Transfer | Mady Avenue Road Ltd. | Fortress Brookdale Inc. |
| AT3894769 | 2015/05/28 | Charge | Fortress Brookdale Inc. | RW Fortress Inc. |
| AT3955352 | 2015/07/23 | Charge | Fortress Brookdale Inc. | Centro Mortgage Inc. |
| AT3955420 | 2015/07/23 | Transfer of Charge | Centro Mortgage Inc. | Centro Mortgage Inc. Olympia Trust Company |
| AT3962441 | 2015/07/30 | Transfer of Charge | Centro Mortgage Inc. Olympia Trust Company | Centro Mortgage Inc. Olympia Trust Company |
| AT3986534 | 2015/08/24 | Transfer of Charge | Centro Mortgage Inc. Olympia Trust Company | Centro Mortgage Inc. Olympia Trust Company |
| AT4021992 | 2015/09/30 | Transfer of Charge | Centro Mortgage Inc. Olympia Trust Company | Centro Mortgage Inc. Olympia Trust Company |

Schedule G - Schedule of Security for Claims for Lien and Costs under s. 44(1) of the Act

| Name of lien claimant | Lien Amount | Security for costs | Total |
|---|------------------------|---------------------------|------------------------|
| Summit Concrete & Drain Ltd. | \$28,024.00 | \$7,006.00 | \$35,030.00 |
| Summit forming Ltd. | \$3,980,765.00 | \$50,000.00 | \$4,030,765.00 |
| D. Zentil Mechanical Inc. | \$360,540.00 | \$50,000.00 | \$410,540.00 |
| Atlas Dewatering Corporation | \$144,048.00 | \$36,012.00 | \$180,060.00 |
| Innocon, Lafarge Canada Inc., Lehigh Hanson Materials Limited, Innocon Inc. | \$1,168,857.00 | \$50,000.00 | \$1,218,857.00 |
| Dircam Electric Limited | \$321,158.00 | \$50,000.00 | \$371,158.00 |
| Dircam Electric Limited | \$818,843.00 | \$50,000.00 | \$868,843.00 |
| Gilbert Steel Limited | \$859,955.00 | \$50,000.00 | \$909,955.00 |
| The Fence People Limited | \$108,117.00 | \$27,029.25 | \$135,146.25 |
| Global Precast Inc. | \$818,839.00 | \$50,000.00 | \$868,839.00 |
| Summit forming Ltd. | \$589,520.00 | \$50,000.00 | \$639,520.00 |
| Concrane Equipment Inc. | \$141,250.00 | \$35,312.50 | \$176,562.50 |
| Aluma Systems Inc. | \$739,244.00 | \$50,000.00 | \$789,244.00 |
| Stephensons Rental Services | \$19,613.00 | \$4,903.25 | \$24,516.25 |
| Concrane Equipment Inc. | <u>\$84,750.00</u> | <u>\$21,187.50</u> | <u>\$105,937.50</u> |
| Total | \$10,183,523.00 | \$581,450.50 | \$10,764,973.50 |

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

In the matter of Sections 97 and 100 of the Courts of Justice Act, R.S.O. 1990 c.C.43, as am.

THE HONOURABLE MR.) THURSDAY, THE 18TH
)
JUSTICE McEWEN) DAY OF OCTOBER, 2018

B E T W E E N:

FIRM CAPITAL MORTGAGE FUND INC.

Applicant

- and -

**FORTRESS BROOKDALE INC., FORTRESS AVENUE ROAD (2015) INC. and
FERNBROOK HOMES (BROOKDALE) LIMITED**

Respondents

VESTING ORDER

THIS APPLICATION, made by Firm Capital Mortgage Fund Inc. (the “**Applicant**”), for an order as contemplated by an agreement of purchase and sale (the “**Sale Agreement**”) between RSM Canada Limited (“**RSM**”), in its capacity as the receiver (the “**Receiver**”) of the Respondents, as vendor, and Empire (Water Wave) Inc., as purchaser (such purchaser or its permitted assignee, the “**Purchaser**”) dated August 23, 2018, vesting in the Purchaser, or as it may direct, the right, title and interest in and to the assets described in the Sale Agreement (the “**Purchased Assets**”) pursuant to, *inter alia*, Sections 97 and 100 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Application of the Applicant, the Affidavit of Forrest Todd sworn September 20, 2018 and the Exhibits thereto (the "**Todd Affidavit**"), the report of the Receiver dated September 20, 2018 and the confidential report of the Receiver dated September 20, 2018 (the "**Confidential Report**") and on hearing the submissions of counsel for the Applicant, the Receiver, the Purchaser and such other counsel as were present, no one else appearing although duly served as appears from the Affidavits of Service of Process sworn September 20, 2018 filed,

UPON BEING SATISFIED THAT (i) the charge/mortgage of land granted by the Respondent, Fortress Brookdale Inc., to the Applicant over the real property identified in Schedule "A" hereto (the "**Lands**") registered on June 7, 2017 as Instrument No. AT4591073 (the "**Mortgage**") has matured and has not been repaid, (ii) the Applicant issued a demand for payment and a Notice of Intention to Enforce Security pursuant to the provisions of the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA Notice**"), (iii) the Applicant issued a Notice of Sale under Charge/Mortgage of Land in respect of the Mortgage dated April 20, 2018 in accordance with the *Mortgages Act* (Ontario), which notice period has expired, (iv) the Receiver was appointed pursuant to the terms of the Applicant's security after the issuance and expiry of a demand and BIA Notice by the Applicant and has executed the Sale Agreement in respect of the Purchased Assets, (v) the Mortgage has not been redeemed, (vi) the lien claimants claim priority over the Mortgage and over the other mortgages on title and (vii) the sum of \$10,764,973.50, out of the purchase price/Net Proceeds of sale (as defined herein), to stand as security for the claims for lien and costs of the lien claimants, is hereby paid into Court, pursuant to the provisions of s. 44(1) of the *Construction Lien Act* (Ontario) (now *Construction Act* (Ontario)) (the "**Act**"), in order to vacate the registration of the claims for lien and certificates of action ~~are more than sufficient to satisfy the requirements of the *Construction Lien Act* (Ontario) (now *Construction Act* (Ontario)) (the "**Act**") to permit the vacating of the Outstanding Construction Liens and the dismissal of the Construction Lien Actions (each as defined herein), in accordance with the terms of this Order;~~

SERVICE

1. **THIS COURT ORDERS** that the time for service and filing of the Notice of

Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof. For greater certainty, service of the Notice of Application and the Application Record on the holders of Unit Agreements (as defined herein) in the manner described in the Todd Affidavit, is hereby approved.

2. **THIS COURT ORDERS** that capitalized terms not defined herein shall have the meanings ascribed thereto in the Sale Agreement.

VESTING

3. **THIS COURT ORDERS AND DECLARES** that, upon the delivery of a Receiver's certificate to the Purchaser substantially in the form attached as Schedule "B" hereto (the "**Receiver's Certificate**"), all of the Applicant's, the Receiver's, the Lien Claimants', the other encumbrancers' and the Respondents' right, title and interest in and to the Lands comprising the Purchased Assets shall vest absolutely in the Purchaser or as it may direct, free and clear of and from any and all any claim, demand, hypothecation, pledge, lien, charge, security agreement, security interest, lease, sublease, title retention agreement, mortgage, encumbrance, execution, easement, right-of-way, restrictive covenant, restriction, encroachment, option or adverse claim of any kind or character whatsoever, or similar interests or instruments charging or creating a security interest in, or against title to, such Purchased Assets, whether created by agreement, statute or otherwise at law, attaching to the property, assets or rights whether registered or unregistered, trusts or deemed trusts (whether contractual, statutory, or otherwise), levies, or other financial or monetary claim and encumbrance of any nature and kinds whatsoever, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (i) any Offers or other rights or claims of the purchaser or tenants under any Offers; (ii) ~~the all Outstanding Construction Liens listed in Schedule C hereto and the remaining;~~ and (iii) ~~those Claims listed on Schedule "C" hereto (all of which are collectively referred to as the "Encumbrances")~~, but for greater certainty the Encumbrances vested out herein shall not include the permitted encumbrances, easements and restrictive covenants listed on Schedule "D" hereto (the "**Permitted Encumbrances**") and, for greater certainty, this Court orders that the construction liens and certificates of action listed in Schedule C hereto are hereby vacated pursuant to the provisions of s. 44(1) of the Act, by the payment into court of the sum of \$10,764,973.50 out of the purchase price, to stand as security for the claims for lien and costs of the lien claimants, and the remaining, ~~save and except as it relates to the Permitted Encumbrances, all of the~~ Encumbrances affecting or relating to the Purchased Assets are hereby

expunged and, discharged (~~vacated, in the case of the Outstanding Construction Liens~~) as against the Purchased Assets on Closing.

4. **THIS COURT ORDERS** that upon the registration in the Land Registry Office for the Land Titles Division of the City of Toronto of an Application for Vesting Order in the form prescribed by the *Land Titles Act*, the Land Registrar is hereby directed to enter the Purchaser as

the owner of the Lands in fee simple, and is hereby directed to vacate the registration of the claims for lien and certificates of action pursuant to s. 44(1) of the Act and delete and expunge from title to the Lands all of the remaining encumbrances and Claims listed in Schedule "C" hereto.

CLOSING OF SALE AGREEMENT

5. THIS COURT ORDERS AND DECLARES that the sum of \$10,764,973.50, out of the purchase price, to stand as security for the claims for lien and costs of the lien claimants, as set out in Schedule G hereto, is hereby paid into court, pursuant to the provisions of s. 44(1) of the Act, in order to vacate the registration of the construction liens and certificates of action listed in Schedule C hereto, upon the delivery of the Receiver's Certificate to the Purchaser on Closing, the Purchased Assets shall vest in the Purchaser free and clear of any and all construction liens (including any related certificates of action) registered against title to the Lands at the time of the Closing of the Sale Agreement (the "Outstanding Construction Liens") including but not limited to those listed on Schedule "C" hereto that are not already vacated, discharged, released or otherwise removed or extinguished from title to the Lands as at the date of this Order, and such Outstanding Construction Liens shall be vacated from title to the Lands.

6. THIS COURT ORDERS that, upon completion of the Closing in accordance with the terms of the Sale Agreement and payment by the Receiver on behalf of the Respondents of the sum of \$10,764,973.50 into court, to stand as security for the claims for lien and costs of the lien claimants pursuant to the provisions of s. 44(1) of the Act, and payment by the Receiver of its fees and disbursements and to the Applicant of the total amount of the outstanding indebtedness secured by the Mortgage including all principal, interest, fees, costs and expenses to the date of the Closing of the transaction contemplated by the Sale Agreement, together with payment of any amounts having legal priority over the Applicant's Mortgage, the Receiver shall pay the balance of the sale proceeds (the "Net Proceeds") into court to the Accountant of the Superior Court of Justice (the "Accountant") to be held in an interest-bearing account for the benefit of all those claiming an interest in such Net Proceeds pending further order of the Court. Upon payment into court, delivery of the Net Proceeds to the Accountant, the Receiver shall deliver a certificate to all parties on the service list herein, substantially in the form attached as Schedule "F" (the "Certificate of Completion") confirming that the payments into court have been made the Net Proceeds have been paid to the Accountant in accordance with the terms of this Order.

7. **THIS COURT ORDERS** that the Receiver shall holdback the amount of \$500,000 (the “**Holdback**”) from the Net Proceeds before paying same ~~into court to the Accountant~~. Such amount shall be used by the Receiver to pay any and all obligations of the ~~Applicant or the Receiver~~ in respect of the Property in connection with the implementation of the Vesting Order, the closing of the sale transaction ~~and~~, the expenses incurred ~~by the Receiver to preserve and protect in relation to the Property or the sale transaction, including but not limited to any fees, costs or expenses, required to be paid by the Applicant or the Receiver to any party relating thereto~~ (collectively, the “**Holdback Obligations**”). Upon the

earlier of (i) the Receiver being satisfied that neither it ~~has nor~~ the Applicant have any further Holdback Obligations, and (ii) the issuance of a Distribution Order in respect of the Net Proceeds, the Receiver shall pay the balance, if any, of the Holdback ~~into court to the Accountant~~ in accordance with the terms as set out herein.

8. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims to the Net Proceeds, including but not limited to those asserted by any mortgagee ~~or by any party in respect of any Outstanding Construction Liens or Construction Lien Actions (as defined herein)~~, the Net Proceeds shall stand in place and instead of the Purchased Assets, and from and after the delivery of the Receiver's Certificate on Closing, the all Claims, Outstanding Construction Liens and Encumbrances, except for the construction liens, shall attach to the Net Proceeds from the sale of the Purchased Assets with the same priority as existed immediately prior to the sale of the Purchased Assets.

9. **THIS COURT ORDERS** that upon the payment of the sum of \$10,764,973.50, to stand as security for the claims for lien and costs of the lien claimants, into court pursuant to the provisions of s. 44(1) of the Act, and delivery by the Receiver to the Service List herein of the Certificate of Completion (as defined below) in accordance with the terms of this Order, the Construction Lien actions all litigation proceedings listed on Schedule "E" hereto relating to the Outstanding Construction Liens (the "Construction Lien Actions") that name the Receiver as a defendant shall thereby be dismissed without costs as against at an end as against the Applicant, RSM and the Receiver, without further order, and no parties to such Construction Lien Actions shall take, or be permitted or required to take, as the case may be, any further steps in connection with any such proceedings as against the Applicant or the Receiver. Within ten (10) business days of the delivery by the Receiver of the Certificate of Completion, the Plaintiff in each of the Construction Lien Actions shall deliver to the Applicant, RSM and the Receiver (if RSM or the Receiver is named as a defendant in any Construction Lien Action), evidence of a dismissal of the action against those parties on a "with prejudice, and without costs" basis. All Claims previously asserted by any party through such Construction Lien Actions or that may be asserted against the Applicant, RSM or the Receiver shall attach to, and be limited to, the Net Proceeds held by the Accountant.

GENERAL

10. **THIS COURT ORDERS AND DIRECTS** the Receiver to deliver to all parties on the service list and file with the Court, copies of the Receiver's Certificate and Certificate of Completion, forthwith after delivery thereof.

11. **THIS COURT ORDERS** that, notwithstanding:

- (a) the pendency of these proceedings;
- (b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Respondents or any one of them and any bankruptcy order issued pursuant to any such applications; and
- (c) any assignment in bankruptcy made in respect of any of the Respondents;

the vesting of the Purchased Assets in the Purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Respondents or any one of them and shall not be void or voidable by creditors of the Respondents, nor shall it constitute nor be deemed to be a reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

12. **THIS COURT ORDERS AND DECLARES** that the Applicant, the Receiver, the Purchaser and all persons acting in good faith in accordance with the terms of this Order shall have all of the protections available for so doing, in accordance with section 142 of the *Courts of Justice Act* (Ontario).

13. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada to give effect to this Order and to assist the Receiver in carrying out the terms of this Order.

SEALING

14. **THIS COURT ORDERS** that the Confidential Report be and is hereby sealed pending further Order of the Court and shall not form part of the public record.

E-SERVICE

15. **THIS COURT ORDERS** that the E-Service Guide of the Commercial List (the “**Guide**”) is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Guide (which can be found on the Commercial List website at: www.ontariocourts.ca//scj/practice/practice-directions/toronto/eservice-commercial/)

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 13 of the Guide, service of documents in accordance with the Guide will be effective on transmission. This Court further orders that a Case Website shall be established by the Receiver in accordance with the Guide with the following URL ‘<<https://rsmcanada.com/fortress-brookdale-inc>>’.

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

EXHIBIT B

This is Exhibit B referred to in the
affidavit of Karen Louzado
sworn before me, this 14th
day of December 2018

Robert C. Harason

From: D. J. Miller <DJMiller@tgf.ca>
Sent: Wednesday, October 03, 2018 5:09 PM
To: Robert C. Harason
Cc: Leanne Williams; Joe Fried
Subject: RE: In the matter of the Application by Firm Capital Mortgage Fund Inc. re Fortress Brookdale Inc. et al. (Court file No. CV-18-604993-00CL)



Robert:

Thanks for your note. Could we please schedule a call to discuss the concepts underlying your markup? Once we have an understanding on a conceptual level, we will be in a position to respond on the substance of your markup. Please let us know of your availability. Could I start the bidding by suggesting 2 pm tomorrow?

Regards,

D.J.

TGF

D. J. Miller | Direct Line: +1 416 304-0559 | Thornton Grout Finnigan LLP | www.tgf.ca

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From: Robert C. Harason [mailto:rharason@beardwinter.com]

Sent: Wednesday, October 3, 2018 2:34 PM

To: D. J. Miller <DJMiller@tgf.ca>; Leanne Williams <LWilliams@tgf.ca>; Roxana Manea <RManea@tgf.ca>; 'Adam Slavens ' <aslavens@torys.com>; 'Amanda S. Hill ' <ahill@toronto.ca>; 'Andrea Lee White ' <andrea.white@shibleyrighton.com>; 'Ari Reichman ' <ari@goldmanspring.com>; 'Arif Dhanani ' <arif.dhanani@rsmcanada.com>; 'Barbara Frederikse ' <barbara@frederlaw.ca>; 'Barry Greenberg ' <bsgreenberg@rogers.com>; 'Bryan A. Tannenbaum ' <bryan.tannenbaum@rsmcanada.com>; 'Catherine E. Willson ' <willson@gsnh.com>; 'Catherine Koch ' <catherine.koch@aviva.com>; 'Christopher J. Henderson ' <Christopher.Henderson@toronto.ca>; 'Courtney V. Raphael ' <craphael@airdberlis.com>; D. J. Miller <DJMiller@tgf.ca>; 'Danielle M. Peck ' <danielle.peck@tarion.com>; 'Danielle Muise ' <dmuise@airdberlis.com>; 'Danny M. Nunes ' <danny.nunes@dlapiper.com>; 'David A. Taub ' <dtaub@robapp.com>; 'David Kerr ' <david.kerr@computershare.com>; 'Derek J. Bell ' <derek.bell@dlapiper.com>; 'Diane Winters ' <diane.winters@justice.gc.ca>; 'Domenic C.S. Presta ' <dpresta@bianchipresta.com>; 'Enzo Di Iorio ' <ediiorio@millერთhompson.com>; 'George Corsianos ' <gcorsianos@cl-law.ca>; 'James M. Butson ' <james.butson@aclaw.ca>; 'John Fox ' <jfox@robapp.com>; 'John Margie ' <jmargie@glaholt.com>; 'Jonathan Bahnuik ' <bahnuikj@olympiatrust.com>; 'Jonathan F. Lancaster ' <jlancaster@fasken.com>; 'Joseph Fried ' <jfried@mwb.ca>; 'Joseph Maggisano ' <jmaggisano@jpmlaw.ca>; 'Keith Bannon ' <kbannon@glaholt.com>; 'Kevin O'Hara ' <kevin.ohara@ontario.ca>; 'Lianne B. Furlong ' <lianne.furlong@aviva.com>; 'Michael A. Handler ' <mhandler@mhandlerlaw.com>; 'Michael De Lellis ' <mdelellis@osler.com>; 'Nicholas A. Richter ' <nrichter@richterlaw.ca>; 'Patrick Riesterer ' <priesterer@osler.com>; 'Randy H. Lebow ' <rlebow@owenswright.com>; 'Riccardo Del Vecchio ' <rdelvecchio@millერთhompson.com>; 'Richard Hammond ' <rhammond@hammondfflesias.com>; 'Roger Jaipargas ' <rjaipargas@blg.com>; 'Sheldon Spring ' <sspring@goldmanspring.com>; 'Thomas McRae ' <thomas.mcrae@shibleyrighton.com>; 'Timothy P. Schumacher ' <tim.schumacher@tarion.com>; 'Xue Yan ' <xyan@blg.com>

Subject: In the matter of the Application by Firm Capital Mortgage Fund Inc. re Fortress Brookdale Inc. et al. (Court file No. CV-18-604993-00CL)

Dear Counsel,

Conditional on (i) the providing by the privately appointed receiver of a report containing satisfactory evidence that the receiver took reasonable steps to obtain an offer to purchase the project for fair market value and (ii) disclosure of the purchase price in the offer, the lien claimants Dircam Electric Limited, Gilbert Steel Limited, Aluma Systems Inc., The Fence People Limited, Atlas Dewatering Corporation, Summit Concrete & Drain Ltd., Summit Forming Ltd., Global Precast Inc. and Innocon will support the sale proposed by the receiver pursuant to the attached form of vesting order (in two versions; one in Word with track changes and one as a pdf without track changes from the form suggested by Firm Capital in its application record).

Please confirm your consent to the attached form of the vesting order by the close of business on Friday, October 5, 2018. If you have questions or concerns, please contact me by email or telephone prior to that time.

Robert C. Harason | Partner

rharason@beardwinter.com

Direct Line: 416.306.1707 | Direct Fax: 416.593.7760



BEARD WINTER LLP

BEARD WINTER LLP | LAWYERS

130 Adelaide Street West, 7th Floor

Toronto, Ontario M5H 2K4

Main: 416.593.5555 | Fax: 416.593.7760 | www.beardwinter.com

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EXHIBIT C

Robert C. Harason

From: Robert C. Harason
Sent: Thursday, October 04, 2018 10:20 AM
To: D. J. Miller
Cc: Leanne Williams; Joe Fried
Subject: In the matter of the Application by Firm Capital Mortgage Fund Inc. re Fortress Brookdale Inc. et al. (Court file No. CV-18-604993-00CL)

Hi DJ,

The concept flows from the intention expressed in your order of securing the liens by the posting of security for the claims and 25% for costs and the need to expressly provide for that so that the liens are secured. The amount posted for the liens has then been carved out of the Net Proceeds. The lien actions are not dismissed against any defendants, except for the receiver (if a defendant), because of the priority claims made in the lien statements of claim.

I'm leaving early for the weekend this morning and won't be able to speak to you, but can correspond further with you by email if you wish so that you can respond to the form of vesting order I have provided. Please do so by the close of business tomorrow.

Robert C. Harason | Partner
rharason@beardwinter.com
Direct Line: 416.306.1707 | Direct Fax: 416.593.7760



This is Exhibit C referred to in the
affidavit of Karen Louzado
sworn before me, this 4th
day of December 2018

mullins
A LLoyd's Licensee

From: D. J. Miller [mailto:DJMiller@tgf.ca]
Sent: Wednesday, October 03, 2018 5:09 PM
To: Robert C. Harason
Cc: Leanne Williams; Joe Fried
Subject: RE: In the matter of the Application by Firm Capital Mortgage Fund Inc. re Fortress Brookdale Inc. et al. (Court file No. CV-18-604993-00CL)

Robert:

Thanks for your note. Could we please schedule a call to discuss the concepts underlying your markup? Once we have an understanding on a conceptual level, we will be in a position to respond on the substance of your markup. Please let us know of your availability. Could I start the bidding by suggesting 2 pm tomorrow?

Regards,

D.J.



D. J. Miller | Direct Line: +1 416 304-0559 | Thornton Grout Finnigan LLP | www.tgf.ca

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From: Robert C. Harason [mailto:rharason@beardwinter.com]
Sent: Wednesday, October 3, 2018 2:34 PM
To: D. J. Miller <DJMiller@tgf.ca>; Leanne Williams <LWilliams@tgf.ca>; Roxana Manea <RManea@tgf.ca>; 'Adam

EXHIBIT D

Robert C. Harason

From: D. J. Miller <DJMiller@tgf.ca>
Sent: Thursday, October 04, 2018 10:50 AM
To: Robert C. Harason
Cc: Leanne Williams; Joe Fried
Subject: RE: In the matter of the Application by Firm Capital Mortgage Fund Inc. re Fortress Brookdale Inc. et al. (Court file No. CV-18-604993-00CL)

Robert:

We are not providing any markup of the Vesting Order until such time as we have had a telephone discussion with you, as it appears clear from your markup and your email below that we view the situation differently. If you are not available for a call then we will simply respond to your email to the Service List and advise all parties of that fact, and will proceed as we had intended. If you would like to make yourself available for a call, then we can move the matter forward.

We remain available to discuss.

D.J.

This is Exhibit D referred to in the
affidavit of Karen Jaygado
sworn before me, this 11th
day of December 2018.

From: Robert C. Harason [mailto:rharason@beardwinter.com]
Sent: Thursday, October 4, 2018 10:20 AM
To: D. J. Miller <DJMiller@tgf.ca>
Cc: Leanne Williams <LWilliams@tgf.ca>; Joe Fried <jfried@mwb.ca>
Subject: In the matter of the Application by Firm Capital Mortgage Fund Inc. re Fortress Brookdale Inc. et al. (Court file No. CV-18-604993-00CL)

D. J. Miller
A Commissioner of the Superior Court of Justice

Hi DJ,

The concept flows from the intention expressed in your order of securing the liens by the posting of security for the claims and 25% for costs and the need to expressly provide for that so that the liens are secured. The amount posted for the liens has then been carved out of the Net Proceeds. The lien actions are not dismissed against any defendants, except for the receiver (if a defendant), because of the priority claims made in the lien statements of claim.

I'm leaving early for the weekend this morning and won't be able to speak to you, but can correspond further with you by email if you wish so that you can respond to the form of vesting order I have provided. Please do so by the close of business tomorrow.

Robert C. Harason | Partner
rharason@beardwinter.com
Direct Line: 416.306.1707 | Direct Fax: 416.593.7760



From: D. J. Miller [mailto:DJMiller@tgf.ca]
Sent: Wednesday, October 03, 2018 5:09 PM
To: Robert C. Harason
Cc: Leanne Williams; Joe Fried

Subject: RE: In the matter of the Application by Firm Capital Mortgage Fund Inc. re Fortress Brookdale Inc. et al. (Court file No. CV-18-604993-00CL)

Robert:

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Regards,

D.J.



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From: Robert C. Harason [<mailto:rharason@beardwinter.com>]

Sent: Wednesday, October 3, 2018 2:34 PM

To: D. J. Miller <DJMiller@tgf.ca>; Leanne Williams <LWilliams@tgf.ca>; Roxana Manea <RManea@tgf.ca>; 'Adam Slavens' <aslavens@torys.com>; 'Amanda S. Hill' <ahill@toronto.ca>; 'Andrea Lee White' <andrea.white@shibleyrighton.com>; 'Ari Reichman' <ari@goldmanspring.com>; 'Arif Dhanani' <arif.dhanani@rsmcanada.com>; 'Barbara Frederikse' <barbara@frederlaw.ca>; 'Barry Greenberg' <bsgreenberg@rogers.com>; 'Bryan A. Tannenbaum' <bryan.tannenbaum@rsmcanada.com>; 'Catherine E. Willson' <willson@gsnh.com>; 'Catherine Koch' <catherine.koch@aviva.com>; 'Christopher J. Henderson' <Christopher.Henderson@toronto.ca>; 'Courtney V. Raphael' <craphael@airdberlis.com>; D. J. Miller <DJMiller@tgf.ca>; 'Danielle M. Peck' <danielle.peck@tarion.com>; 'Danielle Muise' <dmuise@airdberlis.com>; 'Danny M. Nunes' <danny.nunes@dlapiper.com>; 'David A. Taub' <dtaub@robapp.com>; 'David Kerr' <david.kerr@computershare.com>; 'Derek J. Bell' <derek.bell@dlapiper.com>; 'Diane Winters' <diane.winters@justice.gc.ca>; 'Domenic C.S. Presta' <dpresta@bianchipresta.com>; 'Enzo Di Iorio' <ediiorio@millერთhompson.com>; 'George Corsianos' <gcorsianos@cl-law.ca>; 'James M. Butson' <james.butson@aclaw.ca>; 'John Fox' <jfox@robapp.com>; 'John Margie' <jmargie@glaholt.com>; 'Jonathan Bahnuik' <bahnuikj@olympiatrust.com>; 'Jonathan F. Lancaster' <jlancaster@fasken.com>; 'Joseph Fried' <jfried@mwb.ca>; 'Joseph Maggisano' <jmaggisano@jpmlaw.ca>; 'Keith Bannon' <kbannon@glaholt.com>; 'Kevin O'Hara' <kevin.ohara@ontario.ca>; 'Lianne B. Furlong' <lianne.furlong@aviva.com>; 'Michael A. Handler' <mhandler@mhandlerlaw.com>; 'Michael De Lellis' <mdelellis@osler.com>; 'Nicholas A. Richter' <nrichter@richterlaw.ca>; 'Patrick Riesterer' <priesterer@osler.com>; 'Randy H. Lebow' <rlebow@owenswright.com>; 'Riccardo Del Vecchio' <rdelvecchio@millერთhompson.com>; 'Richard Hammond' <rhammond@hammondfflesias.com>; 'Roger Jaipargas' <rjaipargas@blg.com>; 'Sheldon Spring' <sspring@goldmanspring.com>; 'Thomas McRae' <thomas.mcrae@shibleyrighton.com>; 'Timothy P. Schumacher' <tim.schumacher@tarion.com>; 'Xue Yan' <xyan@blg.com>

Subject: In the matter of the Application by Firm Capital Mortgage Fund Inc. re Fortress Brookdale Inc. et al. (Court file No. CV-18-604993-00CL)

Dear Counsel,

Conditional on (i) the providing by the privately appointed receiver of a report containing satisfactory evidence that the receiver took reasonable steps to obtain an offer to purchase the project for fair market value and (ii) disclosure of the purchase price in the offer, the lien claimants Dircam Electric Limited, Gilbert Steel Limited, Aluma Systems Inc., The Fence People Limited, Atlas Dewatering Corporation, Summit Concrete & Drain Ltd., Summit Forming Ltd., Global Precast Inc. and Innocon will support the sale proposed by the receiver pursuant to the attached form of vesting order (in two versions; one in Word with track changes and one as a pdf without track changes from the form suggested by Firm Capital in its application record).

Please confirm your consent to the attached form of the vesting order by the close of business on Friday, October 5, 2018. If you have questions or concerns, please contact me by email or telephone prior to that time.

Robert C. Harason | Partner

rharason@beardwinter.com

Direct Line: 416.306.1707 | Direct Fax: 416.593.7760



BEARD WINTER LLP

BEARD WINTER LLP | LAWYERS

130 Adelaide Street West, 7th Floor

Toronto, Ontario M5H 2K4

Main: 416.593.5555 | Fax: 416.593.7760 | www.beardwinter.com

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EXHIBIT E

This is Exhibit E referred to in
affidavit of Karen Lougado
sworn before me, this 14th
day of December 2018

Robert C. Harason

From: D. J. Miller <DJMiller@tgf.ca>
Sent: Thursday, October 04, 2018 8:18 PM
To: Robert C. Harason
Cc: Courtney Raphael; sbabe@airdberlis.com; Danielle Muise; Domenic Presta;
bsgreenberg@rogers.com; John Margie; Keith Bannon ; Andrea Lee White; Tom McRae;
nrichter@richterlaw.ca; rhammond@hammondfilesias.com; jmaggisano@jpmlaw.ca;
mhandler@mhandlerlaw.com; Catherine Willson; 'Joseph Fried'; 'Tannenbaum, Bryan';
Dhanani, Arif; Leanne Williams
Subject: RE: In the matter of the Application by Firm Capital Mortgage Fund Inc. re Fortress Brookdale
Inc. et al. (Court file No. CV-18-604993-00CL)


D. J. Miller
COURT REPORTER & VIDEO
1000 SHEPPARD AVENUE EAST
SUITE 1000
SCARBOROUGH, ONTARIO M1S 1T5
CANADA
TEL: (416) 291-1111
FAX: (416) 291-1112
WWW.DJMILLER.COM

Counsel for Lien Claimants:

Based on the email below and my brief discussion with Robert Harason today, I think that it would be beneficial to schedule a call with counsel for all lien claimants to discuss the terms of the APA for which the Vesting Order is being sought, the mechanics for closing, and the implications for all concerned.

I would be happy to host a call on **Tuesday, October 9th at 3 pm**. Please confirm if you, or someone from your office can attend. I will then provide call-in details to those who are joining. Thank you.

D.J.



D. J. Miller | Direct Line: +1 416 304-0559 | Thornton Grout Finnigan LLP | www.tgf.ca
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From: Robert C. Harason [mailto:rharason@beardwinter.com]
Sent: October-03-18 2:34 PM
To: D. J. Miller <DJMiller@tgf.ca>; Leanne Williams <LWilliams@tgf.ca>; Roxana Manea <RManea@tgf.ca>; 'Adam Slavens' <aslavens@torys.com>; 'Amanda S. Hill' <ahill@toronto.ca>; 'Andrea Lee White' <andrea.white@shibleyrighton.com>; 'Ari Reichman' <ari@goldmanspring.com>; 'Arif Dhanani' <arif.dhanani@rsmcanada.com>; 'Barbara Frederikse' <barbara@frederlaw.ca>; 'Barry Greenberg' <bsgreenberg@rogers.com>; 'Bryan A. Tannenbaum' <bryan.tannenbaum@rsmcanada.com>; 'Catherine E. Willson' <willson@gsnh.com>; 'Catherine Koch' <catherine.koch@aviva.com>; 'Christopher J. Henderson' <Christopher.Henderson@toronto.ca>; 'Courtney V. Raphael' <craphael@airdberlis.com>; D. J. Miller <DJMiller@tgf.ca>; 'Danielle M. Peck' <danielle.peck@tarion.com>; 'Danielle Muise' <dmuise@airdberlis.com>; 'Danny M. Nunes' <danny.nunes@dlapiper.com>; 'David A. Taub' <dtaub@robapp.com>; 'David Kerr' <david.kerr@computershare.com>; 'Derek J. Bell' <derek.bell@dlapiper.com>; 'Diane Winters' <diane.winters@justice.gc.ca>; 'Domenic C.S. Presta' <dpresta@bianchipresta.com>; 'Enzo Di Iorio' <ediiorio@millerthomson.com>; 'George Corsianos' <gcorsianos@cl-law.ca>; 'James M. Butson' <james.butson@aclaw.ca>; 'John Fox' <jfox@robapp.com>; 'John Margie' <jmargie@glaholt.com>; 'Jonathan Bahnuik' <bahnuikj@olympiatruster.com>; 'Jonathan F. Lancaster' <jlancaster@fasken.com>; 'Joseph Fried' <jfried@mwb.ca>; 'Joseph Maggisano' <jmaggisano@jpmlaw.ca>; 'Keith Bannon' <kbannon@glaholt.com>; 'Kevin O'Hara' <kevin.ohara@ontario.ca>; 'Lianne B. Furlong' <lianne.furlong@aviva.com>; 'Michael A. Handler' <mhandler@mhandlerlaw.com>; 'Michael De Lellis' <mdelellis@osler.com>; 'Nicholas A. Richter' <nrichter@richterlaw.ca>; 'Patrick Riesterer' <priesterer@osler.com>; 'Randy H. Lebow' <rlebow@owenswright.com>; 'Riccardo Del Vecchio' <rdelvecchio@millerthomson.com>; 'Richard Hammond' <rhammond@hammondfilesias.com>; 'Roger Jaipargas' <rjaipargas@blg.com>; 'Sheldon Spring' <sspring@goldmanspring.com>; 'Thomas McRae' <thomas.mcrae@shibleyrighton.com>; 'Timothy P. Schumacher' <tim.schumacher@tarion.com>; 'Xue Yan' <xyan@blg.com>

Subject: In the matter of the Application by Firm Capital Mortgage Fund Inc. re Fortress Brookdale Inc. et al. (Court file No. CV-18-604993-00CL)

Dear Counsel,

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Please confirm your consent to the attached form of the vesting order by the close of business on Friday, October 5, 2018. If you have questions or concerns, please contact me by email or telephone prior to that time.

Robert C. Harason | Partner

rharason@beardwinter.com

Direct Line: 416.306.1707 | Direct Fax: 416.593.7760



BEARD WINTER LLP

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130 Adelaide Street West, 7th Floor

Toronto, Ontario M5H 2K4

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EXHIBIT F

referred to in the
F Karen Louzado
Ken
December 2018

Karen Louzado

From: Leanne Williams <LWilliams@tgf.ca>
Sent: Thursday, December 06, 2018 7:21 PM
To: 'Barry S Greenberg'; Roxana Manea; 'Adam Slavens'; 'Amanda S. Hill'; 'Andrea Lee White'; 'Ari Reichman'; 'Arif Dhanani'; 'Barbara Frederikse'; 'Bryan A. Tannenbaum'; 'Catherine E. Willson'; 'Christine Kellowan'; 'Christopher J. Henderson'; 'Courtney V. Raphael'; D. J. Miller; 'Danielle M. Peck'; 'Danny M. Nunes'; 'David A. Taub'; 'Derek J. Bell'; 'Diane Winters'; 'Domenic C.S. Presta'; 'Enzo Di Iorio'; 'George Corsianos'; 'James M. Butson'; 'Jeremy Dacks'; 'John Fox'; 'John Margie'; 'Jonathan Bahnuik'; 'Jonathan F. Lancaster'; 'Joseph Fried'; 'Joseph Maggisano'; 'Keith Bannon'; 'Ken Chan'; 'Kevin O'Hara'; 'Michael A. Handler'; 'Michael De Lellis'; 'Michael Scaglione'; 'Nicholas A. Richter'; 'Patrick Riesterer'; 'Randy H. Lebow'; 'Riccardo Del Vecchio'; 'Richard Hammond'; 'Robert Armstrong'; Robert C. Harason; 'Roger Jaipargas'; 'Sam Babe'; 'Sheldon Spring'; 'Thomas McRae'; 'Timothy P. Schumacher'; 'Tyronne Hodgins'; 'Vern W. DaRe'; 'Xue Yan'
Subject: RE: Application by Firm Capital Mortgage Fund Inc. under Ss. 97 & 100 of the Courts of Justice Act [Crt. File: CV-18-604993-00CL] [IWOV-Client.FID107201]
Attachments: FBI - Statement of Receipts & Disbursements - 12-05-18 v2.pdf; FILED Certificate of Completion_December 6, 2018.pdf

n. mullins

All,

Pursuant to the Order of Mr. Justice McEwen dated October 18, 2018 (the "Order"), attached please find a copy of the Completion Certificate which was filed with the Court earlier today. We have also received confirmation from the Accountant that the funds were received. Prior to this time, the funds were invested in a GIC while the Receiver determined the disbursements to be paid from the sale proceeds in accordance with the Order.

Please also find attached a Sources and Uses document prepared by the Receiver which sets out the funds received by the Receiver and the disbursements paid by the Receiver from those funds.

Leanne



Leanne Williams | Direct Line: +1 416 304 0060 | Thornton Grout Finnigan LLP | www.tgf.ca
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From: Barry S Greenberg [mailto:bsgreenberg@rogers.com]
Sent: Tuesday, December 4, 2018 2:01 PM
To: Roxana Manea <RManea@tgf.ca>; 'Adam Slavens' <aslavens@torys.com>; 'Amanda S. Hill' <ahill@toronto.ca>; 'Andrea Lee White' <andrea.white@shibleyrighton.com>; 'Ari Reichman' <ari@goldmanspring.com>; 'Arif Dhanani' <arif.dhanani@rsmcanada.com>; 'Barbara Frederikse' <barbara@frederlaw.ca>; 'Bryan A. Tannenbaum' <bryan.tannenbaum@rsmcanada.com>; 'Catherine E. Willson' <willson@gsnh.com>; 'Christine Kellowan' <kellowan@gsnh.com>; 'Christopher J. Henderson' <Christopher.Henderson@toronto.ca>; 'Courtney V. Raphael' <craphael@airdberlis.com>; D. J. Miller <DJMiller@tgf.ca>; 'Danielle M. Peck' <danielle.peck@tarion.com>; 'Danny M. Nunes' <danny.nunes@dlapiper.com>; 'David A. Taub' <dtaub@robapp.com>; 'Derek J. Bell' <derek.bell@dlapiper.com>; 'Diane Winters' <diane.winters@justice.gc.ca>; 'Domenic C.S. Presta' <dpresta@bianchipresta.com>; 'Enzo Di Iorio' <ediiorio@millerthomson.com>; 'George Corsianos' <gcorsianos@cl-law.ca>; 'James M. Butson' <james.butson@aclaw.ca>; 'Jeremy Dacks' <JDacks@osler.com>; 'John Fox' <jfox@robapp.com>; 'John Margie' <jmargie@glaholt.com>; 'Jonathan Bahnuik' <bahnuikj@olympiatruster.com>; 'Jonathan F. Lancaster' <jlancaster@fasken.com>; 'Joseph Fried' <jfried@mwb.ca>; 'Joseph Maggisano' <jmaggisano@jpmlaw.ca>; 'Keith Bannon' <kbannon@glaholt.com>; 'Ken Chan' <ken.chan@aviva.com>; 'Kevin O'Hara' <kevin.ohara@ontario.ca>; Leanne Williams <LWilliams@tgf.ca>; 'Michael A. Handler' <mhandler@mhandlerlaw.com>; 'Michael De Lellis' <mdelellis@osler.com>; 'Michael Scaglione' <mscaglione@bianchipresta.com>; 'Nicholas A. Richter'

<nrichter@richterlaw.ca>; 'Patrick Riesterer' <priesterer@osler.com>; 'Randy H. Lebow'
<rlebow@owenswright.com>; 'Riccardo Del Vecchio ' <rdelvecchio@millerthomson.com>; 'Richard Hammond'
<rhammond@hammondfilesias.com>; 'Robert Armstrong' <robert.armstrong@computershare.com>; 'Robert C.
Harason ' <rharason@beardwinter.com>; 'Roger Jaipargas' <rjaipargas@blg.com>; 'Sam Babe '
<sbabe@airdberlis.com>; 'Sheldon Spring' <spring@goldmanspring.com>; 'Thomas McRae'
<thomas.mcrae@shibleyrighton.com>; 'Timothy P. Schumacher ' <tim.schumacher@tarion.com>; 'Tyronne
Hodgins' <hodgins@gsnh.com>; 'Vern W. DaRe ' <vdare@foglers.com>; 'Xue Yan' <xyan@blg.com>
Subject: RE: Application by Firm Capital Mortgage Fund Inc. under Ss. 97 & 100 of the Courts of Justice Act [Crt.
File: CV-18-604993-00CL] [IWOV-Client.FID107201]

Hi D. J.

Further to Ms. Manea's email of October 24, 2018, providing a copy of the Receiver's Certificate, review of my file indicates that I have not received confirmation of the payment into court or the amount paid in this regard.

Pursuant to paragraph 6 of the Vesting Order, upon completion of the sale and payment to Firm Capital, the net proceeds were to be paid to the Accountant of the Superior Court of Justice.

In light of the above, please provide confirmation of payment into court and the amount paid together with the Receiver's Certificate confirming payment of the Net Proceeds to the Accountant.

As you are aware the issues set out in Justice McEwen's endorsement of October 18, 2018 are to be argued on December 19, 2018 and as such your prompt reply providing the information and documentation requested above would be most appreciated.

Best regards,
Barry

Barry S. Greenberg
Barrister and Solicitor
7626A Yonge Street
Thornhill, Ontario
L4J1V9

Tel: 905-886-9535 Ext.27
Fax:905-886-9540
email: bsgreenberg@rogers.com

From: Roxana Manea <RManea@tgf.ca>

Sent: October 24, 2018 5:12 PM

To: 'Adam Slavens' <aslavens@torys.com>; 'Amanda S. Hill' <ahill@toronto.ca>; 'Andrea Lee White'
<andrea.white@shibleyrighton.com>; 'Ari Reichman' <ari@goldmanspring.com>; 'Arif Dhanani'
<arif.dhanani@rsmcanada.com>; 'Barbara Frederikse' <barbara@frederlaw.ca>; 'Barry Greenberg'
<bsgreenberg@rogers.com>; 'Bryan A. Tannenbaum' <bryan.tannenbaum@rsmcanada.com>; 'Catherine E.
Willson' <willson@gsnh.com>; 'Christine Kellowan' <kellowan@gsnh.com>; 'Christopher J. Henderson'
<Christopher.Henderson@toronto.ca>; 'Courtney V. Raphael' <craphael@airdberlis.com>; D. J. Miller
<DJMiller@tgf.ca>; 'Danielle M. Peck' <danielle.peck@tarion.com>; 'Danny M. Nunes '
<danny.nunes@dlapiper.com>; 'David A. Taub' <dtaub@robapp.com>; 'Derek J. Bell '
<derek.bell@dlapiper.com>; 'Diane Winters' <diane.winters@justice.gc.ca>; 'Domenic C.S. Presta'
<dpresta@bianchipresta.com>; 'Enzo Di Iorio' <ediiorio@millerthomson.com>; 'George Corsianos '

<gcorsianos@cl-law.ca>; 'James M. Butson ' <james.butson@aclaw.ca>; 'Jeremy Dacks' <JDacks@osler.com>; 'John Fox' <jfox@robapp.com>; 'John Margie ' <jmargie@glaholt.com>; 'Jonathan Bahnuik ' <bahnuikj@olympiatrust.com>; 'Jonathan F. Lancaster ' <jlancaster@fasken.com>; 'Joseph Fried' <jfried@mwb.ca>; 'Joseph Maggisano' <jmaggisano@jpmlaw.ca>; 'Keith Bannon ' <kbannon@glaholt.com>; 'Ken Chan' <ken.chan@aviva.com>; 'Kevin O'Hara' <kevin.ohara@ontario.ca>; Leanne Williams <LWilliams@tgf.ca>; 'Michael A. Handler' <mhandler@mhandlerlaw.com>; 'Michael De Lellis' <mdelellis@osler.com>; 'Michael Scaglione ' <mscaglione@bianchipresta.com>; 'Nicholas A. Richter' <nrichter@richterlaw.ca>; 'Patrick Riesterer' <priesterer@osler.com>; 'Randy H. Lebow' <rlebow@owenswright.com>; 'Riccardo Del Vecchio ' <rdelvecchio@millerthomson.com>; 'Richard Hammond' <rhammond@hammondflsias.com>; 'Robert Armstrong' <robert.armstrong@computershare.com>; 'Robert C. Harason ' <rharason@beardwinter.com>; 'Roger Jaipargas' <rjaipargas@blg.com>; 'Sam Babe ' <sbabe@airdberlis.com>; 'Sheldon Spring' <sspring@goldmanspring.com>; 'Thomas McRae' <thomas.mcrae@shibleyrighton.com>; 'Timothy P. Schumacher ' <tim.schumacher@tarion.com>; 'Tyronne Hodgins' <hodgins@gsnh.com>; 'Vern W. DaRe ' <vdare@foglers.com>; 'Xue Yan' <xyan@blg.com>
Subject: Application by Firm Capital Mortgage Fund Inc. under Ss. 97 & 100 of the Courts of Justice Act [Crt. File: CV-18-604993-00CL] [IWOV-Client.FID107201]

To the Service List:

Further to the provisions of the Vesting Order dated October 18, 2018 made in the above-noted matter, attached please find a copy of the Receiver's Certificate dated October 23, 2018, which was filed today with the Superior Court of Justice (Commercial List).

Regards,
Roxana Manea



Roxana G. Manea | Law Clerk | RManea@tgf.ca | Direct Line: +1 416-304-1013 | 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

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IN THE MATTER OF THE RECEIVERSHIP OF FORTRESS BROOKDALE INC., ET AL
RECEIVER'S STATEMENT OF RECEIPTS AND DISBURSEMENTS
FOR THE PERIOD JUNE 11, 2018 TO DECEMBER 5, 2018

RECEIPTS

| | |
|---|-----------------------------|
| Transfer from Fortress Brookdale Inc. | \$ 491,000 |
| Net proceeds from sale of property (Note 1) | 50,052,422 |
| Interest earned | 65,821 |
| Total receipts | <u>\$ 50,609,243</u> |

DISBURSEMENTS

| | |
|---|----------------------------|
| Crane rental | \$ 109,409 |
| Forming equipment - rental and insurance | 198,532 |
| Security | 81,631 |
| Insurance | 52,500 |
| Site clean up | 20,525 |
| Property taxes | 329,273 |
| Appraisal fees | 24,820 |
| Newspaper and signage advertisement | 8,698 |
| Professional fees paid (Note 2) | 1,641,672 |
| Court ordered legal holdback re FCMF legal fees | 750,000 |
| Data room license fee | 500 |
| Utilities | 423 |
| Miscellaneous | 1,085 |
| HST paid | 132,455 |
| PST paid | 4,200 |
| Total disbursements | <u>\$ 3,355,722</u> |

| | |
|--|--------------------------|
| Excess receipts over disbursements | \$ 47,253,521 |
| Less: Repayment of Firm Capital Mortgage Fund Inc. indebtedness | <u>(20,131,330)</u> |
| Excess receipts over disbursements after secured creditor repayment | \$ 27,122,191 |
| Amount paid to the Ontario Superior Court of Justice on December 5, 2018 | <u>(26,945,205)</u> |
| Balance in Receiver's trust account | <u>\$ 176,986</u> |

IN THE MATTER OF THE RECEIVERSHIP OF FORTRESS BROOKDALE INC., ET AL
RECEIVER'S STATEMENT OF RECEIPTS AND DISBURSEMENTS
FOR THE PERIOD JUNE 11, 2018 TO DECEMBER 5, 2018

Notes:

1. The total proceeds received by Meyer, Wassenaar & Banach LLP ("MWB") on closing were \$47,552,422. This amount is comprised of the following:

| | |
|---|-----------------------------|
| Selling price | \$ 50,000,000 |
| Closing adjustments | 52,422 |
| Subtotal | <u>\$ 50,052,422</u> |
| Less: Deposits received | (2,500,000) |
| Balance of purchase price received at closing | <u><u>\$ 47,552,422</u></u> |

(i) MWB was directed by the Receiver to distribute the balance of purchase price received at closing, as follows:

| | |
|---|-----------------------------|
| Firm Capital Mortgage Fund Inc. ("FCMF") | \$ 20,131,330 |
| Receiver's real estate counsel fees - MWB | 112,800 |
| FCMF real estate counsel fees - pre-receivership - Owens Wright LLP ("Owens Wright") | 61,006 |
| Counsel to FCMF - Thornton Grout Finnigan LLP ("TGF") - for the period October 17, 2017 to October 18, 2018 | 884,630 |
| To TGF re Court ordered legal holdback re FCMF legal fees | 750,000 |
| City of Toronto - property taxes | 329,273 |
| City of Toronto - utilities | 371 |
| | <u>\$ 22,269,409</u> |
| Balance paid to the Receiver | <u>25,283,013</u> |
| Total | <u><u>\$ 47,552,422</u></u> |

(ii) The balance paid to the Receiver was for the following:

| | |
|--|-----------------------------|
| Court ordered Receiver's holdback | \$ 250,000 |
| Payment of site expenses | 346,760 |
| Receiver's fees - for the period to October 15, 2018 | 377,912 |
| Retained in the Receiver's bank account | 24,308,341 |
| Total | <u><u>\$ 25,283,013</u></u> |

The disbursements set out in this Note 1 are included in the Disbursement amounts set out on the Receiver's Statement of Receipts and Disbursements

2. Professional fees includes following:

| | |
|--|----------------------------|
| Receiver fees - for the period to October 31, 2018 | \$ 548,296 |
| Receiver's real estate counsel's fees (MWB) - for the period to October 23, 2018 | 123,102 |
| Fees of FCMF's counsel (Owens Wright) - pre-receivership | 68,506 |
| FCMF counsel - TGF - for the period October 17, 2017 to October 31, 2018 | 901,769 |
| | <u><u>\$ 1,641,672</u></u> |

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

In the matter of Sections 97 and 100 of the Courts of Justice Act, R.S.O. 1990 c.C.43, as am.

B E T W E E N:

FIRM CAPITAL MORTGAGE FUND INC.

Applicant

- and -

**FORTRESS BROOKDALE INC., FORTRESS AVENUE ROAD (2015) INC. and
FERNBROOK HOMES (BROOKDALE) LIMITED**

Respondents

CERTIFICATE OF COMPLETION

RECITALS

A. Pursuant to an Order of the Court in this proceeding dated October 18, 2018 (the “**Order**”), the Court directed the Receiver to serve and file a certificate confirming that it had paid the Net Proceeds to the Accountant of the Ontario Superior Court of Justice.

B. Unless otherwise indicated herein, capitalized terms have the meanings set out in the Order.

THE RECEIVER CONFIRMS the following:

1. The Receiver paid the Net Proceeds to the Accountant pursuant to the terms of the Order on December 5, 2018.

**RSM Canada Limited, in its capacity as
Receiver of Fortress Brookdale Inc., Fortress
Avenue Road (2015) Inc. and Fernbrook
Homes (Brookdale) Limited, and not in its
personal capacity**

Per:



Name: Daniel R. Weisz

Title: Senior Vice-President

In the Matter of Sections 97 and 100 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43, as amended

FIRM CAPITAL MORTGAGE FUND INC.

- and -

**FORTRESS BROOKDALE INC., FORTRESS AVENUE ROAD
(2015) INC. and FERNBROOK HOMES (BROOKDALE) LIMITED**

Applicant

Respondents

Court File No. CV-18-604993-00CL

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

Proceedings commenced at Toronto, Ontario

CERTIFICATE OF COMPLETION

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 (LSUC# 34393P)
Tel: (416) 304-0559
Email: djmiller@tgf.ca

Leanne M. Williams (LSUC# 41877E)
Tel: (416) 304-0060
Email: lwilliams@tgf.ca

Lawyers for the Applicant, Firm Capital Mortgage Fund Inc.



EXHIBIT G

Robert C. Harason

This is being referred to in the
all of Karen Juzado
sw: 1/24
de: December 2018

From: Roxana Manea <RManea@tgf.ca>
Sent: Wednesday, October 17, 2018 2:37 PM
To: 'Adam Slavens'; 'Amanda S. Hill'; 'Andrea Lee White'; 'Ari Reichman'; 'Arif Dhanani'; 'Barbara Frederikse'; 'Barry Greenberg'; 'Bryan A. Tannenbaum'; 'Catherine E. Willson'; 'Christine Kellowan'; 'Christopher J. Henderson'; 'Courtney V. Raphael'; 'D. J. Miller'; 'Danielle M. Peck'; 'Danny M. Nunes'; 'David A. Taub'; 'Derek J. Bell'; 'Diane Winters'; 'Domenic C.S. Presta'; 'Enzo Di Iorio'; 'George Corsianos'; 'James M. Butson'; 'Jeremy Dacks'; 'John Fox'; 'John Margie'; 'Jonathan Bahnuik'; 'Jonathan F. Lancaster'; 'Joseph Fried'; 'Joseph Maggisano'; 'Keith Bannon'; 'Ken Chan'; 'Kevin O'Hara'; 'Leanne Williams'; 'Michael A. Handler'; 'Michael De Lellis'; 'Michael Scaglione'; 'Nicholas A. Richter'; 'Patrick Riesterer'; 'Randy H. Lebow'; 'Riccardo Del Vecchio'; 'Richard Hammond'; 'Robert Armstrong'; 'Robert C. Harason'; 'Roger Jaipargas'; 'Sam Babe'; 'Sheldon Spring'; 'Thomas McRae'; 'Timothy P. Schumacher'; 'Tyronne Hodgins'; 'Vern W. DaRe'; 'Xue Yan'
Subject: RE: Application by Firm Capital Mortgage Fund Inc. under Ss. 97 & 100 of the Courts of Justice Act [Crt. File: CV-18-604993-00CL] [IWOV-Client.FID107201]
Attachments: Factum of Applicant (Firm Capital Mortgage Fund Inc.)_Oct 17, 2018.PDF; Book of Authorities of the Applicant dated October 17, 2018.PDF

N. Mullins

To the Service List:

In connection with the above-noted matter and the application returnable tomorrow, attached please find the Factum and Book of Authorities of the Applicant, Firm Capital Mortgage Fund Inc., which are hereby served upon you.

Regards,
Roxana Manea



Roxana G. Manea | Law Clerk | Direct Line: +1 416-304-1013 | Thornton Grout Finnigan LLP | www.tgf.ca
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From: Roxana Manea
Sent: September-21-18 3:53 PM
To: 'Adam Slavens' <aslavens@torys.com>; 'Amanda S. Hill' <ahill@toronto.ca>; 'Andrea Lee White' <andrea.white@shibleyrighton.com>; 'Ari Reichman' <ari@goldmanspring.com>; 'Arif Dhanani' <arif.dhanani@rsmcanada.com>; 'Barbara Frederikse' <barbara@frederlaw.ca>; 'Barry Greenberg' <bsgreenberg@rogers.com>; 'Bryan A. Tannenbaum' <bryan.tannenbaum@rsmcanada.com>; 'Catherine E. Willson' <willson@gsnh.com>; 'Catherine Koch' <catherine.koch@aviva.com>; 'Christopher J. Henderson' <Christopher.Henderson@toronto.ca>; 'Courtney V. Raphael' <craphael@airdberlis.com>; 'D. J. Miller' <DJMiller@tgf.ca>; 'Danielle M. Peck' <danielle.peck@tarion.com>; 'Danielle Muise' <dmuise@airdberlis.com>; 'Danny M. Nunes' <danny.nunes@dlapiper.com>; 'David A. Taub' <dtaub@robapp.com>; 'David Kerr' <david.kerr@computershare.com>; 'Derek J. Bell' <derek.bell@dlapiper.com>; 'Diane Winters' <diane.winters@justice.gc.ca>; 'Domenic C.S. Presta' <dpresta@bianchipresta.com>; 'Enzo Di Iorio' <ediiorio@millerthomson.com>; 'George Corsianos' <gcorsianos@cl-law.ca>; 'James M. Butson' <james.butson@aclaw.ca>; 'John Fox' <jfox@robapp.com>; 'John Margie' <jmargie@glaholt.com>; 'Jonathan Bahnuik' <bahnuikj@olympiatrust.com>; 'Jonathan F. Lancaster' <jlancaster@fasken.com>; 'Joseph Fried' <jfried@mwb.ca>; 'Joseph Maggisano' <jmaggisano@jpmlaw.ca>; 'Keith Bannon' <kbannon@glaholt.com>; 'Kevin O'Hara' <kevin.ohara@ontario.ca>; 'Leanne Williams' <LWilliams@tgf.ca>; 'Lianne B. Furlong' <lianne.furlong@aviva.com>; 'Michael A. Handler' <mhandler@mhandlerlaw.com>; 'Michael De Lellis' <mdelellis@osler.com>; 'Nicholas A. Richter' <nrichter@richterlaw.ca>; 'Patrick Riesterer' <priesterer@osler.com>; 'Randy H. Lebow' <rlebow@owenswright.com>; 'Riccardo Del Vecchio' <rdelvecchio@millerthomson.com>; 'Richard Hammond' <rhammond@hammondflcias.com>;

'Robert C. Harason' <rharason@beardwinter.com>; 'Roger Jaipargas' <rjaipargas@blg.com>; 'Sheldon Spring' <sspring@goldmanspring.com>; 'Thomas McRae' <thomas.mcrae@shibleyrighton.com>; 'Timothy P. Schumacher' <tim.schumacher@tarion.com>; 'Xue Yan' <xyan@blg.com>

Subject: Application by Firm Capital Mortgage Fund Inc. under Ss. 97 & 100 of the Courts of Justice Act [Crt. File: CV-18-604993-00CL] [IWOV-Client.FID113323]

In the matter of an application brought by Firm Capital Mortgage Fund Inc. under Sections 97 and 100 of the Courts of Justice Act

Re: Fortress Brookdale Inc., Fortress Avenue Road (2015) Inc. and Fernbrook Homes Brookdale Limited (the "Respondents")

We are counsel for Firm Capital Mortgage Fund Inc., the Applicant in this proceeding. Please be advised that a Notice of Application bearing **Court File No. CV-18-604993-00CL** (attached) was issued on September 12, 2018 in this matter. This application is returnable on **October 18, 2018 at 9:00 a.m.**, before a Judge of the **Ontario Superior Court of Justice (Commercial List) at 330 University Avenue, Toronto, Ontario.**

Please find below a link to the electronic copy of our client's Application Record dated September 21, 2018 in support of a Vesting Order, which is hereby served upon you pursuant to the *Rules of Civil Procedure* (Ontario) and the E-Service Protocol of the Commercial List.

<https://tgf.sharefile.com/d-s851891b77d94e44b>

Should any party wish to receive notice of further materials that may be served and filed in this proceeding, **please serve and file a Notice of Appearance in the form prescribed under the Rules of Civil Procedure (Ontario).** Please do not hesitate to contact counsel for the Applicant if you have any issues accessing the link noted above.

Regards,
Roxana Manea



Roxana G. Manea | Law Clerk | RManea@tgf.ca | Direct Line: +1 416-304-1013 | 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

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Court File No. CV-18-604993-00CL

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

In the matter of Sections 97 and 100 of the Courts of Justice Act, R.S.O. 1990 c.C.43, as am.

B E T W E E N:

FIRM CAPITAL MORTGAGE FUND INC.

Applicant

- and -

**FORTRESS BROOKDALE INC., FORTRESS AVENUE ROAD (2015) INC. and
FERNBROOK HOMES (BROOKDALE) LIMITED**

Borrowers

**FACTUM OF THE APPLICANT,
FIRM CAPITAL MORTGAGE FUND INC.**

Dated: October 17, 2018

Thornton Grout Finnigan LLP
Barristers and Solicitors
Toronto-Dominion Centre
100 Wellington Street West
Suite 3200, P.O. Box 329
Toronto, Ontario
M5K 1K7

D.J. Miller (LSO# 34393P)
Tel: 416-304-0559
Fax: 416-304-1313

Leanne M. Williams (LSO# 41877E)
Tel: 416-304-0060
Fax: 416-304-1313

Lawyers for the Applicant

PART I – OVERVIEW

1. This factum is filed in support of an application (the “**Application**”) by Firm Capital Mortgage Fund Inc. (the “**Lender**”) for an Order, *inter alia*, vesting the right, title and interest in and to the assets described in the Sale Agreement in the Purchaser (as such terms are defined herein) pursuant to Sections 97 and 100 of the *Courts of Justice Act*¹ (the “**CJA**”) (the “**Vesting Order**”).

PART II – THE FACTS

2. A brief summary of the facts is provided below. The facts underlying this Application and its background are set out in more detail in the affidavit of Forrest Todd sworn September 20, 2018 (the “**Todd Affidavit**”)² and the Report of the Receiver dated October 2, 2018. Capitalized terms not defined herein shall have the meanings ascribed to them in the Todd Affidavit.

The Mortgage

3. Fortress Brookdale Inc. is the registered owner (as bare trustee for the beneficiaries) of certain real property municipally known as 1678-1704 Avenue Road, 375-377 Fairlawn Avenue and 412-416 Brookdale Avenue, Toronto (the “**Property**”).³ Fortress Avenue Road (2005) Inc. and Fernbrook Homes (Brookdale) Inc. are the beneficial owners of the Property.⁴

¹ R.S.O. 1990, c. C.43, as amended.

² Affidavit of Forrest Todd sworn September 20, 2018, Application Record of the Applicant, Tab 2 [“**Todd Affidavit**”].

³ Todd Affidavit at para. 5.

⁴ Todd Affidavit at para. 6.

4. Pursuant to a Mortgage Loan Commitment dated April 18, 2017 (as amended, the “**Loan Commitment**”), issued by Firm Capital Corporation (“**FCC**”) and subsequently assigned by FCC to the Lender, the Lender made a mortgage loan available to the Borrowers in the principal amount of \$18,500,000 plus interest and costs (the “**Mortgage Loan**”).⁵

5. Pursuant to the Loan Commitment and as security for its obligations to the Lender, FBI granted a Charge/Mortgage of Land (the “**First Mortgage**”) to the Lender in the amount of the Mortgage Loan which was registered against title to the Property on June 7, 2017.⁶ All other charges against title to the Property have either been contractually postponed in favour of the Lender or were registered subsequent to the First Mortgage and registered after the last advance of the Lender.⁷ The Borrowers also granted general security agreements to the Lender which were perfected pursuant to the *Personal Property Security Act* (Ontario).⁸

6. As at September 14, 2018 the Borrowers were indebted to the Lender under the Loan Commitment in the amount of CAD\$20,138,450.97 (which includes principal, accrued interest and fees), together with accruing interest thereon and all costs and fees, including professional fees and disbursements of counsel to the Lender and those fees and disbursements of the Receiver appointed by the Lender, until the indebtedness is paid in full.⁹ The First Mortgage provides for the payment of all costs, charges and expenses of the Receiver from the proceeds of any sale of

⁵ Todd Affidavit at para. 7.

⁶ Todd Affidavit at para. 8.

⁷ Todd Affidavit at para. 9.

⁸ R.S.O. 1990, c. P.10; Todd Affidavit at paras. 13, 14.

⁹ Todd Affidavit at para. 10.

the Property.¹⁰ The First Mortgage further provides for the payment of all legal fees payable on a solicitor and his client basis, costs and out-of-pocket expenses incurred by the Lender and for such costs to be added to the mortgage indebtedness secured thereunder should the Borrower fail to pay such costs.¹¹

The Project and Outstanding Construction Liens

7. The Borrowers commenced construction on a seven-story mixed-use building known as “Brookdale on Avenue Road” (the “**Project**”) at the Property site. By the end of January, 2018, however, construction had ceased.¹²

8. The Mortgage Loan matured on December 1, 2017 and was automatically contractually renewed for an additional month. As a result, the indebtedness under the Mortgage Loan became due and owing on January 1, 2018. By letter dated January 24, 2018, the Lender demanded repayment from the Borrowers of all amounts then outstanding and delivered a Notice of Intention to Enforce Security pursuant to Section 244 of the *Bankruptcy and Insolvency Act* (Canada).¹³

9. Commencing on February 2, 2018, certain trades began to register Claims for Lien and Certificates of Pending Litigation against title to the Property (the “**Outstanding Construction**

¹⁰ Todd Affidavit, Exhibit E, pages 9-10 of 21.

¹¹ Todd Affidavit, Exhibit E, page 11 of 21.

¹² Todd Affidavit at paras. 21, 22.

¹³ R.S.C. 1985, c. B-3; Todd Affidavit at paras. 38, 39.

Liens”). The aggregate amount of the Outstanding Construction Liens registered against title to the Property as at September 20, 2018 was \$10,183,524.65.¹⁴

10. Each of the claimants having Outstanding Construction Liens (the “**Construction Lien Claimants**”) filed a Certificate of Action against title to the Property and, with one exception, issued a Statement of Claim (collectively, the “**Lien Actions**”) against numerous defendants, including the Lender. One Construction Lien Claimant also included RSM Canada Limited as a defendant in the action it commenced in respect of its construction lien.¹⁵

Marketing and Sale of the Property

11. On April 20, 2018 the Lender issued a Notice of Sale under Charge/Mortgage of Land under the *Mortgages Act* (Ontario) (the “**Notice of Sale**”).¹⁶ Pursuant to the terms of its security, on June 11, 2018 the Lender privately appointed RSM Canada Limited as its receiver (the “**Receiver**”), with the written consent of the Borrowers, for the purpose of realizing on the collateral of the Borrowers, including but not limited to marketing the Property for sale.¹⁷

12. The Receiver conducted a thorough and robust sale process in respect of the Property which resulted in the execution of an agreement of purchase and sale dated August 23, 2018 (the “**Sale Agreement**”) with Empire (Water Wave) Inc. or its assignee (the “**Purchaser**”).¹⁸

¹⁴ Todd Affidavit at paras. 34, 35.

¹⁵ Todd Affidavit at paras. 36, 37.

¹⁶ R.S.O. 1990, c. M.40 [*Mortgages Act*].

¹⁷ Report of the Receiver dated October 2, 2018; Todd Affidavit at paras. 42, 43.

¹⁸ Todd Affidavit at para. 46.

13. Pursuant to the terms of the Sale Agreement, the assets that are the subject thereof (the “**Purchased Assets**”) are required to be conveyed pursuant to a Vesting Order issued by the Ontario Superior Court of Justice (Commercial List) on the following terms:

- (a) Vesting title in and to the Property free of all encumbrances (except certain Permitted Encumbrances as set out in the Sale Agreement), including but not limited to:
 - (i) the Outstanding Construction Liens; and
 - (ii) any and all (i) agreements of purchase and sale for the purchase of condominium residential units, parking and locker units, (ii) rental agreements, if any, for rental units, and (iii) agreements of purchase and sale or agreements to lease for non-residential components of the Project being constructed or to be constructed on the Lands forming part of the Purchased Assets (collectively, the “**Offers**”);
- (b) Declaring that the net proceeds of the sale, after the payment in full of the indebtedness owing to the Lender, of the Purchased Assets (the “**Net Proceeds**”) are to be paid into Court; and
- (c) Declaring that the Net Proceeds paid into Court stand in place and instead of the Purchased Assets and that all claims and encumbrances attach to the Net Proceeds on closing with the same (but no greater) priority as they had with respect to the Purchased Assets immediately prior to the sale of the Purchased Assets.¹⁹

¹⁹ Todd Affidavit at para. 47.

14. The proceeds of the sale of the Purchased Assets are more than sufficient to:
- (a) Pay amounts having legal priority to the First Mortgage, including real property taxes and utilities, that will be required to be paid on closing;
 - (b) Pay all amounts owing to the Lender under the First Mortgage, including all costs, interest and fees associated therewith, and those of the Receiver and its counsel; and
 - (c) Permit the Net Proceeds in an amount that is expected to be more than 200% of the aggregate amount of the Outstanding Construction Liens, but will in no event be less than 125%, to be paid into Court.²⁰

PART III – THE ISSUES

15. The issues on this application are:
- (1) Should a vesting order be granted pursuant to sections 97 and 100 of the *Courts of Justice Act*?
 - (2) Where more than 125% of the aggregate amount of all Outstanding Construction Liens is paid into Court to stand in place and instead of the Purchased Assets, should the Court grant the requested vesting order and require that the actions relating thereto against the Lender and the Receiver be dismissed?
 - (3) Is a sealing order appropriate in respect of the sealing of the Confidential Appendices to the Receiver's Report?

²⁰ Todd Affidavit at para. 48.

PART IV – THE LAW

Issue (1): The Court’s Jurisdiction

16. The Lender has brought an application under Rule 14.05 of the *Rules of Civil Procedure* for an Order, *inter alia*, vesting the right, title and interest in and to the assets described in the Sale Agreement in the Purchaser.

17. The Court’s power to grant a vesting order is found in Section 100 of the *CJA* which states that a “court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.”

18. Vesting orders made under Section 100 of the *CJA* are discretionary and have their origins in the court’s equitable jurisdiction.²¹ The Court’s discretion under the provision is broad, and the determination of whether such an order will or will not be granted is dependent on the circumstances of the particular case.²² Section 100 of the *CJA* provides a mechanism to grant ownership of the property to which they would otherwise be entitled.²³

19. The Court’s authority to vest title in the Purchaser is derived from the *Mortgages Act*. The Lender issued the Notice of Sale on April 20, 2018 and the requisite thirty-five day waiting period has lapsed. Accordingly, pursuant to section 28 of the *Mortgages Act*, “[the] person exercising the power of sale has power to convey or assign to and vest in the purchaser the property sold for all the estate and interest therein of the mortgagor and of which the mortgagor had power to dispose.”

²¹ *Lynch v. Segal*, 2006 CarswellOnt 7929 at para. 27.

²² *Ibid* at para. 32.

²³ *Trick v. Trick*, 2006 CarswellOnt 4139 at para. 19.

The Lender's power to vest the Property in the Purchaser satisfies the requirement under section 100 of the *CJA* that the Court has the authority to convey title to the Property.

20. The Purchaser requires a vesting order to complete the transaction contemplated in the Sale Agreement (the "**Transaction**"). Accordingly, the Lender respectfully submits that the Court has the jurisdiction to issue the vesting order required to complete the Transaction.

Issue (2): Vacating the Outstanding Construction Liens

21. Pursuant to sections 14(1) and 15 of the *Construction Act* (Ontario) (the "*Act*");²⁴

14(1) A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials.

15 A person's lien arises and takes effect when the person first supplies services or materials to the improvement.

22. In addition to the construction lien, section 22(1) of the *Act* imposes a statutory holdback on each payer upon a contract or subcontract:

22(1) Each payer upon a contract or subcontract under which a lien may arise shall retain a holdback equal to 10 per cent of the price of the services or materials as they are actually supplied under the contract or subcontract until all liens that may be claimed against the holdback have expired or been satisfied, discharged or otherwise provided for under this Act.

23. Sections 23(1), (2) and (3) of the *Act* set out the personal liability of an owner for the holdbacks:

23(1) Subject to subsections (2), (3) and (4), an owner is personally liable for holdbacks that the owner is required to retain under this Part to those lien claimants who have valid liens against the owner's interest in the premises.

²⁴ R.S.O. 1990, c. C.30.

23(2) Where the defaulting payer is the contractor, the owner's personal liability to a lien claimant or to a class of lien claimants as defined by section 79 does not exceed the holdbacks the owner is required to retain.

23(3) Where the defaulting payer is a subcontractor, the owner's personal liability to a lien claimant or to a class of lien claimants as defined by section 79 does not exceed the lesser of,

- (a) the holdbacks the owner is required to retain; and
- (b) the holdbacks required to be retained by the contractor or a subcontractor from the lien claimant's defaulting payer.

24. "Owner" is defined in section 1 of the *Act* as "any person, including the Crown, having an interest in a premises at whose request and, (a) upon whose credit, or (b) on whose behalf, or (c) with whose privity or consent, or (d) for whose direct benefit, an improvement is made to the premises but does not include a home buyer". "Payer" is defined as "the owner, contractor or subcontractor who is liable to pay for the services or materials supplied to an improvement under a contract or subcontract."

25. The Lender refutes that it is an "Owner" under the *Act*. However, in the present circumstances, even if the Lender were found to be an Owner under the *Act*, the Lender would be relieved of any potential liability that it may have under the *Act* following the payment of the Net Proceeds into Court. Sections 44(1) and (2) of the *Act* state:

44(1) Upon the motion of any person, without notice to any other person, the court shall make an order vacating,

- (a) where the lien attaches to the premises, the registration of a claim for lien and any certificate of action in respect of that lien; or
- (b) where the lien does not attach to the premises, the claim for lien, where the person bringing the motion pays into court, or posts security in an amount equal to, the total of,
- (c) the full amount claimed as owing in the claim for lien; and

- (d) the lesser of \$250,000 or 25 per cent of the amount described in clause (c), as security for costs.

44(2) Upon the motion of any person, the court may make an order vacating the registration of a claim for lien, and any certificate of action in respect of that lien, upon the payment into court or the posting of security of an amount that the court determines to be reasonable in the circumstances to satisfy the lien.

26. Liens can be vacated as of right under section 44 of the *Act* upon the payment into court or posting of security in the requisite amount, in which case the lien itself would continue as a charge on those monies rather than a charge against the property.²⁵

27. After the payment of all amounts owing to the Lender (which includes principal, accrued interest and fees, including professional fees and disbursements of counsel to the Lender and those fees and disbursements of the Receiver), the remaining proceeds of sale will be sufficient to permit the Receiver to pay at least 200% of the total amounts claimed under the Outstanding Construction Liens into Court to stand in place and instead of the Purchased Assets. This payment by the Receiver satisfies the requirements of section 44 of the *Act* which entitles the Lender to have the Outstanding Construction Liens vacated.

28. Sections 44(6), 44(9), and 47(1.1) of the *Act* state further:

44(6) Where an order is made under clause (1)(a) or subsection (2), the lien ceases to attach to the premises and ceases to attach to the holdbacks and other amounts subject to a charge under section 21, and becomes instead a charge upon the amount paid into court or security posted, and the owner or payer shall, in respect of the operation of sections 21, 23 and 24, be in the same position as if the lien had not been preserved or written notice of the lien had not been given.

44(9) Where an order is made under subsection (1), (2) or (3), the following rules apply:

²⁵ *Heinrichs v. 374427 Ontario Ltd.*, 2018 ONSC 78 at para. 30.

1. The lien claimant whose lien was the subject of the order may proceed with an action to enforce his claim against the amount paid into court or security posted in accordance with the procedures under Part VIII, but no certificate of action shall be registered against the premises.

47(1.1) The court may, on motion, make any of the following orders, on any proper ground:

1. An order that the registration of a claim for lien, a certificate of action or both be vacated.
2. If written notice of a lien has been given, a declaration that the lien has expired or that the written notice of the lien shall no longer bind the person to whom it was given.
3. An order dismissing an action.

29. The effect of a vacating order made under section 44 of the *Act* is to remove the lien as a charge against the property, the holdbacks, and all other amounts subject to a charge under section 21 of the *Act*. The lien is thereby converted to a charge upon the amount paid into Court and the owner or payer is placed in the same position as if the lien had not been perfected.²⁶

30. The Lender and the Outstanding Lien Claimants have no direct contractual relationships. Once the Outstanding Construction Liens have been vacated, the Outstanding Lien Claimants will have no outstanding claims against the Lender and no grounds on which an action could be continued. Instead, their claims will be against the amount paid into Court.

31. If the Lender were required to defend each of the statements of claim filed by the Outstanding Lien Claimants, the Lender would incur unnecessary costs that would, pursuant to the terms of the First Mortgage outlined above, be added to the Lender's security and result in a lower recovery for other creditors.

²⁶ *Tom Jones Corp. v. OSBBC Ltd.*, 1997 CarswellOnt 1752 at para. 28.

Issue (4): The Sealing Order

32. The Lender requests that certain confidential and commercially sensitive information in connection with the Transaction for which approval is sought in this motion, including the amount of the Sale Proceeds and deposit for the Transaction, be sealed. Such confidential information is or will be contained in the Confidential Appendix to the Report of the Receiver to be filed.

33. The test for such an order, as established by the Supreme Court of Canada, is:

“A confidentiality order under R. 151 should only be granted when:

- (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.”²⁷

34. The Lender submits that such an order is necessary in order to prevent a serious risk to their commercial interest and that there would be no unduly salutary effects of granting the same.


PART V – RELIEF REQUESTED

35. The Lender seeks an Order, *inter alia*:

- (1) Vesting the right, title and interest in and to the assets described in the Sale Agreement in the Purchaser pursuant to Sections 97 and 100 of the *Courts of Justice Act*; and
- (2) Sealing the Confidential Appendices.

²⁷ *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para 53; see also *Re Target Canada Co.*, 2015 ONSC 1487 at paras. 28-30.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of October, 2018.


Thornton Grout Finnigan LLP

Barristers and Solicitors
Toronto-Dominion Centre
100 Wellington Street West
Suite 3200, P.O. Box 329
Toronto, Ontario
M5K 1K7

D.J. Miller (LSO# 34393P)

Tel: 416-304-0559

Fax: 416-304-1313

Leanne M. Williams (LSO# 41877E)

Tel: 416-304-0060

Fax: 416-304-1313

Lawyers for the Applicant

SCHEDULE "A"
LIST OF AUTHORITIES

| Tab | Caselaw |
|------------|--|
| 1 | <i>Lynch v. Segal</i> , 2006 CarswellOnt 7929 |
| 2 | <i>Trick v. Trick</i> , 2006 CarswellOnt 4139 |
| 3 | <i>Heinrichs v. 374427 Ontario Ltd.</i> , 2018 ONSC 78 |
| 4 | <i>Tom Jones Corp. v. OSBBC Ltd.</i> , 1997 CarswellOnt 1752 |
| 5 | <i>Sierra Club of Canada v. Canada (Minister of Finance)</i> , 2002 SCC 41 |
| 6 | <i>Re Target Canada Co.</i> , 2015 ONSC 1487 |

**SCHEDULE "B"
RELEVANT STATUTES**

Courts of Justice Act, R.S.O. 1990, c. C.43 – ss. 97 100

Declaratory orders

97. The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right whether or not any consequential relief is or could be claimed.

Vesting orders

100. A court may by order vest in any person an interest in real or personal property that the court has the authority to order be disposed of, encumbered or conveyed.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Title of Proceeding

14.06(1) Every originating process shall contain a title of the proceeding setting out the names of all the parties and the capacity in which they are made parties, if other than their personal capacity.

(2) In an action, the title of the proceeding shall name the party commencing the action as the plaintiff and the opposite party as the defendant.

(3) In an application, the title of the proceeding shall name the party commencing the application as the applicant and the opposite party, if any, as the respondent and the notice of application shall state the statutory provision or rule, if any, under which the application is made.

Mortgages Act, R.S.O. 1990, c. M.40 – s. 28

Conveyance to the purchaser

28. The person exercising the power of sale has power to convey or assign to and vest in the purchaser the property sold for all the estate and interest therein of the mortgagor and of which the mortgagor had the power to dispose.

Construction Act, R.S.O. 1990, c. C.30

Definitions

1(1) In this Act,

[...]

“owner” means the owner, contractor or subcontractor who is liable to pay for the services or materials supplied to an improvement under a contract or subcontract;

“**payer**” means the owner, contractor or subcontractor who is liable to pay for the services or materials supplied to an improvement under a contract or subcontract;

Creation of lien

14(1) A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials.

When lien arises

15. A person’s lien arises and takes effect when the person first supplies services or materials to the improvement.

Lien a charge

21. The lien of a person is a charge upon the holdbacks required to be retained by Part IV, and subject to subsection 17(3), any additional amount owed in relation to the improvement by a payer to the contractor or to any subcontractor whose contract or subcontract was in whole or in part performed by the supply of services or materials giving rise to the lien.

Basic holdback

22(1) Each payer upon a contract or subcontract under which a lien may arise shall retain a holdback equal to 10 per cent of the price of the services or materials as they are actually supplied under the contract or subcontract until all liens that may be claimed against the holdback have expired or been satisfied, discharged or otherwise provided for under this Act.

Vacating lien by payment into court; without notice

44(1) Upon the motion of any person, without notice to any other person, the court shall make an order vacating,

- (a) where the lien attaches to the premises, the registration of a claim for lien and any certificate of action in respect of that lien; or
- (b) where the lien does not attach to the premises, the claim for lien, where the person bringing the motion pays into court, or posts security in an amount equal to, the total of,
- (c) the full amount claimed as owing in the claim for lien; and
- (d) the lesser of \$250,000 or 25 per cent of the amount described in clause (c), as security for costs.

On payment in of reasonable amount

44(2) Upon the motion of any person, the court may make an order vacating the registration of a claim for lien, and any certificate of action in respect of that lien, upon the payment into court or

the posting of security of an amount that the court determines to be reasonable in the circumstances to satisfy the lien.

[...]

Lien a charge upon amount paid into court

44(6) Where an order is made under clause (1)(a) or subsection (2), the lien ceases to attach to the premises and ceases to attach to the holdbacks and other amounts subject to a charge under section 21, and becomes instead a charge upon the amount paid into court or security posted, and the owner or payer shall, in respect of the operation of sections 21, 23 and 24, be in the same position as if the lien had not been preserved or written notice of the lien had not been given.

Idem

44(7) Where an order is made under clause (1)(b) or subsection (3), the lien ceases to attach to the holdbacks and other amounts subject to a charge under section 21 and becomes instead a charge upon the amount paid into court or security posted and the owner or payer shall, in respect of the operation of sections 21, 23 and 24, be in the same position as if the lien had not been preserved or written notice of the lien had not been given

[...]

Rules

44(9) Where an order is made under subsection (1), (2) or (3), the following rules apply:

1. The lien claimant whose lien was the subject of the order may proceed with an action to enforce his claim against the amount paid into court or security posted in accordance with the procedures under Part VIII, but no certificate of action shall be registered against the premises.
2. The amount paid into court or security posted is subject to the claims of all persons having a lien to the same extent as if the amount paid into court or security posted was realized by the sale of the premises in an action to enforce the lien and shall be distributed among all lien claimants in accordance with the priorities provided for in section 80.
3. Where any amount is realized in a lien action by the sale of the premises or otherwise, it shall be pooled into a common fund with the amount paid into court or security posted under this section, and shall be distributed among all lien claimants in accordance with the priorities provided for in section 80.
4. A lien claimant whose lien is sheltered, in accordance with subsection 36(4), under the lien that was the subject of the order may proceed with an action to enforce the sheltered lien as if the order had not been made.

General powers of the court

47(1) The court may, on motion, order the discharge of a lien,

- (a) on the basis that the claim for the lien is frivolous, vexatious or an abuse of process; or
- (b) on any other proper ground.

Power to vacate, etc.

47(1.1) The court may, on motion, make any of the following orders, on any proper ground:

1. An order that the registration of a claim for lien, a certificate of action or both be vacated.
2. If written notice of a lien has been given, a declaration that the lien has expired or that the written notice of the lien shall no longer bind the person to whom it was given.
3. An order dismissing the action.

In the Matter of Sections 97 and 100 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43, as amended

FIRM CAPITAL MORTGAGE FUND INC.

- and -

**FORTRESS BROOKDALE INC., FORTRESS AVENUE ROAD
(2015) INC. and FERNBROOK HOMES (BROOKDALE) LIMITED**

Applicant

Respondents

Court File No. CV-18-604993-00CL

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

Proceedings commenced at Toronto, Ontario

**FACTUM OF THE APPLICANT,
FIRM CAPITAL MORTGAGE FUND INC.**

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 (LSUC# 34393P)

Tel: (416) 304-0559

Email: djmiller@tgf.ca

Leanne M. Williams (LSUC# 41877E)

Tel: (416) 304-0060

Email: lwilliams@tgf.ca

Lawyers for the Applicant, Firm Capital Mortgage Fund Inc.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

AFFIDAVIT OF KAREN LOUZADO

Beard Winter LLP
Barristers and Solicitors
130 Adelaide St. West, Suite 701
Toronto, ON M5H 2K4

Robert C. Harason LSUC#: 19535S
Tel: 416.306.1707
Fax: 416.593.7760

Lawyers for the Lien Claimant Dircam Electric
Limited

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**SUPPLEMENTARY RESPONDING
APPLICATION RECORD OF DIRCAM
ELECTRIC LIMITED**

Beard Winter LLP
Barristers and Solicitors
130 Adelaide St. West, Suite 701
Toronto, ON M5H 2K4

Robert C. Harason LSUC#: 19535S
Tel: 416.306.1707
Fax: 416.593.7760

Lawyers for the Lien Claimant Dircam Electric
Limited