

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

B E T W E E N:

PEAKHILL CAPITAL INC.

Applicant  
(Respondent on Motion)

and

1000093910 ONTARIO INC.

Respondent  
(Applicant on Motion)

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

**FACTUM OF THE RESPONDENT, GUARANTORS, AND TENANTS**

**(returnable June 12, 2024)**

June 10, 2024

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**TO: SERVICE LIST**

## **PART I: OVERVIEW STATEMENT**

1. This is an urgent responding motion and cross-motion by the Debtor, the Guarantors of the first and second mortgage, and the commercial tenants.<sup>1</sup> The Debtor and the Guarantors, relying on the principles set out in [Vector Financial Services v 33 Hawarden Crescent](#), 2024 ONSC 1635, seek the right of redemption (i.e, pay the first mortgage debt, and the costs of the Receiver, and bring the second mortgage debt into good standing, and discharge the Receivership).
2. The commercial tenants seek to extend the time by which they must vacate their premises should the right to redeem not be granted.

## **PART II: STATEMENT OF FACT**

3. On Thursday, June 6, 2024, the second mortgagee, VISRAM, agreed to extend his mortgage and advance further funds to the Debtor. In light of this, the Debtor and the Guarantors, on an urgent basis, prepared these responding motion and cross-motion materials.
4. The Debtor had already secured from Firm Capital a commitment to advance approximately \$18,500,000. In addition, on Friday, June 7, 2024, after 4:00 p.m., the Guarantors advanced \$950,000 to the trust account of Scalzi Caplan LLP, the lawyers for the moving parties.
5. Although the Debtor does not have a fulsome accounting from Peakhill, the first mortgagee, the moving parties believe that they have sufficient funds available to them to exercise their right of redemption.

## **PART III: ARGUMENT AND THE LAW**

### **A. THE ABILITY TO REDEEM**

6. In Ontario, there are two competing lines of authority that inform a debtor's right of redemption where a receiver wishes to close a concluded deal for the sale of property.
7. The two lines of authority are succinctly set out in [Vector Financial Services v 33 Hawarden Crescent](#), a decision of Justice W.D. Black, of the Superior Court, released on March 19, 2024.

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<sup>1</sup> The moving parties rely on Rule 2.01, 2.02, and 2.03 of the [Rules of Civil Procedure](#) and note that all disputes should be adjudicated on their substance and merits, not on procedural technicality.

8. In the instant case, the Debtor and Guarantors seek to engage the [Royal Bank of Canada v Soundair Corp](#) (1991), 4 O.R. (3d) 1 (C.A.) principles and submit to this Court that the balance of justice should tip in their favour for the following reasons:

- a. Although this responding motion and cross-motion appear to be brought at the last minute, it is not – it is brought as soon as possible as the Debtor and Guarantors have worked tirelessly since the dismissal of their appeal before the Court of Appeal on April 8, 2024, to secure first place financing. They secured the commitment of Firm Capital which is prepared to advance approximately \$18,620,000, on condition that this Court grant the Debtor the opportunity to redeem. It was only on Thursday, *June 6, 2024*, that the last piece of the Debtor's financing fell into place when the second mortgagee agreed to extend the maturity date of his mortgage and advance further funds. Finally, it was only on Friday, *June 7, 2024*, that the Guarantors advanced a further amount of cash to their lawyers. In other words, it was not until the weekend of June 8 and 9, 2024, that the Debtor and Guarantors secured financing.
- b. Should the Debtor and Guarantors be granted the opportunity to redeem the security and pay the Receiver's fees and expenses: (i) the Debtor will recover its property; (ii) the Guarantors will eliminate their immediate exposure on their guarantee on their second mortgage; (iii) Peakhill will be paid in full; and (iv) there will be no need, on the part of the commercial tenants, to vacate the premises, even though they have made arrangements to do so, if the relief sought is not granted. Putting it another way, it is commercially sensible and in the interest of the parties to allow the Debtor and Guarantors to be granted a chance to redeem.
- c. The only party affected with what might be a disadvantage is the disappointed Stalking Horse purchaser. But, it is respectfully submitted that this purchaser baked into its Stalking Horse Agreement a break fee of \$250,000 had the sales process produced a successful bidder. It is therefore respectfully submitted that the purchaser's opportunity to close the transaction has been valued and if the

purchaser is paid that value it is in the same position it would have been in had it been outbid in the sales process.

- d. The Debtor and the Guarantors however, take the position, that based on the strict wording contained in the Stalking Horse APS, no break fee is payable. Nonetheless, the Debtor and the Guarantors are prepared to pay the break fee into Court, pending a judicial determination of this issue.
- e. The case law, as set out in [Vector Financial Services v 33 Hawarden Crescent](#), suggests that to enjoy the fruit of redemption at this stage, the Debtor must come to the Court with cash. In the circumstances of this case, this was neither practical nor possible, but, given the commitment of Firm Capital and the agreement of the second mortgagee, VISRAM, it is fair and equitable that the Debtor and Guarantors be given the opportunity to close on these commitments. To do so, these moving parties ask that this Court adjourn these proceedings to allow the Debtor and Guarantors to come back to Court with the cash in hand. In that regard, the Debtor and the Guarantors say that they will be in a position to close on this new financing on June 28, 2024.
- f. Should this request be granted, no prejudice will accrue to Peakhill or the Receiver. In fact, granting the sought relief makes commercial sense. The disappointed buyer will have the comfort, on that date, of the payment of the break-fee into Court.

9. This Court, no doubt, has the discretion to deny the adjournment request. However, the *Soundair* principles mandate that, in so doing, this Court weigh the competing facts set out therein.

10. It is respectfully submitted that this Court must take into account the interests of the Guarantors, the second mortgagee, VISRAM, and the Debtor, in its analysis. Where, as here, there is no harm or prejudice to the initiating creditor, the Receiver, and the disappointed purchaser. Importantly, there is no harm to the Receivership process or proceeding. When compared to the benefit that accrues to all parties, it is respectfully submitted that the balance weighs in favour of

granting the adjournment and allowing the Debtor and the Guarantors the opportunity to redeem. It is commercially efficient, and sensible that the adjournment be granted.

11. It is submitted that the integrity of procedure and process must yield in the face of real prejudice to the moving parties should the adjournment request be denied.

#### **B. RELIEF FROM FORFEITURE**

12. Should this Court deny the Debtor's / Guarantors' requests to adjourn the Receiver's motion, to allow them to redeem, the commercial tenants, which are related to the Debtor, and the Guarantors, seek an extension of time to vacate the premises.

13. The commercial operations of the tenants involve heavy equipment and inventory that is owned by third parties. The tenants require, and have retained a team of riggers, electricians, HVAC specialists, among others, to remove the equipment, goods and property, of the tenants.

14. The commercial tenants have scrambled to secure alternative premises in order to vacate the subject property. But, regardless, the nature of the business, the equipment and the inventory, the vacating of the premises requires no less than 20 business days to remove the equipment and goods, and this is whether it is Peakhill or the tenants that move the equipment and goods.

15. Should the relief sought by the moving parties be granted, the time pressure to move is removed.

#### **C. ADJOURNMENT OF DISCHARGE MOTION**

16. Should this Court deny the Debtor's / Guarantor's request to redeem, the moving parties in any event request that the Court adjourn the Receiver's motion to distribute funds and for a discharge of the Receiver until further and better evidence is produced.

17. The Receiver seeks orders permitting it to distribute the sale proceeds from the Stalking Horse sale to, among other parties, the first mortgagee Peakhill. However, the Receiver has not filed any evidence setting out what Peakhill claims to be owed under its mortgage. The Debtor and Guarantors cannot form a position on the merits of this motion unless they understand what amounts the Receiver actually intends to distribute to Peakhill and what those amounts are for.

18. It is respectfully submitted that this Court grant an Order abridging the time for the service and hearing of the within motion and cross motion.

19. It is further respectfully submitted that the Receiver's motion be adjourned to allow the Debtor and Guarantors to finalize and fund the redemption of the security and the Receivership on such terms as this Court deems necessary.

20. It is respectfully submitted that the time to vacate the premises be extended July 11, 2024.

21. Further, and in the alternative, if the Stalking Horse sale is approved, the Debtor and Guarantors request that the Receiver's distribution and discharge motion be adjourned until further evidence is filed by the Receiver.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED, June 10, 2024.**



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PROCEEDING COMMENCED AT  
NEWMARKET

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