

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

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

(Motion returnable June 12, 2024)

June 11, 2024

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Motion)

TO: SERVICE LIST

1. The Receiver has advised the moving parties that it will oppose any attempt by these moving parties to argue their responding motion and cross-motion at the hearing of the Receiver's Approval, Vesting Order, and Discharge hearing returnable June 12, 2024.
2. If this Honourable Court is not prepared, or not able to hear the responding and cross-motions, the moving parties respectfully request that the Receiver's Motion and the Cross-Motion be adjourned to the Court's first available date to hear both motions.
3. This Supplementary Factum sets out the moving parties' position in support of that adjournment request.

A. Service of Motion Materials, No Prejudice

4. It is respectfully submitted that these moving parties delivered their motion materials as quickly as possible in the circumstances and should not be punished or deprived of their opportunity to argue their response and cross-motion.
5. The bid deadline for the Property expired May 7, 2024. The Receiver did not deliver their motion materials until three and a half weeks later, on May 31, 2024, being seven business days before the motion. It is respectfully submitted that this was not sufficient time to prepare and file responding materials given the complexity of the matter.
6. Furthermore, as set out in the affidavit of Ravi Aurora sworn June 10, 2024¹ (the "**Aurora Affidavit**"), these moving parties have been working diligently to arrange \$23,000,000 in financing to discharge the Receiver. That financing only came together on June 7, 2024.²
7. Furthermore, these moving parties first requested a payout statement from Peakhill on May 16, 2024.³ The statement was delivered thirteen days later, on May 29, 2024.⁴ It is

¹ Responding and Cross-Motion Record dated June 10, 2024 ("RCMR"), Affidavit of Ravi Aurora, Tab 2, paragraphs 12 to 14

² Aurora Affidavit, paragraph 8; and Exhibit "B"

³ Aurora Affidavit, paragraph 13; Exhibit "E"

⁴ *Ibid*

respectfully submitted that the moving parties' materials could not be finalized until they had this statement which gave them the amount owing under the first mortgage.

8. In addition to arranging financing, these moving parties have been trying to vacate the premises in response to the Notice of Termination of Lease delivered by Peakhill on May 28, 2024. As set out in paragraphs 22 to 34 of the Aurora Affidavit, this is a major undertaking which involves multiple trades moving several pieces of heavy machinery and production lines.

9. These moving parties respectfully submit that there will be no prejudice to the Receiver or the Stalking Horse Purchaser if a short adjournment were granted to hear the motion and cross-motion together.

10. It should be noted that the closing date is defined in the Stalking Horse APS as being five days after the Receiver obtains an Approval and Vesting Order. As such, there is no contractual obligation requiring this motion to be heard urgently.

11. However, if this adjournment request is refused and the cross-motion is not heard, then it is respectfully submitted that the Debtor, Guarantors, and the Tenants would all suffer significant, and irreparable prejudice.

B. Discharge and Distribution Motion Needs to Be Adjourned Anyway

12. As set out in the Notice of Cross-Motion and the Moving' parties' factum, these moving parties already take the position that the Receiver's motion for the Distribution and Discharge Order⁵ must be adjourned until the Receiver and/or the first mortgagee Peakhill Capital Inc. ("**Peakhill**") files evidence of the amount which Peakhill claims is owing under its mortgage.

13. The Receiver effectively seeks an order approving a distribution to pay Peakhill's mortgage without any indication of how much will be distributed, and without any evidence or accounting of the outstanding balance. The responding parties have been put in the impossible position of trying to assess the Receiver's request in the abstract, and without sufficient particulars of what the actual distribution will be.

⁵ See Motion Record of the Receiver dated May 31, 2024 ("Receiver's Motion Record"), TAB 1, Notice of Motion

14. The only evidence in the record of the amounts claimed by Peakhill under its mortgage is the information statement delivered to the Debtor on May 28, 2024.⁶ However, as explained in paragraphs 12 to 14 of the Aurora Affidavit, the descriptions of the amounts set out on this statement are not correct. All the information statement claims to do is provide the total amount owing under the Peakhill mortgage.

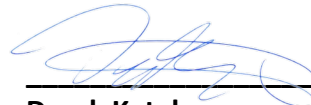
15. It should be noted however that the statement does not include Peakhill's legal fees and disbursements which, presumably, Peakhill will seek to recover under the mortgage.

16. It is therefore respectfully submitted that the motion for a Discharge and Distribution motion must be adjourned until further and better information is provided by the Receiver.

17. If further respectfully submitted that if the Discharge and Distribution Order is already being adjourned, balance of the Receiver's motion and the Cross-motion should also be adjourned so that the motions can be heard together.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: June 11, 2024



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⁶ Responding and Cross-Motion Record dated June 10, 2024 ("RCMR"), Exhibit "D"

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Court File No. CV-23-00004031-0000

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PROCEEDING COMMENCED AT
NEWMARKET

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