

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

BETWEEN:

COMERICA BANK

Applicant

- and -

**ARXX BUILDING PRODUCTS INC., ARXX CORPORATION, ARXX BUILDING
PRODUCTS U.S.A. INC., ECB HOLDINGS, LLC, APS HOLDINGS, LLC, UNISAS
HOLDINGS, LLC, AND ECO-BLOCK INTERNATIONAL, LLC**

Respondents

APPLICATION UNDER SECTION 243 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 RECEIVER
(MOTION RETURNABLE JUNE 24, 2014)**

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Restructuring, Inc., in its capacity as
the receiver for ARXX Building
Products Inc., ARXX Corporation,
ARXX Building Products U.S.A. Inc.,
ECB Holdings, LLC, APS Holdings,
LLC, UNISAS Holdings, LLC and
Eco-Block International, LLC

PART I - OVERVIEW

1. Pursuant to an order of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) made on December 9, 2013 (the “**Appointment Order**”), Duff & Phelps Canada Restructuring Inc. (“**D&P**”) was appointed receiver (in such capacity, the “**Receiver**”) of the assets, property and undertaking of each of ARXX Building Products Inc. (“**ARXX Canada**”), ARXX Building Products U.S.A. Inc. (“**ARXX USA**” and, together with ARXX Canada, “**ARXX**”), ARXX Corporation, ECB Holdings, LLC, APS Holdings, LLC, UNISAS Holdings, LLC and Eco-Block International, LLC (collectively, the “**ARXX Group**”).
2. On December 27, 2013, this Honourable Court granted an order approving a Stalking Horse Agreement dated December 19, 2013, between the Receiver and Airlite Plastics Co. (the “**Purchaser**”) and related bidding procedures (the “**Bidding Procedures**”) and sales process (the “**Sale Process**”) for the purchased assets (the “**Stalking Horse Order**”).
3. The Receiver seeks an order (the “**Order**”) of this Honourable Court, substantially in the form of the draft order included at Tab 3 of the Receiver’s Motion Record, among other things:
 - i) approving the third report of the Receiver, dated June 13, 2014 (the “**Third Report**”) and the activities outlined therein;
 - ii) approving the fees and disbursements of the Receiver and the Receiver’s legal counsel (collectively, the “**Fees and Disbursements**”) and the payment thereof;
 - iii) discharging the Receiver, upon the filing by the Receiver of a certificate certifying that it has completed the other activities described in the Third Report, from its obligations, liabilities, responsibilities and duties in its capacity as Receiver in these proceedings, and releasing and discharging Duff & Phelps Canada Restructuring Inc. from any and all liability that Duff & Phelps Canada Restructuring Inc. now has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of Duff & Phelps Canada Restructuring Inc. while acting in its capacity as Receiver in these proceedings, save and except its gross negligence or willful misconduct; and

iv) providing such further and other relief as this Honourable Court deems just.

4. The Receiver recommends issuance of the Order for the factual and legal bases set forth herein and in its Motion Record.

PART II - THE FACTS

(i) General Background

5. A detailed description of the facts relating to the ARXX Group's corporate and capital (including debt) structure, is set forth in the Third Report.

6. The Receiver has filed its Third Report to provide this Honourable Court with the background, basis for, and its recommendation in respect of the relief requested herein, and the Third Report is located at Tab 2 of the Receiver's Motion Record.

7. The ARXX Group was in the business of designing and marketing building products known as insulating concrete forms ("ICF"), which are a green, energy-efficient technology used in residential and commercial construction. The business was operated principally through ARXX Canada, an Ontario Corporation, and ARXX USA, a Delaware company that is a wholly-owned subsidiary of ARXX Canada. ARXX USA was entirely dependent on ARXX Canada and did not operate on a standalone basis.

Third Report, Receiver's Motion Record, Tab 2, 2.0, para. 1.

8. On December 30, 2013, a Chapter 15 order was granted by the United States Bankruptcy Court for the District of Delaware. A recognition order and sale approval order were granted by the United States Bankruptcy Court for the District of Delaware on January 31, 2014.

Third Report, 1.0, para. 3.

9. On December 19, 2013, the Receiver entered into the APA, which was to serve as a stalking horse agreement within the Sale Process. The APA, the Sale Process and the Bidding Procedures were approved by this Honourable Court on December 27, 2013.

Third Report, 2.1, para. 1.

10. On January 29, 2014, this Honourable Court granted an order (the “**Sale Approval Order**”) approving a sale transaction (the “**Sale Transaction**”) between the Receiver and the Purchaser, vesting in the Purchaser all of the ARXX Group’s right, title and interest in and to the purchased assets, and authorizing certain distributions by the Receiver to Comerica Bank (the “**Distribution Order**”).

Third Report, 2.1, para. 2.

11. On February 3, 2014, the Sale Transaction closed. Since that time, the Receiver has completed the administration of the receivership in respect of the ARXX Group save for those incidental tasks described in the Third Report.

Third Report, 2.1, para. 3.

12. The Receiver’s activities up to January 22, 2014, were approved in the Sale Approval Order. The Receiver’s activities since that time are set out in the Third Report and the Receiver respectfully requests that such activities be approved by this Court.

13. The Receiver and its legal counsel, Torys LLP, have accrued fees and expenses in their capacity as Receiver and counsel to the Receiver, respectfully.

14. As outlined in the Affidavit of Lily Coodin sworn June 13, 2014 (the “**Coodin Affidavit**”), and the Affidavit of David Sieradzki sworn June 13, 2014 (the “**Sieradzki Affidavit**”), the Fees and Disbursements, exclusive of HST, total \$516,967.25, which amount includes legal fees already paid to Torys LLP in the amount of \$226,531.00.

PART III - ISSUES

15. The Receiver’s request for approval of the Order raises the following issues for this Honourable Court:

- i) Should this Court approve the Fees and Disbursements?
- ii) Should this Court approve the activities of the Receiver?
- iii) Should this Court discharge and release the Receiver?

PART IV - LAW AND ARGUMENT

i) The Fees and Disbursements Should Be Approved

16. The Receiver submits that the Fees and Disbursements should be approved.

17. The test for approving the fees and disbursements of a receiver or its counsel is whether the fees and disbursements are fair and reasonable in the circumstances. The Ontario Court of Appeal, in the case of *Re Confectionately Yours*, considered the issue of fees and disbursements in relation to a receivership and the fees of the receiver and its counsel. The Court of Appeal held that, in determining whether such fees and disbursements are fair and reasonable, the Court may consider a number of factors, including (but not limited to):

- (a) the work done;
- (b) the responsibility imposed on the receiver;
- (c) the time spent doing the work;
- (d) the reasonableness of the time expended;
- (e) the necessity of doing the work; and
- (f) the results obtained.

Re Confectionately Yours, (2002), 36 C.B.R. (4th) 200 (Ont. C.A.) at para. 46, Receiver's Brief of Authorities, Tab 1.

18. The Receiver's activities are set out in the Third Report, and include responsibility for overseeing the ARXX Group's operations, dealing with cash management issues, including paying post-filing expenses from the receivership accounts, reviewing all documentation filed in the US Court in connection with the ongoing Chapter 15 proceedings and attending at US Court via teleconference for the Recognition and Sale Approval hearing on January 31, 2014, completing the Sale Transaction and dealing with related post-closing matters, arranging for the return of certain leased assets, and making distributions in accordance with the Distribution Order.

Third Report, 5.0, para. 1.

19. It is the Receiver's view that its and Torys' fees and disbursements were incurred at the Receiver's and Torys' standard rates and charges, and are fair, reasonable and justified in the circumstances. The Fees and Disbursements are consistent with the responsibilities of the Receiver, including the complexity of the case, the Court-approved sale process carried out by the Receiver, overseeing the ongoing operations of the ARXX Group during the proceedings, the number of legal entities in the receivership and the cross-border proceedings and other issues involved. The time incurred is reasonable given the work that has been undertaken, and was at all times necessary and consistent with the Receiver's duties under the BIA. Further, the Fees and Disbursements accurately reflect the work done by the Receiver and on behalf of the Receiver by Torys in connection with the receivership, which work was necessary and in line with the responsibility placed on the Receiver. The results obtained were, in the opinion of the Receiver, the best possible under the circumstances. The Receiver therefore respectfully submits that the Fees and Disbursements should be approved.

Third Report, 6.0, para. 3.

20. The Court is to use the same criteria set out above to evaluate the fees and disbursements of counsel.

21. Torys' fees and disbursements were billed at their standard rates. The Receiver believes that both the time expended and the fees charged by Torys LLP are reasonable in light of the services performed and the prevailing market rates for such services in Toronto. The standard hourly rates charged by Torys are consistent with the rates charged by other law firms practicing in the area of bankruptcy and insolvency in Toronto.

Third Report, 6.0, para. 3.

22. The Fees and Disbursements are fair and reasonable in the circumstances. The factors set forth in the jurisprudence referenced above militate in favour of this conclusion. As detailed in the Third Report, the Sieradzki Affidavit and the Coodin Affidavit, the Receiver and Torys performed work necessary for the optimal administration of the receivership. Therefore, the Trustee respectfully submits that the Fees and Disbursements should be approved.

Third Report, 6.0, para. 3.

23. The Receiver also engaged Young Conaway Stargatt & Taylor, LLP (“YCST”), as its U.S. counsel for the Chapter 15 proceedings in respect of the ARXX Group. In order to avoid unnecessary costs given the relative quantum of the fees and disbursements of YCST, the Receiver has treated these costs as disbursements of the Receiver for the purpose of the within motion and has not sought to obtain a separate fee affidavit from YCST in respect of these costs. Full details with respect to the fees and disbursements of YCST are set out in the Third Report. The Receiver believes that the fees and disbursements of YCST are fair and reasonable in the circumstances. The factors set forth in the jurisprudence above militate in favour of this conclusion.

ii) The Activities of the Receiver Should Be Approved

24. The activities of the Receiver, as set out in detail in the Third Report, were all necessary and untaken in good faith pursuant to the Receiver’s duties and powers set out in the Appointment Order and other Orders made in these proceedings. The activities of the Receiver were in each case in the best interests of the ARXX Group and its stakeholders. The Receiver therefore respectfully submits that such activities should be approved by this Court.

iii) The Receiver Should Be Discharged and Released

25. The Receiver has substantially completed its mandate as contemplated by the Appointment Order, the Stalking Horse Order, the Distribution Order and the Sale Approval Order. Accordingly, the Receiver respectfully submits that it should be discharged and released, following the filing of a certificate confirming that its administration of the receivership and performance of its obligations in these proceedings are complete (attached as Exhibit “A” to the Discharge Order).

26. The Receiver is also seeking a release from any and all liability that Duff & Phelps Canada Restructuring Inc., in its capacity as Receiver, now has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of Duff & Phelps Canada Restructuring

Inc. while acting in its capacity as Receiver, save and except for any gross negligence or willful misconduct on the part of Duff & Phelps Canada Restructuring Inc.


27. As Justice Pattillo asserted in the case of *Pinnacle Capital Resources Ltd. v. Kraus Inc.*, “in the absence of any evidence of improper or negligent conduct, the release should issue.” There is an absence of any evidence of improper or negligent conduct in the case at bar, and the Receiver submits that it is fair and reasonable for it to have the certainty provided by the release sought in the within proceedings. Thus, the Receiver respectfully submits that the release should be granted.

Pinnacle Capital Resources Ltd. v. Kraus Inc., 2012 CarswellOnt 14138 (Ont. Sup. Ct. J. [Commercial List]) at para. 47, Receiver’s Brief of Authorities, Tab 2.

PART V - ORDER REQUESTED

28. For the reasons set forth herein and in the Third Report, the Receiver respectfully requests the granting of the Order in the form contained in the Receiver’s Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of June, 2014.

per: 

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ARXX Corporation, ARXX Building Products
U.S.A. Inc., ECB Holdings, LLC, APS Holdings,
LLC, UNISAS Holdings, LLC, and Eco-Block
International, LLC

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Confectionately Yours Inc., Re*, (2002), 36 C.B.R. (4th) 200 (Ont. C.A.).
2. *Pinnacle Capital Resources Ltd. v. Kraus Inc.*, 2012 CarswellOnt 14138 (Ont. Sup. Ct. [Commercial List]).

**SCHEDULE “B”
RELEVANT STATUTES**

1. *Bankruptcy and Insolvency Act* (R.S.C., 1985, c. B-3), s. 243

Court may appoint receiver

243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or
- (c) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

Definition of “receiver”

(2) Subject to subsections (3) and (4), in this Part, “receiver” means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
 - (i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or
 - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of “receiver” — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition “receiver” in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver’s claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

2. *Courts of Justice Act* (R.S.O. 1990, c.C.43), s.101.

Injunctions and receivers

101.(1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

COMERICA BANK

and

ARXX BUILDING PRODUCTS INC., ARXX CORPORATION,
ARXX BUILDING PRODUCTS U.S.A. INC., ECB HOLDINGS,
LLC, APS HOLDINGS, LLC, UNISAS HOLDINGS, LLC, and ECO-
BLOCK INTERNATIONAL, LLC

APPLICANT

Court File No. CV-13-10353-00CL

RESPONDENTS

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

Proceedings commenced in Toronto

**FACTUM
(RECEIVER'S DISCHARGE)**

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