

Court File No. CV-24-00724076-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

B E T W E E N:

FOREMOST MORTGAGE HOLDING CORPORATION

Applicant

and

BARAKAA DEVELOPER INC., LERRATO INC. and  
2145499 ONTARIO INC.

Respondents

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**FACTUM OF THE RECEIVER  
RE: AUTHORIZATION TO TERMINATE AND DISCLAIM AGREEMENTS OF  
PURCHASE AND SALE**

**MOTION RETURNABLE OCTOBER 10, 2025**

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TO: **SERVICE LIST**

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## **PART I - OVERVIEW**

1. KSV Restructuring Inc. ("**KSV**"), in its capacity as the Court-appointed receiver (the "**Receiver**") of certain real property of Barakaa Developer Inc. ("**Barakaa**") and Lerrato Inc. ("**Lerrato**") and the property, assets and undertakings of 2145499 Ontario Inc. ("**214 Ontario**") and together with Barakaa and Lerrato, the "**Debtors**", is seeking an order, among other things:

(a) authorising and approving the disclaimer by the Receiver of:

(i) the Agreement of Purchase and Sale dated October 29, 2023 (the "**2023 APS**") between Barakaa Developer Inc. ("**Barakaa**"), as seller, and Mohammed Alsharafi and Fatima Jeddi (the "**23 Madison Purchasers**"), as Purchasers, pursuant to which the 23 Madison Purchaser had agreed to purchase the land and building known municipally as 23 Madison Avenue, Richmond Hill, Ontario ("**23 Madison**"), and the chattels listed in the 2023 APS, as amended by:

(1) an amendment dated January 9, 2024 to extend the outside closing date to February 9, 2024 (the "**First Amendment**"); and

(2) the Amendment to the Agreement of Purchase and Sale dated February 9, 2024 (the "**Second Amendment**" and together with the 2023 APS and the First Amendment, the "**23 Madison APS**") between Barakaa and the 23 Madison Purchasers pursuant to

which, *inter alia*, the 23 Madison Purchasers agreed to pay additional deposits to Barakaa in the aggregate amount of \$500,000 by February 16, 2024, and Barakaa agreed to give possession of 23 Madison to the 23 Madison Purchasers on February 17, 2024;

- (b) ordering and declaring that the Receiver is entitled to vacant possession of 23 Madison;
- (c) ordering the 23 Madison Purchasers and any other occupants of 23 Madison to vacate 23 Madison by no later than 4:00p.m on the date that is 30 days from the delivery of a written notice by the Receiver to the 23 Madison Purchasers to deliver up vacant possession, or the next business day if that day is a weekend or holiday (the “**Vacancy Date**”);
- (d) ordering that if the 23 Madison Purchasers or any other occupants of 23 Madison refuse to vacate 23 Madison by or before 4:00pm on the Vacancy Date, then, at the request of the Receiver, the Ontario Provincial Police and/or the Sherriff of the Regional Municipality of York, are hereby authorized and directed to accompany and assist the Receiver in taking vacant possession of 23 Madison;
- (e) granting the Receiver leave to issue writs of possession directed to Sherriff of the Regional Municipality of York against 23 Madison; and

- (f) ordering and directing Remax Crossroads Realty Inc. ("**Remax**") to deliver to the 23 Madison Purchasers, within five days of the Disclaimer Order, a bank draft in the amount of \$150,000, representing the return of the deposit funds held in trust in respect of the 2023 APS.

2. The Receiver was appointed pursuant to the order of Justice W.D. Black dated October 21, 2024 (the "**Appointment Order**"). The Receiver has completed the sale of certain of the real properties but, notwithstanding months of indulgences and negotiations, the Receiver has, to date, been unable to reach acceptable terms to complete the sale of three properties: 23 Madison, being the subject of this motion, and 369 Porte and 377 Porte are the subject of a separate motion returnable October 7, 2025.

3. The Receiver's view and recommendation to the Court is that the disclaimer of the 23 Madison APS will maximize the value of 23 Madison and is in the best interest of the Barakaa stakeholders as a whole.

## **PART II - SUMMARY OF FACTS**

4. 214 Ontario, Lerrato and Barakka are a real estate development companies controlled by Hitesh Jhaveri ("**Mr. Jhaveri**") and his wife Niketa Wadia ("**Ms. Wadia**").<sup>1</sup>

5. Pursuant to the Appointment Order<sup>2</sup>, KSV was appointed as Receiver of certain real properties of the Debtors including:

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<sup>1</sup> Fourth Report to Court of KSV Restructuring Inc. as Receiver and Manager of 2145499 Ontario Inc. and certain properties of Barakaa Developer Inc., and Lerrato Inc. [**"Fourth Report"**] at 2.0, para 1, Amended Motion Record [**"AMR"**], Tab 3, p. 24.

<sup>2</sup> Order (Appointing Receiver) at para 2, AMR, Appendix A, p. 33.

- (a) two fully constructed homes in Richmond Hill, Ontario owned by Barakaa, being 25 Madison Avenue ("**25 Madison**") and 23 Madison;<sup>3</sup>
- (b) five fully constructed residential freehold townhouses and one parcel of residual real property (a municipal easement) in Ajax, Ontario owned by Lerrato (the "**Porte Properties**");<sup>4</sup> and
- (c) a substantially completed 10-unit townhouse condominium project in Ajax, Ontario owned by 2145499 (the "**Doric Development**")<sup>5</sup>

(collectively, the "**Receivership Assets**").

6. The Receiver has completed sales of 371, 373 and 375 Porte Road (the "**Completed Porte Transactions**") and 25 Madison.<sup>6</sup>

7. The Receiver attempted for several months to negotiate commercially acceptable, value maximizing transactions with the purchaser of 23 Madison, the 369 Porte Purchaser and the 377 Porte Purchasers similar to those entered into with the purchasers/occupants in the Completed Porte Transactions.<sup>7</sup>

8. The Receiver's negotiations with the 23 Madison Purchaser, the 369 Porte Purchaser, and the 377 Porte Purchasers have been unsuccessful to date.<sup>8</sup>

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<sup>3</sup> First Report of Receiver, [**"First Report"**] at 2.0, para 1, AMR, Appendix D, p. 87.

<sup>4</sup> First Report at 2.0, paras 2-3, AMR, Appendix D, p. 87-88.

<sup>5</sup> First Report at 2.0, para 5, AMR, Appendix D, p. 88.

<sup>6</sup> Fourth Report at 2.1, paras 4 and 5, AMR, Tab 3, p. 24-25.

<sup>7</sup> Fourth Report at 3.0, para 1, AMR, Tab 3, p. 27.

<sup>8</sup> Fourth Report at 3.0, para 1, AMR, Tab 3, p. 27.

9. The within motion is supported by Foremost Mortgage Holding Corporation, a secured lender to Lerrato, with a first-in-time mortgage registered on title to 23 Madison.

**A. 23 Madison**

10. Since the date of the Receiver's appointment on October 21, 2024, the 23 Madison Purchasers have been in occupancy of 23 Madison pursuant to the Second Amendment.

11. 23 Madison was built by Barakaa and is subject to the 23 Madison APS. The 23 Madison Purchasers have paid: (i) initial deposits totalling \$150,000 (the "**Initial Deposit**") which the Receiver understands are being held in trust with ReMax, a brokerage associated with the principal of 141 Ontario, the third mortgagee; and (ii) deposits of \$200,000 made on February 13, 2024 and \$300,000 on February 16, 2024 (the "**Subsequent Deposits**"), paid directly to Barakaa, following which Barakaa granted the 23 Madison Purchasers possession of 23 Madison pending closing. These Subsequent Deposit amounts appear to have been expended by Mr. Jhaveri/Barakaa for purposes other than repaying Foremost, as senior mortgagee, or any other mortgagee of 23 Madison.

12. If the 23 Madison Purchasers were to receive full credit for the Subsequent Deposit amounts they paid (\$500,000), the net proceeds of sale available for distribution to Foremost would be approximately \$1.6 million, which is both less than appraisals of 23 Madison obtained by the Receiver in November 2024 and August of 2025, and than the proceeds of sale of 25 Madison by the Receiver completed in April of 2025 (approximately \$1.9 million, after payment of HST and real estate commissions).

13. Notwithstanding several months of discussions with the 23 Madison Purchasers, the Receiver has been unable to reach an agreement with the 23 Madison Purchasers on acceptable terms to date. The requested and recommended disclaimer of the 23 Madison APS may advance those discussions, or may result in 23 Madison being brought back to market by the Receiver.

14. Similar to 377 Porte, the 23 Madison Purchasers can pursue Barakaa for the \$500,000 of Subsequent Deposits as Barakaa, itself, is not subject to these receivership proceedings.

15. To maximize the realizable value of 23 Madison for the benefit of stakeholders, the Receiver needs to obtain vacant possession of 23 Madison from the 23 Madison Purchasers, return the residence to saleable condition, and re-expose it to the market as soon as possible.

#### **B. The Receiver's Recommendation**

16. The Receiver is of the view that the disclaimer the 23 Madison APS is, in all the circumstances, in the best interests of Barakaa's stakeholders as a whole given:

- (i) the Receiver has tried unsuccessfully for several months to negotiate a value maximizing transaction with the 23 Madison Purchasers consistent with the terms of the Completed Porte Sales;
- (ii) if the Receiver closed on the terms proposed by the 23 Madison Purchasers, the net proceeds from that sale would be materially less than what could be realized by the Receiver if it resold 23 Madison;



- (iii) by the Court ordering Remax to return their \$150,000 deposit held in trust, the 23 Madison Purchasers will recover those funds, and can seek to recover damages on account of the Supplemental Deposits paid to Barakaa under the Second Amendment, as Barakaa itself continues to operate and is not subject to these receivership proceedings;
- (b) given the lengthy advance notice of this motion and its return date, vacant possession of 23 Madison within 30 days of the delivery of a notice requiring vacant possession by the Receiver should provide the 23 Madison Purchasers sufficient time to make alternative living arrangements; and
- (c) Foremost is supportive of the Receiver's recommendations and is prejudiced by further cost and delay if this matter is not resolved on a timely basis.<sup>9</sup>

### **PART III - STATEMENT OF ISSUES**

17. This motion raises the following issues of law:

- (a) Whether this Court should authorize the Receiver to terminate and disclaim the 23 Madison APS;
- (b) Whether this Court should order and declare that the Receiver is entitled to vacant possession of 23 Madison;
- (c) Whether this Court should order:

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<sup>9</sup> Fourth Report at 3.4, paras 2-3, AMR, Tab 3, p.29-30.

- (i) the 23 Madison Purchasers and any other occupants of 23 Madison, to vacate 23 Madison by no later than 4:00p.m on the Vacancy Date;
- (ii) that if the 23 Madison Purchasers, or any other occupants of 23 Madison refuse to vacate 23 Madison by or before 4:00pm on the Vacancy Date, then, at the request of the Receiver, the Ontario Provincial Police and/or the Sherriff of the Regional Municipality of York are authorized and directed to accompany and assist the Receiver in taking vacant possession of 23 Madison;
- (d) Whether this Court should grant the Receiver leave to issue a writ of possession for 23 Madison directed to the Sherriff of the Regional Municipality of York; and
- (e) Whether the Court should Order Remax to return the Initial Deposit to the 23 Madison Purchasers.

18. The Receiver submits that the these issues should all be answered 'yes'.

#### **PART IV - LAW**

##### **A. This Court should authorize the Receiver to disclaim the 23 Madison APS**

19. The Court's jurisdiction to direct a receiver to disclaim agreements of purchase and sale in the context of real property developments is well established and has been

authorized by this court many times.<sup>10</sup> Disclaimers are an important tool by which a receiver can maximize the value of the assets of the estate for the benefit of a debtor's stakeholders as a whole.<sup>11</sup>

20. The Court considers the following factors when determining whether it should authorize a receiver to disclaim a pre-sale purchase agreement:

- (a) the respective legal priority positions as between the competing interests;
- (b) whether a disclaimer would enhance the value of the assets, and, if so, whether a failure to disclaim would amount to a preference in favour of one party; and
- (c) if a preference would arise, whether the party seeking to avoid a disclaimer has established that the equities support that result.<sup>12</sup>

21. When applied to the circumstances of the within matter, the above factors strongly support the authorization of the Receiver to disclaim the 23 Madison APS.

**1. The Madison Purchasers' interest is subordinate to that of the secured lenders**

22. At the time the 2023 APS, the First Amendment and the Second Amendment were entered into between Barakaa and the 23 Madison Purchasers, 23 Madison was subject to the duly registered mortgages in favour of the three current mortgagees. The 23

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<sup>10</sup> *Cameron Stephens Mortgage Capital Ltd. v 2011836 Ontario Corp. et al*, 2024 ONSC 3507 [“**Cameron Stephens**”] at para 17, Receiver's Book of Authorities [“**RBOA**”], Tab 1, citing *Forjay Management Ltd. v 0981478 BC Ltd.*, [2018 BCSC 527](#), 11 B.C.L.R. (6th) 395 [“**Forjay Management**”] at paras. [131-132](#); *Firm Capital Mortgage Fund Inc. v 2012241 Ontario Ltd.*, [2012 ONSC 4816](#), 99 C.B.R. (5th) 120, at paras. [31-38](#); and *Peoples Trust Company v Censorio Group (Hastings & Carleton) Holdings Ltd*, [2020 BCSC 1013](#), 80 C.B.R. (6th) 118 [“**Peoples Trust**”] at para. [57](#); see also [Bankruptcy and Insolvency Act](#), RSC 1985, c B-3, [s 243\(1\)\(c\)](#).

<sup>11</sup> *Forjay Management* at para. [36](#); *Peoples Trust* at para. [25](#).

<sup>12</sup> *Cameron Stephens* at para. 18, RBOA, Tab 1, citing *Forjay Management* at paras. [41-44](#).

Madison APS grants no proprietary rights or interests in favour of the 23 Madison Purchasers.

**2. *Disclaiming the 23 Madison APS will enhance the value of the Debtor's estate***

23. If the Receiver closed on terms proposed by the 23 Madison Purchasers the net proceeds will be materially less than what could be realized by the Receiver if the Receiver resold 23 Madison.<sup>13</sup>

**3. *Denying a disclaimer will be detrimental to all stakeholders***

24. When considering the detriment to all stakeholders, in *Re Ravelston Corp.* Doherty J.A. recognized:

Receivers will often have to make difficult business choices that require a careful cost/benefit analysis and the weighing of competing, if not irreconcilable, interests. Those decisions will often involve choosing from among several possible courses of action, none of which may be clearly preferable to the others. Usually, there will be many factors to be identified and weighed by the receiver. Viable arguments will be available in support of different options. The receiver must consider all of the available information, the interests of all legitimate stakeholders, and proceed in an evenhanded manner. That, of course, does not mean that all stakeholders must be equally satisfied with the course of conduct chosen by the receiver. If the receiver's decision is within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all stakeholders, the court will support the receiver's decision.<sup>14</sup>

25. While disclaimer of the 23 Madison APS and occupancy arrangements will have a negative impact on the 23 Madison Purchasers, this does not justify overriding the secured lender's legal priority.

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<sup>13</sup> Fourth Report at 3.4, para 1.(b)(ii), AMR, Tab 3, p. 29.

<sup>14</sup> *Ravelston Corp. (Re)*, [2005 CanLII 63802 \(ON CA\)](#) at para 40.

26. Because the 23 Madison Purchasers are insisting on a \$650,000 deposit credit, despite only \$150,000 of it being held in trust by Remax, the net proceeds of sale from 23 Madison on those terms would materially increase the shortfalls to the mortgagees of 23 Madison. The Receiver has advised the 23 Madison Purchasers that it will close the sale of 23 Madison on terms similar to those of the Completed Porte Sales, which includes, a credit for a market deposit (in this case the amount of \$150,000 held in trust by Remax). The 23 Madison Purchasers continue to take the position that all amounts they paid to Barakaa as the Subsequent Deposits should be netted against and applied as a deposit against the purchase price.

27. Following a disclaimer, the 23 Madison Purchasers may seek to recover the Subsequent Deposit (or damages therefor) from Barakaa, since Barakaa is not subject to receivership proceedings and has other development projects.<sup>15</sup>

28. Without the disclaimer, the Receiver will not be able to market 23 Madison and the secured lenders will suffer a materially more substantial loss relative to a re-marketing of 23 Madison.

#### **B. The Court Should Order Vacant Possession and Ancillary Relief**

29. Vacant possession of 23 Madison is required in order to maximize the proceeds of the sale and in order to do that the Receiver must be able to offer a prospective purchaser vacant possession. The Receiver reiterates and relies on the equities as stated above for an order for vacant possession.

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<sup>15</sup> Fourth Report at 3.4, para 1.(b)(iii), AMR, Tab 3, p. 29.

30. The Receiver submits that vacant possession be made available to the Receiver within 30 days of the delivery of a notice requiring vacant possession, as that should provide the 23 Madison Purchasers sufficient time to make alternative living arrangements.

31. If vacant possession is not provided by the 23 Madison Purchasers within the 30 day period, the Receiver will seek the assistance of the Ontario Provincial Police or the Sherriff of the Regional Municipality of York.

**C. The Court should order the return of the Initial Deposit to the 23 Madison Purchasers**

32. The Initial Deposit is the property of the 23 Madison purchasers. It was paid to ReMax to be held in trust pending the closing of the sale transaction reflected in the 2023 APS and ultimately the 23 Madison APS. ReMax was and is obligated to deposit and hold the Initial Deposit funds into its trust account established pursuant to section 27(1) of the *Trust in Real Estate Services Act*, S.O. 2002, Ch. 30 Schedule C.<sup>16</sup> Given the disclaimer of the 23 Madison APS, there will be no closing of a transaction thereunder and the 23 Madison Purchaser is entitled to the return of the \$150,000 Initial Deposit monies.

**PART V - ORDER REQUESTED**

33. The Receiver requests that this Court make an order in the form of the draft order included in the Receiver's Motion Record.

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<sup>16</sup> [\*Trust in Real Estate Services Act\*, S.O. 2002, Ch. 30 Schedule C, s. 27\(1\).](#)

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 29th day of September, 2025.



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Lawyers for the Receiver

**SCHEDULE “A”**

**LIST OF AUTHORITIES**

1. *Cameron Stephens Mortgage Capital Ltd. v 2011836 Ontario Corp. et al*, 2024 ONSC 3507. **[RBOA, Tab 1]**
2. *Firm Capital Mortgage Fund Inc. v 2012241 Ontario Ltd.*, [2012 ONSC 4816](#), 99 C.B.R. (5th) 120.
3. *Forjay Management Ltd. v 0981478 BC Ltd.*, [2018 BCSC 527](#), 11 B.C.L.R. (6th) 395.
4. *Peoples Trust Company v Censorio Group (Hastings & Carleton) Holdings Ltd*, [2020 BCSC 1013](#), 80 C.B.R. (6th) 118.
5. *Ravelston Corp. (Re)*, [2005 CanLII 63802 \(ON CA\)](#).

I certify that I am satisfied as to the authenticity of every authority.

*Note: Under the Rules of Civil Procedure, an authority or other document or record that is published on a government website or otherwise by a government printer, in a scholarly journal or by a commercial publisher of research on the subject of the report is presumed to be authentic, absent evidence to the contrary (rule 4.06.1(2.2)).*

Date September 29, 2025



Signature



## **SCHEDULE “B”**

### **TEXT OF STATUTES, REGULATIONS & BY - LAWS**

**Trust in Real Estate Services Act, S.O. 2002, Ch, 30 Schedule C.**

#### **Trust account**

**27 (1)** Every brokerage shall,

- (a)** maintain in Ontario an account designated as a trust account, in,
  - (i)** a bank or authorized foreign bank as defined in section 2 of the Bank Act (Canada);
  - (ii)** a loan or trust corporation; or
  - (iii)** a credit union within the meaning of the Credit Unions and Caisses Populaires Act, 2020;
- (b)** deposit into the account all money that comes into the brokerage’s hands in trust for other persons in connection with the brokerage’s business;
- (c)** at all times keep the money separate and apart from money belonging to the brokerage; and
- (d)** disburse the money only in accordance with the terms of the trust. 2004, c. 19, s. 18 (18); 2007, c. 7, Sched. 7, s. 190 (4); 2020, c. 1, s. 18 (1); 2020, c. 36, Sched. 7, s. 334 (3).

**Bankruptcy and Insolvency Act, RSC 1985, c B-3.**

#### **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.

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MOTION RETURNABLE OCTOBER 10, 2025**

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