

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**COMMERCIAL LIST**

**BETWEEN**

**FIERA FP REAL ESTATE FINANCING FUND, L.P.**

Applicant

-and-

**CHANCERY (OSHAWA) THE BARTLETT LIMITED PARTNERSHIP and  
CHANCERY (OSHAWA) THE BARTLETT GP INC.**

Respondents

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

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**FACTUM OF THE APPLICANT**

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July 13, 2023

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**TO: SERVICE LIST**

## PART I – OVERVIEW

1. Fiera FP Real Estate Financing Fund, L.P. (“**Fiera**” or the “**Applicant**”) seeks orders, *inter alia*:

- (a) an Order (the “**Receivership Order**”) appointing KSV Restructuring Inc. (“**KSV**”) as receiver (in such capacity, the “**Receiver**”) of: (i) all of the assets, undertakings and properties of Chancery (Oshawa) The Bartlett Limited Partnership and Chancery (Oshawa) the Bartlett GP Inc. (collectively, the “**Debtors**”); and (ii) the real property known municipally as 550 Bond Street West, Oshawa, Ontario and legally described in PINs 16301-0236 (LT), 16301-0464 (LT) and 16301-0462 (LT) (the “**Land**” and with (i), the “**Property**”); and
- (b) an Order (the “**Declaratory Order**” and with the Receivership Order, the “**Orders**”) declaring that certain minor errors in certain of the Security (as defined below) entered into mutually by the Applicant and the Chancery Group (as defined below) are rectified.

2. This factum is filed with this Honourable Court in support of the relief contained in both the Receivership Order and the Declaratory Order. Capitalized terms used herein but undefined shall have the meanings given to them in the affidavit of Ralph Doerr sworn June 8, 2023 (the “**Doerr Affidavit**”).

3. The Debtors are indebted to Fiera in connection with certain credit facilities that were extended to them by Fiera. The Debtors have committed various Events of Default under the terms of the Commitment Letter (as defined below), and while Fiera has attempted to work in good faith with the Debtors to resolve this matter, no timely resolution has been reached. Fiera has determined that the path forward that is in the best interests of the Debtors and their stakeholders, and for the purposes of expediently and efficiently monetizing the Land and recovering the amounts owed to it, is the bringing of this Application and the granting of the Orders sought herein.

4. Fiera has the right under its various security and loan documents to appoint the Receiver. The Receiver has consented to act as a court-appointed officer. Furthermore, it is just and convenient to appoint the Receiver for the ultimate purpose of effecting a timely sales process to monetize the Land and preserve the Property of the Debtors, for the benefit of all of the Debtors’ stakeholders.

## PART II – FACTS

### Background

5. Fiera is a limited partnership that was established in 2006 for the express purpose of offering financing to real estate developers or property owners for construction projects or for the redevelopment of real estate assets.<sup>1</sup>

6. The Respondents to this Application are part of a group of parties (collectively, the “**Chancery Group**”) which are set out below:

- (a) **Borrower:** Chancery (Oshawa) the Bartlett Limited Partnership (“**Chancery LP**” or the “**Borrower**”);
- (b) **Corporate Guarantors:** Suske Capital Inc. (“**Suske Capital**”); Chancery Seniors Housing Investments Inc. (“**Chancery Seniors**”); Chancery (Oshawa) the Bartlett GP Inc. (“**Chancery GP**”); Hillsport Developments Inc. (“**Hillsport**” and with Suske, Chancery Seniors, and Chancery GP, the “**Corporate Guarantors**”); and
- (c) **Individual Guarantors:** Stephen A. Suske (“**Suske**”) and Jessica Zhang (“**Zhang**” and with Suske, the “**Individual Guarantors**”, and with the Corporate Guarantors, the “**Guarantors**”).<sup>2</sup>

7. The Land is marketed for lease to seniors online as “The Bartlett”, which is a fully constructed 129-unit apartment building with approximately 11,000 square feet of retail space and which functions as a seniors’ apartment building (the “**Project**”).<sup>3</sup>

8. Chancery LP is an active Ontario limited partnership with a partnership declaration date of July 26, 2017, and Chancery GP is an active Ontario corporation that was incorporated on July 25, 2017.<sup>4</sup> Pursuant to a limited partnership agreement dated August 18, 2017 between Chancery GP, as general partner, Hillsport, Chancery Seniors, Sarah Cathrae, and relevant limited partners of Chancery LP, the purpose of Chancery LP was to “develop 2.38 acres of development land located at 550 Bond Street West, Oshawa, Ontario, and to develop, build and

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<sup>1</sup> Affidavit of Ralph Doerr sworn June 8, 2023 at para 4 [Doerr Affidavit]; Application Record dated June 8, 2023 at Tab 4.

<sup>2</sup> Doerr Affidavit, *supra* note 1 at para 5.

<sup>3</sup> *Ibid* at para 7.

<sup>4</sup> *Ibid* at paras 18, 27.

stabilize a 129 suite seniors apartment building [...] and the ultimate lease-up and refinance or sale of the Project.”<sup>5</sup>

9. In 2020, the Chancery Group approached Fiera for the purpose of securing financing for the Project, which resulted in the eventual establishment of certain credit facilities by Fiera (collectively, the “**Credit Facilities**”), all as set out in a commitment letter dated November 25, 2020, amended as follows (the “**Initial Commitment**”):<sup>6</sup>

- (a) Commitment Letter Amendment dated December 8, 2020 (the “**First Amended CL**”);
- (b) Commitment Letter Amendment dated December 9, 2020 (the “**Second Amended CL**”);
- (c) Commitment Letter Amendment dated January 10, 2022 (the “**Third Amended CL**”);
- (d) Amended and Restated Commitment Letter dated February 11, 2022 (the “**Fourth Amended CL**”); and
- (e) Loan Extension Offer dated December 29, 2022 (the “**Loan Extension Offer**” and with the Initial Commitment, the First Amended CL, the Second Amended CL, the Third Amended CL and the Fourth Amended CL, collectively the “**Commitment Letter**”).

10. Fiera understands that the Project’s construction was completed in August 2021. As it currently stands, Fiera is owed the principal sum of \$53,250,000 (which includes an interest reserve in the amount of \$3,185,000) (the “**Loan**”). The maturity date on the Loan was March 31, 2023, which has not been extended. Interest, fees and costs continue to accrue.<sup>7</sup>

11. Fiera holds certain security for the Credit Facilities made available pursuant to the Commitment Letter, including (collectively and as defined in the Doerr Affidavit, the “**Security**”):<sup>8</sup>

- (a) Charge granted by the Borrower and Chancery GP over the Project, as instrument no. DR1954575, as amended by a mortgage amending agreement

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<sup>5</sup> *Ibid* at para 20, Exhibit “F”; Limited Partnership Agreement dated August 18, 2017 at Recital A.

<sup>6</sup> Doerr Affidavit, *supra* note 1 at para 38.

<sup>7</sup> *Ibid* at paras 42–43.

<sup>8</sup> *Ibid* at para 55.

dated April 14, 2022 granted by the Borrower, Chancery GP, Suske Capital, Chancery Seniors, Hillsport, Suske, Zhang and Fiera in the amount of \$55,000,000 and as amended by instrument no. DR2122548 (collectively, the “**Charge**”), among other Security documents; and

(b) General Security Agreement dated November 30, 2020 granted by the Borrower.

12. The registered owners in respect of the three PINs are Chancery GP and Chancery LP.<sup>9</sup> As indicated in the Charge, all provisions of the Commitment Letter are incorporated into the Charge.<sup>10</sup> Fiera has also appropriately perfected and registered its security interests against the Borrower under the *Personal Property Security Act* (the “**PPSA**”).<sup>11</sup>

13. Since maturity, Fiera has had multiple discussions with various individuals at the Chancery Group concerning the possibility of monetizing the Project. A summary of those discussions is provided in the Doerr Affidavit.<sup>12</sup>

14. After the Credit Facilities matured on March 31, 2023 (per the Loan Extension Offer), on or about April 17, 2023, Fiera, via its real estate counsel, delivered to the Chancery Group a demand for repayment which included Notices of Intention to Enforce Security delivered pursuant to s. 244(1) of the *Bankruptcy and Insolvency Act* (Canada) (the “**BIA**” and collectively, the “**Demand**” and the “**NITES**”). The Demand and the NITES have since expired, and the Chancery Group has failed to repay the indebtedness cited therein.<sup>13</sup> \$54,609,105.46 is currently owing to Fiera as indebtedness current to June 2, 2023, with interests and costs continuing to accrue.<sup>14</sup>

15. On or about April 18, 2023, the Borrower failed to pay the April interest payment of \$481,657.19.<sup>15</sup> On April 26, 2023, counsel to Chancery Seniors sent a letter to Hillsport advising that earlier that month, Hillsport caused the Borrower to make a payment in amount of approximately \$474,000 such that there were then allegedly insufficient funds to make the

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<sup>9</sup> *Ibid* at para 59.

<sup>10</sup> *Ibid* at para 57.

<sup>11</sup> *Ibid* at para 60.

<sup>12</sup> *Ibid* at para 70.

<sup>13</sup> *Ibid* at para 72.

<sup>14</sup> *Ibid*.

<sup>15</sup> *Ibid* at para 73.

missed interest payment and alleged that Hillsport “intentionally caused a payment default under the Credit Agreement in an attempt to cause the Project to be marketed in a distressed asset sale [...] so that [it could] purchase the Project below market value and without Chancery’s participation”.<sup>16</sup>

16. On or about May 1, 2023, Suske wrote directly to Fiera to outline an updated plan for the Project, which indicated a desire to enter into a forbearance agreement and replace Hillsport in its role as “property manager”. The letter also stated that Suske and Zhang were still participating in discussions with potential purchasers.<sup>17</sup> However, despite the correspondence, no further discussions about forbearance were advanced by any of the Chancery Group or the Borrower.<sup>18</sup>

17. On or about May 9, 2023, Fiera requested that the Borrower provide it with information concerning the commercial spaces of the Project and financial statements, but Fiera has still not received any written response.<sup>19</sup>

18. On or about May 11, 2023, Fiera visited the Project with its appraiser and met with Joshua Skaist (“**Skaist**”), the Director and Chief Executive Officer of Chancery GP, on site. It is believed that Skaist confirmed verbally that rent was not being appropriately paid pursuant to a lease between the Borrower and The Bartlett Bistro Inc., dated April 14, 2022 (the “**Bistro Lease**”) and a lease between the Borrower and 4Sync Healthcare Solutions Inc. dated December 7, 2020. Skaist also alleged that the Bistro Lease may not be valid.<sup>20</sup>

19. Fiera remains unclear as to the communications and state of the relationship among Skaist, Suske, and Zhang. On or about May 12, 2023, Fiera’s appraiser provided Fiera with an appraisal of the Project which specifically noted that: “discussions with the listing agent and the property contact indicated that the [Chancery Group] has presented challenges throughout the sale process and perhaps tainted the presentation of the Subject Property to the market. In

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<sup>16</sup> *Ibid* at para 75.

<sup>17</sup> *Ibid* at para 77.

<sup>18</sup> *Ibid* at para 79.

<sup>19</sup> *Ibid* at para 80.

<sup>20</sup> *Ibid* at para 81.

addition, there have been operational challenges with the medical clinic and bistro that have dampened potential buyers' interest.”<sup>21</sup>

20. On or about May 23, 2023, Fiera was advised that the May interest payment of \$466,119.86 was returned, which constitutes an additional Event of Default.<sup>22</sup>

21. On or about May 30, 2023, counsel to Fiera sent a notice email to all notice parties for the Borrower and Guarantors under the Commitment Letter, informing them that Fiera intends to bring an application to appoint a Receiver, and enclosing a draft form of the Receivership Order that would later be amended and updated.<sup>23</sup>

22. On or about June 5, 2023, Fiera received an executed copy of a non-binding letter of intent for an agreement of purchase and sale (the “**LOI**”) which Fiera understands had been negotiated by Suske, Zhang and the potential purchaser, although Suske later advised Fiera’s counsel orally that the LOI still required additional signatures due to ongoing edits.<sup>24</sup> The LOI requires that an agreement of purchase and sale to be entered into within 45 days of the LOI and indicates a deposit of \$150,000 within five business days post-execution, and a second deposit of \$350,000 within five business days after the purchaser waives its due diligence conditions.<sup>25</sup>

23. Fiera has not consented to the LOI. Fiera has significant concerns about the LOI due to the extended due diligence and closing timeline, and deposit refundability provisions, among others.<sup>26</sup>

24. The Chancery Group has failed to rectify the multiple Events of Default committed and Fiera is increasingly concerned that indebtedness owing to Fiera under the Commitment Letter, and the accompanying Security, is at risk. Fiera believes that immediate judicial intervention is

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<sup>21</sup> *Ibid* at paras 82–83.

<sup>22</sup> *Ibid* at para 85.

<sup>23</sup> *Ibid* at para 87.

<sup>24</sup> *Ibid* at para 89.

<sup>25</sup> *Ibid*.

<sup>26</sup> *Ibid* at para 90.

required to obtain the requisite information to preserve the Project and address operational issues and the issues related to any sale process efforts.<sup>27</sup>

25. If this Honourable Court grants the aforementioned Orders, the Receiver intends to commence the Sale Process as detailed in the pre-filing report of the proposed receiver, to be filed (the “**Pre-Filing Report**”), which approval is also being sought pursuant to the Receivership Order. Details on the Sale Process can be reviewed within the Pre-Filing Report.

### **PART III – ISSUES**

26. The issues at hand are as follows:

- (a) Should this Court appoint the Receiver:
  - (i) Is there jurisdiction to appoint the Receiver?
  - (ii) If this Court appoints the Receiver, are the terms of the Receivership Order appropriate in these circumstances?
- (b) Should this Court rectify the Mutual Mistakes?
- (c) Should this Court approve the Sale Process (as defined in the Pre-Filing Report)?

### **PART IV- LAW & LEGAL AUTHORITIES**

#### **(A) THIS COURT SHOULD APPOINT THE RECEIVER**

27. Section 101 of the *Courts of Justice Act*, as amended (the “**CJA**”) provides for the appointment of a receiver by this Court where it is “just or convenient”.<sup>28</sup> Section 243(1) of the BIA also provides that, on an application by a secured creditor, this Court may appoint a receiver if it considers it to be just or convenient to do so to: (a) take possession over the assets of an insolvent person; (b) exercise any control that the Court considers advisable over the property and business; or (c) take any other action that the Court considers advisable.<sup>29</sup>

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<sup>27</sup> *Ibid* at paras 92–93.

<sup>28</sup> RSO 1990, c C-43, s 101.

<sup>29</sup> *Bankruptcy And Insolvency Act*, RSC 1985, c B-3, ss 243(1) [BIA].



28. As indicated above, the Applicant is a secured creditor of the Borrower with a perfected security interest pursuant to its real property registrations and PPSA registration.<sup>30</sup> As such, it is permitted to bring the within application to appoint the Receiver under subsection 243(1) of the BIA. Such appointment is not precluded by subsection 243(1.1) of the BIA as the Applicant has delivered the NITES in accordance with section 244 of the BIA and the ten-day notice period prescribed thereunder has expired.<sup>31</sup>

29. As set out immediately below, each of the remaining technical requirements enumerated under the BIA for the appointment of the Receiver are satisfied.

### There Is Jurisdiction to Appoint the Receiver

#### *The Locality of the Debtor Is in Ontario*

30. Where an application is brought for the appointment of a receiver under subsection 243(1) of the BIA, subsection 243(5) requires that it be filed in “a court having jurisdiction in the judicial district in the locality of the debtor”.<sup>32</sup> Section 2 of the BIA defines the “locality of a debtor” as the principal place:

(a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,

(b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or

(c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated.<sup>33</sup>

31. As previously discussed, the Land is located in Oshawa, Ontario and the Debtors have registered head offices within Ontario.<sup>34</sup> Thus, the locality of the Debtor is Ontario and this application is properly before the Ontario Superior Court of Justice (Commercial List).

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<sup>30</sup> Doerr Affidavit, *supra* note 1 at para 60.

<sup>31</sup> *Ibid* at paras 71–72.

<sup>32</sup> BIA, *supra* note 29 at s 243(5).

<sup>33</sup> *Ibid* at s 2.

<sup>34</sup> Doerr Affidavit, *supra* note 1 at para 3.

*The Receiver Is a Trustee Under the BIA*

32. Pursuant to subsection 243(4), only a “trustee” may be appointed as a receiver under the BIA.<sup>35</sup> KSV is a trustee under the BIA, has provided its consent to act as the Receiver if so appointed and is qualified to act as such.<sup>36</sup>

*The Receiver’s Appointment Is Just or Convenient Under the BIA and CJA*

33. In determining whether it is just or convenient to appoint the proposed Receiver under subsection 243(1) of the BIA and section 101 of the CJA, this Court must have regard to “all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto.”<sup>37</sup> There is no requirement for the Applicant to establish that it will suffer irreparable harm if the proposed Receiver is not appointed.<sup>38</sup>

34. This Court has regularly issued receivership orders in favour of secured creditors over debtors in situations where loans associated with real property have matured and/or there is otherwise default under the terms of the financing arrangements.<sup>39</sup>

35. Where the loan agreement and related transaction documents contemplate the appointment of a receiver, this Court may have regard to the principles summarized by Justice Newbould in *RMB Australia Holdings Limited v. Seafield Resources Ltd.*:<sup>40</sup>

[...] Blair J., as he then was, in *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 1996 CanLII 8258 (ON SC), 40 C.B.R. (3d) 274 (Ont. S.C.J.) [...] also referred to the relief being less extraordinary if a security instrument provided for the appointment of a receiver:

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<sup>35</sup> *BIA*, *supra* note 29 at s 243(4).

<sup>36</sup> Doerr Affidavit, *supra* note 1 at paras 99–100.

<sup>37</sup> *Bank of Nova Scotia v Freure Village of Clair Creek*, [1996] OJ No 5088 (QL), 40 CBR (3d) 274 at para 11 [Freure]; *Bank of Montreal v Carnival National Leasing Limited*, 2011 ONSC 1007 at para 24 [Carnival]; *Elleway Acquisitions Limited v The Cruise Professionals Limited*, 2013 ONSC 6866 at para 27 [Elleway]; *Bank of Montreal v Sherco Properties Inc*, 2013 ONSC 7023 at para 41.

<sup>38</sup> *Freure*, *supra* note 37 at para 10; *Carnival* at para 24.

<sup>39</sup> See for example *DUCA Financial Services Credit Union Ltd v 1725859 Ontario Inc, 1941275 Ontario Ltd, and 1941276 Ontario Inc* (November 1, 2021) Toronto, Ont Sup Ct [Commercial List] CV-21-00668237-00CL (Order Appointing Receiver and Endorsement).

<sup>40</sup> [2014 ONSC 5205](#) at paras 28–29.

While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver -- and even contemplates, as this one does, the secured creditor seeking a court appointed receiver -- and where the circumstances of default justify the appointment of a private receiver, the “extraordinary” nature of the remedy sought is less essential to the inquiry. Rather, the “just or convenient” question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not.

See also *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866, in which Morawetz J., as he then was, stated:

...while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. [...]

36. Although the appointment of a receiver has traditionally been considered an extraordinary remedy, it is now well established that “its extraordinary nature is significantly reduced when dealing with a secured creditor who has the right to a receivership under its security arrangements.”<sup>41</sup> In such circumstances, the burden on the applicant secured creditor is relaxed as the applicant is simply seeking to enforce a term of an agreement assented to by the parties. The appointment of a receiver “becomes even less extraordinary when dealing with a default under a mortgage.”<sup>42</sup>

37. This even further lowered burden in cases in which there has been a default by a mortgagor is described by Justice Farley in *Confederation Life Insurance Co. v. Double Y Holdings Inc.* (“**Confederation Life**”):<sup>43</sup>

I must also note that there appears to be a major distinction between those [cases] where the borrower is in default and those where it is not. [...] See *Receiverships*, Bennet (1985), at p.91 referring to: “In many cases, a security holder whose instrument charges all or substantially all of the debtor’s property will request a court - appointed receivership if the debtor is in default”. (In this case the plaintiffs have a very strong

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<sup>41</sup> [BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc.](#), 2020 ONSC 1953 at para 43.

<sup>42</sup> *Ibid* at para 44.

<sup>43</sup> [1991 CarswellOnt 1511, OJ No 2613](#) at para 20.

case - not only are the loans in default, they have matured). See also *Kerr on Receiverships* (1983), 16th ed. at p.5:

There are two main classes of cases in which appointment is made: (1) to enable persons who possess rights over property to obtain the benefit of those rights and to preserve the property, pending realization, where ordinary legal remedies are defective and (2) to preserve property from some danger which threatens it.

[...] In the first class of cases are included those in which the court appoints a receiver at the instance of a mortgagee whose principal is immediately payable or whose interest is in arrear. ... In such cases the appointment is made as a matter of course as soon as the applicant's right is established and it is unnecessary to allege any danger to the property.

38. The inquiry as to whether it is just and convenient to appoint a receiver “requires the court to determine whether it is in the interests of all concerned to have the receiver appointed”.<sup>44</sup>

39. In the present case, the Debtors are in default under the Commitment Letter and the mortgage is immediately payable, meaning that this is the first class of cases referred to in *Confederation Life*. Thus, with the Applicant's contractual entitlement to appoint a receiver and the existence of a mortgage default, the appointment of a receiver is not extraordinary relief, and the burden has been lowered further. The following factors identified by Justice Farley in *Confederation Life* should thus be considered:

- (a) The security is at risk of deteriorating;
- (b) There is a need to stabilize or preserve business;
- (c) There is a loss of confidence in management; and
- (d) If relevant, positions of other creditors.

40. The Applicant submits that the burden to appoint a receiver has been met and that such appointment is just and convenient in the circumstances, as:

- (a) **The Debtors contractually agreed to the appointment of the Receiver:** Pursuant to both the Initial Commitment and the Fourth Amended CL, the Applicant is free, following an Event of Default, to apply to a court of competent

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<sup>44</sup> *Elleway, supra* note 37 at para 28.

jurisdiction to appoint a receiver over the Property (terms as defined in the Initial Commitment and the Fourth Amended CL).<sup>45</sup>

- (b) **The Commitment Letter and the Security are in default:** The Credit Facilities matured on March 31, 2023 and have not been repaid. As detailed above, the Borrower has missed multiple interest payments and as at June 2, 2023, \$54,609,105.46 is due and owing to Fiera, with interests and costs continuing to accrue.<sup>46</sup>
- (c) **The Applicant's Security is at risk of deteriorating and needs to be preserved:** Fiera believes that disputes between Hillspoint and other members of the Chancery Group have potentially triggered a divergence in strategy on how to monetize the Project. As it stands, multiple attempts to sell the Project have been made but none of these have resulted in a successful sale.<sup>47</sup> In their appraisal of the Project, Fiera's appraiser specifically noted that "discussions with the listing agent and the property contact indicated that the vendor has presented challenges throughout the sale process and perhaps tainted the presentation of the Subject Property to the market. In addition, there have been operational challenges with the medical clinic and bistro that have dampened potential buyers' interest."<sup>48</sup>
- (d) **The Applicant has lost confidence in the Debtors' management:** As stated above, Chancery Seniors has alleged that Hillspoint "intentionally caused a payment default under the Credit Agreement in an attempt to cause the Project to be marketed in a distressed asset sale" and Suske has stated his confidence in Hillspoint's management of the Project has been lost.<sup>49</sup> Despite Fiera's request for further information in light of these developments, Fiera has yet to receive any such information in writing.<sup>50</sup> The partially executed LOI received in early June has not instilled new confidence in the ability of the Chancery Group to effect a sale of the Project absent a court-appointed receiver.
- (e) **Position of other creditors:** As at the date of this factum, no other creditor has opposed this receivership application. The Receiver will be able to monetize the Project and accordingly equitably deal with the interests of creditors other than the Applicant. The receivership provides parties with an effective forum in which to deal with any issues that may arise in respect of the Debtors and/or the Project itself.

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<sup>45</sup> Commitment Letter dated November 25, 2020; Amended and Restated Commitment Letter dated February 11, 2022; Doerr Affidavit, *supra* note 1 at Exhibit "M".

<sup>46</sup> Doerr Affidavit, *supra* note 1 at paras 72–73, 85.

<sup>47</sup> *Ibid* at para 70.

<sup>48</sup> *Ibid* at para 83.

<sup>49</sup> *Ibid* at paras 75, 77.

<sup>50</sup> *Ibid* at para 80.

41. As at the date of this Factum, the Applicant is not aware of any other restructuring efforts by the Debtors.

The Terms of the Receivership Order Are Appropriate in These Circumstances

42. The terms of the proposed Receivership Order are substantially the same as the terms of the Commercial List's model receivership order, and the modifications to same are indicated in the blacklined copy provided at Tab 3 to the Application Record.

**(B) THE MUTUAL MISTAKES SHOULD BE RECTIFIED BY THIS COURT**

43. The Applicant has identified a minor administrative typographical error in certain of the Security, the Corporate Guarantees and the Individual Guarantees (as each term is defined in the Doerr Affidavit and as hereinafter collectively defined as the "**Documentation**") that occurred due to mutual mistake of the parties when executing the documents (the "**Mutual Mistakes**").<sup>51</sup> In particular, while the legal description of each parcel making up the Land is stated correctly in the Documentation, the third PIN listed in the Documentation states "PIN 16301-0**236** (LT)", when it should instead state "PIN 16301-0**462** (LT)" in order to match the corresponding legal description.

44. The Applicant submits that, pursuant to subsection 46(4) of the PPSA, the Mutual Mistakes do not invalidate the enforceability of the Documentation. Subsection 46(4) of the PPSA states: "A financing statement or financing change statement is not invalidated nor is its effect impaired by reason only of an error or omission therein or in its execution or registration unless a reasonable person is likely to be misled materially by the error or omission."<sup>52</sup>

45. The Ontario Court of Appeal (the "**ONCA**") interpreted this provision in the case of *Re, Lambert*.<sup>53</sup> The Court in this case clarified that the reasonable person standard is an objective one and that the inquiry posed by the provision requires an assessment of the likelihood that

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<sup>51</sup> *Ibid* at paras 55, 64, Exhibit "W".

<sup>52</sup> *Personal Property Security Act*, RSO 1990, c P.10, s 46(4).

<sup>53</sup> [\[1994\] 119 DLR \(4th\) 93, 20 OR \(3d\) 108](#).

some member of the class of persons who may have cause to use the PPSA search facilities will be materially misled by the error.<sup>54</sup>

46. This interpretation of the provision has been upheld by courts, including the ONCA itself in 2010 in *Fairbanx Corp. v. Royal Bank of Canada*.<sup>55</sup> In this case the Court restated the objective test and noted that a registered financing statement is *prima facie* effective.<sup>56</sup>

47. The Applicant submits that, while the Mutual Mistakes exist within the Documentation, no reasonable person using the PPSA search facilities would be materially misled by the Mutual Mistakes because the Applicant properly registered its security interest under the PPSA. As shown in Exhibits “T” and “U” of the Doerr Affidavit, the PPSA search results of all registrations against the Chancery Group entities in favour of the Applicant do not include reference to the specific PINs in the General Collateral Description (the “GCD”).<sup>57</sup> In fact, all references to the Land contained in the GCDs of the Applicant’s PPSA registrations against each of the Respondents refer to the Land as “that property being 550 Bond Street West, Oshawa, Ontario”. Thus, the Applicant submits that no reasonable person could be misled by the Mutual Mistakes.

48. Furthermore, with respect to the Documentation itself, the Applicant requests this Court to rectify the Mutual Mistakes. Rectification is an equitable remedy that is available in situations such as the present: to correct a contract in order to reflect the common intention of the contracting parties. The ONCA has summarized rectification as follows:<sup>58</sup>

[...] an equitable remedy designed to ensure that one party is not unjustly enriched at the expense of another. A court will rectify an inaccurately drawn written agreement so that it conforms to the agreement the parties intended to make. In *Downtown King West Development Corp. v. Massey Ferguson Industries Ltd.* (1996), 28 O.R. (3d) 327 (Ont. C.A.) at 336, Robins J.A. explained the remedy's underlying rationale, while acknowledging that rectification cannot be used to correct every mistake:

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<sup>54</sup> *Ibid* at para 30.

<sup>55</sup> [2010 ONCA 385](#).

<sup>56</sup> *Ibid* at para 18.

<sup>57</sup> Doerr Affidavit, *supra* note 1 at Exhibits “T” and “U”.

<sup>58</sup> [Royal Bank of Canada v El-Bris Ltd](#), 2008 ONCA 601 at para 13.

The remedy of rectification is available only in certain defined circumstances and cannot be invoked to correct every mistake. In principle, rectification is permitted, not for the purpose of altering the terms of an agreement, but to correct a contract which has been mistakenly drawn so as to carry out the common intention of the parties and have the contract reflect their true agreement. The remedy is normally granted only where the mistake is mutual or common to the contracting parties.

49. In cases of common mistake, equity requires the following for rectification: (i) the parties had reached a prior agreement whose terms are definite and ascertainable; (ii) the agreement was still effective when the instrument was executed; (iii) the instrument fails to record accurately that prior agreement; and (iv) if rectified as proposed, the instrument would carry out the agreement.<sup>59</sup> This Honourable Court has previously rectified mutual mistake errors in insolvency matters using the doctrine of rectification where typographical errors are improperly recorded, if it is “beyond any serious dispute that both parties intended from the outset that [the error] was the result of a simple clerical mistake”.<sup>60</sup>

50. In this situation, all of the above factors are met. The Applicant submits that the Mutual Mistakes were simply typographical ‘copy/paste’ errors and that the following facts make it abundantly clear that the common intention of the parties was to provide a security interest over all three PINs that comprise the Land:

- (a) as stated above, the legal description under each PIN in the Documentation is correct, including the third PIN containing the typographical error;
- (b) the municipal description of the Land, where included, being 550 Bond Street West, Oshawa, Ontario, is the same throughout the Documentation;
- (c) as stated above, the PPSA registrations against the Respondents in favour of the Applicant reference the municipal description of the Land, and not the PINs; and
- (d) the Applicant properly registered the Charge over all three PINs, as shown in Exhibit “R” of the Doerr Affidavit.<sup>61</sup>

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<sup>59</sup> *Canada (Attorney General) v Fairmont Hotels Inc*, 2016 SCC 56 at para 14.

<sup>60</sup> *Bridging Finance Inc v 1033803 Ontario Inc*, 2023 ONSC 1721 (March 14, 2023) Toronto, Ont Sup Ct [Commercial List] CV-18-608978-00CL ([Endorsement](#)) at para 45.

<sup>61</sup> Doerr Affidavit, *supra* note 1 at Exhibit “R”.



51. Given the foregoing, the Applicant respectfully submits that the Documentation and the security interests created by such are enforceable, and requests that this Court rectify the Mutual Mistakes within the Documentation.

**(C) THE SALE PROCESS SHOULD BE APPROVED**

52. The proposed Sale Process has been designed by KSV with input from qualified professionals and in consultation with stakeholders. It is consistent with real property sale processes approved by this Court in other cases.

53. The Real Property (as defined in the Pre-Filing Report) (and if relevant, associated personal property located on site) will be subject to extensive public marketing, will be sold on an “as is, where is” basis, and any sale will be subject to the prior approval of the Court. In short, the Sale Process has all the hallmarks of a transparent, accessible and commercially reasonable process that will permit the market to determine the value of the Real Property and provide for their realization in a fair, efficient and timely manner for the benefit of stakeholders.

54. Section 243 of the BIA permits the Court broad discretion as to the powers it grants receivers to exercise control over the property of a company in a receivership and in making orders generally:

**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.<sup>62</sup>

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<sup>62</sup> BIA, *supra* note 29 at s 243(1).

55. The Court of Appeal has recognized that the purpose of a receivership is to “enhance and facilitate the preservation and realization of receivership assets for the benefit of creditors”, and that this purpose is “generally achieved through a liquidation of the debtor’s assets”.<sup>63</sup> Sale processes are routinely approved and undertaken in receivership proceedings to facilitate such sales.<sup>64</sup>

56. In the seminal case of *Royal Bank of Canada v. Soundair Corp.*, the ONCA held that a Court was to consider the following factors when deciding whether to approve the sale of property subject to a receivership:<sup>65</sup>

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which offers are obtained; and
- (d) whether there has been unfairness in the working out of the process.

57. In *CCM Master Qualified Fund Ltd v blutip Power Technologies Ltd*, the Court held that the criteria identified in *Soundair* also inform the determination of whether to approve a court-appointed receiver’s proposed sale process, as a court must assess the commercial efficacy of the process, the fairness of the process, and whether the process will optimize the chances of securing the best price for the assets.<sup>66</sup>

58. Each of the factors identified in *Soundair* and *CCM* support the approval of the Sale Process, as:

- (a) The Sale Process will be conducted by KSV as Receiver, and will include a process to determine a listing agent considered appropriate by the receiver to list the Real Property for sale;
- (b) The Sale Process will contemplate a broad public marketing process for the Real Property, including the preparation of relevant marketing materials. This

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<sup>63</sup> *Third Eye Capital Corp v Dianor Resources Inc*, 2019 ONCA 508 at para 73.

<sup>64</sup> *Ibid*; *2056706 Ontario Inc v Pure Global Cannabis Inc*, 2021 ONSC 5533 at para 11.

<sup>65</sup> *[1991] 83 DLR (4th) 76, 4 OR (3d) 1* at para 16.

<sup>66</sup> *2012 ONSC 1750* at para 6.

comprehensive marketing process will provide extensive exposure for maximization of value of the assets;

- (c) KSV, as Receiver, will evaluate offers as and when received on key objective criteria, including, but not limited to, consideration offered, closing conditions (if any), time required to close and other relevant factors;
- (d) The Sale Process is commercially reasonable and consistent with other processes approved by this Honourable Court.

59. In addition, if the best offer received in the Sale Process does not generate proceeds sufficient to repay Fiera in full on terms satisfactory to it, and Fiera does not consent to the transaction resulting from the best offer, the Receiver will terminate the Sale Process and Fiera will thereafter have the option to credit bid its debt to purchase the Property. This credit bid option has previously been approved by this Honourable Court in other sale processes during receiverships, and is a common feature of commercial real estate processes in insolvency proceedings.<sup>67</sup>

60. For the reasons set out above, Fiera submits that the Sale Process is consistent with the criteria established in *CCM*, in that it will optimize the chance of securing the best possible price for the Project, and will promote a disposition of the Debtors' assets that satisfies the *Soundair* criteria. Accordingly, Fiera submits that the Court should approve the Sale Process.

## **PART V – RELIEF SOUGHT**

61. For the reasons set forth herein and in the Application Record, it is respectfully requested that the orders sought in the form attached to the Application Record be granted.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 13th day of July, 2023.

*Tamie Dolny*

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Tamie Dolny on behalf of Steven Graff

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<sup>67</sup>*Kingsett Mortgage Corp and Dorr Capital Corp v Stateview Homes (Minu Towns) Inc et al*, (June 5, 2023) Toronto, Ont Sup Ct [Commercial List] CV-23-00698576-00CL ([Endorsement](#)).

**SCHEDULE “A”  
LIST OF AUTHORITIES**

1.	<a href="#"><i>Bank of Nova Scotia v Freure Village on Clair Creek</i></a> , [1996] OJ No 5088 (QL), 40 CBR (3d) 274
2.	<a href="#"><i>Bank of Montreal v Carnival National Leasing Limited</i></a> , 2011 ONSC 1007
3.	<a href="#"><i>Elleway Acquisitions Limited v The Cruise Professionals Limited</i></a> , 2013 ONSC 6866
4.	<a href="#"><i>Bank of Montreal v Sherco Properties Inc.</i></a> , 2013 ONSC 7023
5.	<i>DUCA Financial Services Credit Union Ltd v 1725859 Ontario Inc, 1941275 Ontario Ltd, and 1941276 Ontario Inc</i> (November 1, 2021) Toronto, Ont Sup Ct [Commercial List] CV-21-00668237-00CL (Order Appointing Receiver and Endorsement)
6.	<a href="#"><i>RMB Australia Holdings Limited v Seafield Resources Ltd</i></a> , 2014 ONSC 5205
7.	<a href="#"><i>BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc</i></a> , 2020 ONSC 1953
8.	<a href="#"><i>Confederation Life Insurance Co v Double Y Holdings Inc</i></a> , 1991 CarswellOnt 1511
9.	<a href="#"><i>Re, Lambert</i></a> , [1994] 119 DLR (4th) 93, 20 OR (3d) 108
10.	<a href="#"><i>Fairbanx Corp v Royal Bank of Canada</i></a> , 2010 ONCA 385
11.	<a href="#"><i>Royal Bank of Canada v El-Bris Ltd</i></a> , 2008 ONCA 601
12.	<a href="#"><i>Canada (Attorney General) v Fairmont Hotels Inc</i></a> , 2016 SCC 56
13.	<i>Bridging Finance Inc v 1033803 Ontario Inc</i> , 2023 ONSC 1721 (March 14, 2023) Toronto, Ont Sup Ct [Commercial List] CV-18-608978-00CL ( <a href="#">Endorsement</a> )
14.	<a href="#"><i>Third Eye Capital Corp v Dianor Resources Inc</i></a> , 2019 ONCA 508
15.	<a href="#"><i>2056706 Ontario Inc v Pure Global Cannabis Inc</i></a> , 2021 ONSC 5533
16.	<a href="#"><i>Royal Bank of Canada v Soundair Corp</i></a> , [1991] 83 DLR (4th) 76, 4 OR (3d)
17.	<a href="#"><i>CCM Master Qualified Fund v blutip Power Technologies</i></a> , 2012 ONSC 1750

18.	<i>Kingsett Mortgage Corp and Dorr Capital Corp v Stateview Homes (Minu Towns) Inc et al</i> , (June 5, 2023) Toronto, Ont Sup Ct [Commercial List] CV-23-00698576-00CL ( <a href="#">Endorsement</a> )
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## **SCHEDULE “B” RELEVANT STATUTES**

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

#### **Definitions**

**2** In this Act,

[...]

**locality of a debtor** means the principal place

- (a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,
- (b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or
- (c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated;

#### **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.

[...]

#### **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.

### **Courts of Justice Act, R.S.O. 1990, c. C-43**

#### **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.

**Personal Property Security Act, R.S.O. 1990, c. P.10, ss. 46(4)**

**Errors, etc.**

**46 (4)** A financing statement or financing change statement is not invalidated nor is its effect impaired by reason only of an error or omission therein or in its execution or registration unless a reasonable person is likely to be misled materially by the error or omission.

**FIERA FP REAL ESTATE FINANCING FUND, L.P.**

- and -

**CHANCERY (OSHAWA) THE BARTLETT LIMITED  
PARTNERSHIP et al.**

Applicant

Respondents

Court File No. CV-23-00700694-00CL

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

**Proceedings commenced at Toronto**

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**FACTUM OF THE APPLICANT**

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