

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(Commercial List)**

**IN THE MATTER OF THE *SECURITIES ACT***  
**R.S.O. 1990, C. s. 5, AS AMENDED**

B E T W E E N:

ONTARIO SECURITIES COMMISSION

Applicant

and

PETER SBARAGLIA, MANDY SBARABLIA,  
CO CAPITAL GROWTH INC. AND 91 DAYS HYGIENE SERVICES INC.

Respondents

**APPLICATION UNDER Section 129 of the *Securities Act***

**FACTUM OF CERTAIN CREDITORS OF C.O. CAPITAL GROWTH INC.**  
**(in respect of the Receiver's motion returnable September 7, 2011)**

September 1, 2011

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**APPLICATION UNDER**  
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**FACTUM OF CERTAIN CREDITORS OF C.O. CAPITAL GROWTH INC.**  
**(in respect of the Receiver's motion returnable September 7, 2011)**

**PART I - INTRODUCTION**

1. This is a motion by RSM Richter Inc. (the "Receiver"), receiver over the assets of Peter Sbaraglia, Mandy Sbaraglia, C.O. Capital Growth Inc., and 91 Days Hygiene Services Inc. (collectively the "CO Group"), for an Order transferring the remaining funds realized in the receivership over the CO Group to the estate of Robert Mander, E.M.B. Asset Group Inc. and related entities (collectively, the "Mander Debtors") for certain fees paid by the estate of the Mander Debtors.



2. The grounds for the motion are that funds from the estate of the Mander Debtors were used to pay certain of the Receiver's fees in connection with the investigation of the CO Group. Certain creditors of CO Capital oppose such a transfer of funds.

3. The investigation of the CO Group by the Receiver was undertaken for the benefit of creditors of the Mander Estate and in connection with the receivership over the assets of the Mander estate. Moreover, the transfer of funds would completely deplete the funds remaining within the receivership of the CO Group and thereby deny the creditors of the CO Group any recovery whatsoever.

4. For these reasons, the Receiver's motion to transfer the funds should not be granted.

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

5. The Receiver was appointed as Receiver over the assets of the Mander Debtors on March 17, 2010. From March 17, 2010 until December 23, 2010, the Receiver acted solely as the Receiver over the assets of the Mander Debtors.

**Reference:** Receiver's Twelfth Report dated August 17, 2011, p. 1

The Fresh as Amended Receivership Order, Appendix A to the Receiver's Twelfth Report dated August 17, 2011

6. In its Fourth Report dated July 2, 2010, filed in the Mander proceedings, the Receiver advised the Court that issues identified during its investigation of the Mander Debtors suggested that an investigation should be undertaken of the CO Group. This investigation was authorized by an Order of the Honourable Justice Morawetz dated July 14, 2010.

**Reference:** Receiver's Twelfth Report dated August 17, 2011, p. 4

The July 14, 2011 Order Authorizing and Directing the Receiver to Commence an Investigation into the Affairs of the CO Capital Debtors, Appendix B to the Receiver's Twelfth Report dated August 17, 2011

7. The investigation into the affairs of the CO Group was begun on the basis of the Receiver's Fourth Report dated July 2, 2010, which suggested that the affairs of the Mander Debtors and the CO Group were intertwined and that CO Group had received a significant quantum of funds from the Mander Estate. The Fourth Report indicated that the Receiver wished to explore whether any proceedings should be taken against the CO Group.

**Reference:** Receiver's Fourth Report dated July 2, 2010, pp. 19-28

8. On or around September 8, 2010, the Ontario Securities Commission (the "OSC") brought an application pursuant to section 129 of the *Securities Act*, R.S.O. 1990, c. S.5, to have the Receiver appointed as receiver of the assets of the CO Group.

9. This Application was opposed by the CO Group. Certain creditors of CO Capital also made submissions at the hearing of the Application opposing the appointment of the Receiver over the CO Group.

10. On December 23, 2010, the Honourable Justice Morawetz granted the Order appointing the Receiver as Receiver over the assets of the CO Group.

**Reference:** Justice Morawetz's Reasons for Judgment, Appendix E to the Receiver's Twelfth Report dated August 17, 2011

11. According to the Receiver's Twelfth Report dated August 17, 2011, the Receiver and its counsel spent approximately \$386,000 and \$310,000, respectively, related to the investigation of the CO Capital in the period between July 14, 2010 and December 23, 2010.

**Reference:** Receiver's Twelfth Report dated August 17, 2011, p. 5

12. According to the Receiver's Twelfth Report, for the period from December 29, 2010, to July 19, 2011, the Receiver over the assets of the CO Group has realized \$1,095,819 in receipts

and has paid out \$425,531 in disbursements. As of July 19, 2011, there remained \$670,288 in the Receiver's bank account relating to the CO Group.

**Reference:** Receiver's Twelfth Report dated August 17, 2011, p. 5

Schedule of Receipts and Disbursements re: CO Capital Debtors, as at July 19, 2011, Appendix B to the Receiver's Twelfth Report dated August 17, 2011

### **PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES**

13. Certain Creditors of CO Capital oppose the Receiver's motion insofar as the Receiver seeks a motion transferring the remaining funds of the CO Group to the estate of the Mander Debtors.

14. The Creditors oppose this motion for two reasons:

- (a) The Receiver's investigation of CO Capital was authorized and conducted incident to the receivership over the assets of the Mander Debtors and for the benefit of estate of the Mander Debtors and its creditors. The estate of the Mander Debtors should therefore bear the costs; and
- (b) The transfer of funds would deny the creditors of CO Capital any recovery whatsoever. This would be unjust and unfair to the Creditors of CO Capital.

### **The Actions of the Receiver Were for the Benefit of the Creditors of the Mander Estate**

15. The investigations of the Receiver into the affairs of the CO Group were made for the benefit of the creditors of the Mander Debtors. Consequently, the costs of such investigation are appropriately paid from the estate of the Mander Debtors rather than the remaining funds of the CO Group.



16. The ordinary rule for the payment of a receiver's fees is that the receiver's fees are to be paid from the proceeds realized from the property of the debtor over which the receiver is appointed.

17. In the present case, the Receiver seeks to transfer funds from the CO Group to the Mander Estate in respect of fees incurred by the Receiver when it acted as receiver over the assets of the Mander Estate.

18. The investigation begun by the Receiver into the affairs of the CO Group was authorized by an Order of the Honourable Justice Morawetz dated July 14, 2010.

**Reference:** Receiver's Twelfth Report dated August 17, 2011, p. 4

The July 14, 2011 Order Authorizing and Directing the Receiver to Commence an Investigation into the Affairs of the CO Capital Debtors, Appendix B to the Receiver's Twelfth Report dated August 17, 2011

19. This Order was obtained largely on the basis of the Receiver's Fourth Report dated July 2, 2010, in the Mander Proceedings, which suggested that there were issues which warranted an investigation of the CO Group. In particular, the Receiver's Fourth Report suggested that CO Capital had received net proceeds of approximately \$3 million from the Mander Debtors.

**Reference:** Receiver's Fourth Report dated July 2, 2010, p. 12

20. Moreover, in its concluding paragraph on the CO Group, the Receiver's Fourth Report noted as follows:

Given the testimony of Peter Sbaraglia and Mander at the OSC examination, potentially deleted correspondence, the relationship between CO Capital and Mander and the significant amounts paid to CO Capital – amounts apparently sufficient to repay all principal loaned by CO Capital to EMB/Mander – the Receiver believes it is appropriate for it to investigate the business and affairs of CO Capital to determine whether any relief should be sought against CO Capital, including the scope of that relief. [emphasis added]

**Reference:** Receiver's Fourth Report dated July 2, 2010, p. 28

21. The investigation of the CO Group was therefore commenced for the benefit of the creditors of the Mander Debtors and as a corollary of the receivership over the estate of the Mander Debtors.

**Reference:** Receiver's Fourth Report dated July 2, 2010, p. 28

22. Indeed, as Receiver solely over the assets of the Mander Debtors at that time, the Receiver's mandate would have been to investigate and take steps for the benefit of creditors of the Mander Group. At that time, the Receiver would not have owed any duties towards creditors of CO Group, but rather towards the estate of the Mander Debtors and its creditors.

**Reference:** *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.)

23. Because the Receiver was acting for the benefit of the Mander Estate in investigating the CO Group, the ordinary rule should apply that the Receiver's costs should be paid out of the assets of the Mander Debtors. Consequently, funds should not be transferred from the CO Group to the estate of the Mander Debtors.

24. Moreover, the Receiver was already investigating the affairs of the Mander Debtors. Because the affairs of the Mander Debtors and the CO Group were "interwined", the Receiver would already, of necessity, have needed to investigate transactions between the CO Group and the Mander Estate. Such work would have had to have been done in the ordinary course of the receivership over the Mander Estate, regardless of the fact that an Application was ultimately made to extend the Receivership to the assets of the CO Group. Consequently, such costs were incurred in the ordinary course of the receivership over the assets of the Mander Estate and should therefore be paid from the estate of the Mander Debtors.

**Reference:** Receiver's Fourth Report dated July 2, 2010, p. 19

### **The Transfer of Funds Would be Inequitable to the Creditors of CO Capital**

25. The transfer of funds from the CO Group to the estate of the Mander Debtors would be inequitable to the creditors of CO Capital, as it would leave the creditors of CO Capital with absolutely no funds whatsoever. This would be an unjust result, as it would deny similarly situated creditors, who have been the victims in the same manner as have the creditors of the Mander Debtors, any recovery whatsoever in respect of their losses.

26. The Receiver indicates in its Twelfth Report that the CO Capital Debtors opposed the Application to appoint the Receiver over the CO Group for a substantial period of time, thereby increasing the costs of the proceedings.

**Reference:** Receiver's Twelfth Report dated August 17, 2011, p. 6

27. It is undoubtedly true that the Receiver had to incur additional costs, including additional legal costs, as a result of the opposition of the CO Capital Debtors to the OSC's application.

28. However, while it may be true that certain actions of the CO Capital Debtors resulted in additional costs for the Receiver, an Order transferring funds from the CO Group to the estate of the Mander Debtors would not impact the CO Capital Debtors themselves, but rather would deny any recovery whatsoever to the creditors of CO Capital. In other words, the transfer of funds from the CO Group to the estate of the Mander Debtors would, in effect, penalize the creditors of the CO Group for decisions made by members of the CO Group. It would be unjust to require the creditors of the CO Group to effectively bear any increased costs as a result of the CO Group's opposition to the receivership application.

29. Certain creditors of CO Capital also opposed the appointment of the Receiver. Indeed, they did so in part on the basis that a receivership over the assets of the CO Group would be expensive and could consume most, if not all, of the funds remaining within the CO Group.



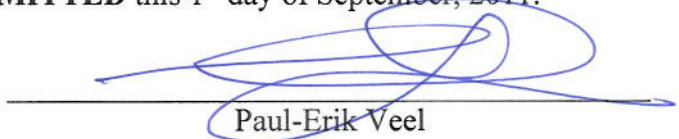
However, the opposition of certain Creditors of CO Capital to the appointment of the Receiver over the CO Group was limited to merely making legal submissions at the hearing of the Application and was made in the context of the CO Group itself having launched a much larger opposition to the Application.

30. Consequently, the mere fact that the CO Creditors made limited submissions in opposition to the Receivership the application to appoint the Receiver over the CO Group should not disentitle them from any recovery whatsoever. As indicated in the Receiver's Twelfth Report, the expenses incurred by the Receiver were incurred as a result of the opposition of the CO Group, and it is unfair to, in effect, penalize the Creditors of CO Capital for these costs being incurred.

#### **PART IV – ORDER REQUESTED**

31. Certain creditors of the CO Group request that the Receiver's motion for an Order transferring funds from the CO Group to the estate of the Mander Debtors be dismissed.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 1<sup>st</sup> day of September, 2011.



Paul-Erik Veel

September 1, 2011

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**SCHEDULE A****CASES**

1. *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.)

ONTARIO SECURITIES COMMISSION

-and-

PETER SBARAGLIA, MANDY SBARABLIA,  
CO CAPITAL GROWTH INC. AND 91 DAYS  
HYGIENE SERVICES INC.

Applicant

Respondents

Court File No. CV-10-8883-OOCL

**ONTARIO  
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PROCEEDING COMMENCED AT TORONTO

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